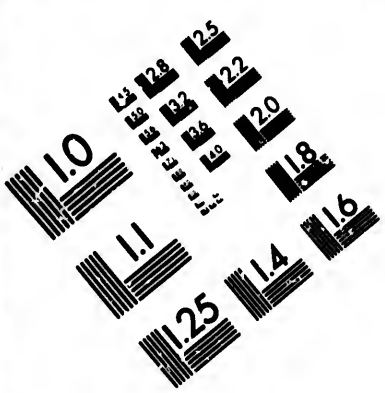

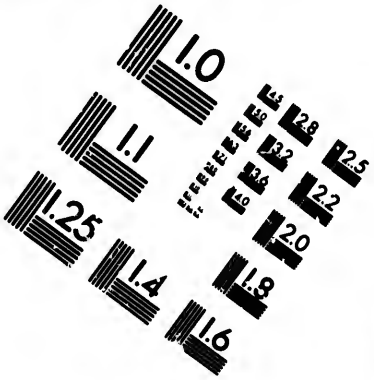

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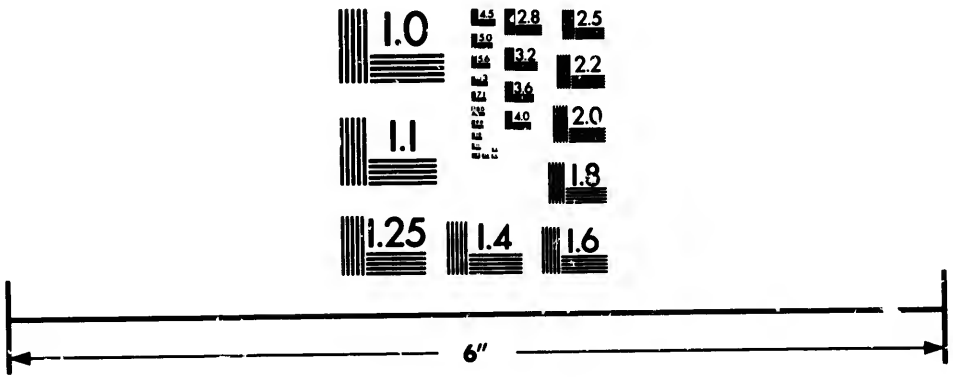

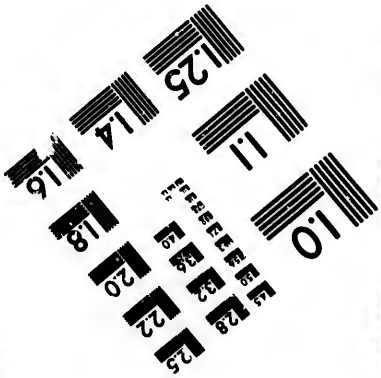

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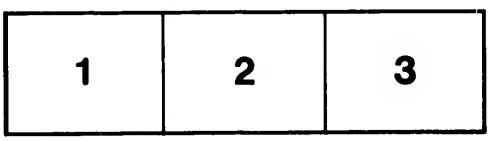

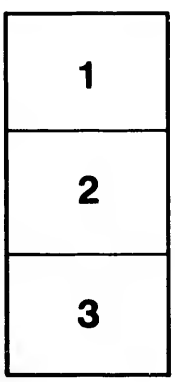

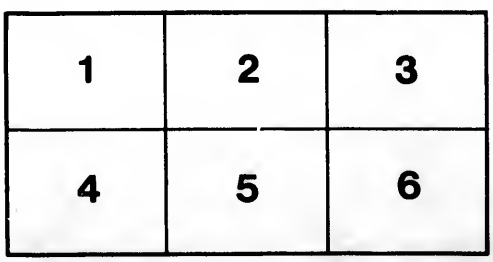

Addison on Torts.

A TREATISE

ON

WRONGS AND THEIR REMEDIES

SIXTH EDITION.

By HORACE SMITH,

Editor of "Addison on Contracts," "Roscoe's Criminal Evidence," and Author of "A Treatise on the Law of Negligence," &c.

WITH AMERICAN NOTES

By H. G. WOOD,

Author of Treatises on the Law of Railways; of Limitations; of Nuisances," etc., etc.

IN TWO VOLUMES.

VOL. I.:

TABLE OF CASES AND PP. 1-468.

VOL. II.:

PAGES 469 TO END.

TORONTO:

CARSWELL & Co.,

Law Publishers,

1890.

PREFACE TO THE AMERICAN NOTES.

These notes to the Sixth Edition of Addison on Torts cover as fully as would seem desirable the most difficult phases of the topics to which the text relates, and point out the distinction between the Common Law Rules in America and in England. In instances where the English authorities are not numerous, confirmatory American decisions are cited.

A separate Index of American Cases has been added.

Where any portion of the text is not applicable in America, a note calls attention to the fact.

The pagination of the English Edition is denoted by the black type [**109**], to which pages the Table of Contents, Index of English Cases, List of Statutes, and the General Index refer.

H. G. WOOD.

New York,
January, 1887.

PREFACE TO THE SIXTH EDITION.

CONSIDERABLE changes have been effected since the Fifth Edition of this Work was published in 1879, particularly in the law relating to "Bankruptcy," "Bills of Sale," "Bills of Exchange," and "Married Women." The arrangement adopted in the last Edition appeared to be incapable of improvement, and only to admit of development. The nature of the right infringed has been taken as the basis of the arrangement. The first five chapters are general and preliminary. The first deals with the Nature of Torts generally. The second, which is a new chapter, treats of the Justification of Torts, indicating the five different ways in which a tort may be justified, viz., (1) by showing that the act was done in defence of person or property, (2) under legal authority, (3) by the leave and license of the plaintiff, (4) that it was the result of an inevitable accident, (5) that it was caused by the act of the plaintiff himself. The third chapter treats of the Discharge of Torts, or the different modes in which the responsibility of a wrong-doer can be determined. The fourth chapter is devoted to the different Remedies for Torts, as by "abatement," "distress *damage feasant*," or "action" (including injunction); while the fifth disposes of questions arising from the Status or Condition of the Wrong-doer, such as the liability of corporations, infants, married women, and lunatics, for their own torts; or that

of principals, masters, and owners of animals for the injurious acts of their agents, servants, or cattle. The consideration of particular torts is begun in the sixth chapter with those torts which interfere with Rights of Personal Security and Liberty. The seventh chapter deals with Injuries to Rights of Reputation, and is divided into two sections, the first relating to defamation of character, and the second to malicious prosecution, which is in its nature primarily an injury to reputation, although it also often involves an infringement of the right of personal liberty. The eighth chapter is devoted to the consideration of Injuries to Rights of Property, which are subdivided into rights of property generally, rights of property in land, rights of property in movables, and rights of property not having a corporeal object, such as copyright, patent right, &c. The ninth chapter deals with Rights arising out of the Domestic Relations, such as the rights of a master with relation to his servant, a husband to his wife, or a parent to his child, as against third persons, and the right to compensation conferred by Lord Campbell's Act on the families of persons wrongfully killed. In the tenth chapter Injuries to Public Rights are considered, so far as, by reason of any special and particular damage thereby caused to an individual, they are private wrongs. The eleventh chapter treats of the Duties of Public Officers, especially judicial officers and ministerial officers of justice. The twelfth chapter is devoted to the subject of Fraud, which, although a tort in the sense of being a wrong independent of contract, yet in many respects resembles a breach of contract, and forms a connecting link between torts and implied contracts. The thirteenth chapter deals with Statutory Compensation. The fourteenth with Notice of Action; and the fifteenth, and last, with Costs.

The result of this arrangement is that the consideration of the rights and duties of bailors and bailees inter se, of the duties of carriers in carrying goods, and of the power of landlords to distrain for rent, is relegated to the Treatise on "The Law of Contracts," by the same Author, where these subjects are already more or less fully discussed. It is hoped that the present Edition may not be found to have fallen behind its predecessors in accuracy and utility: and notwithstanding the introduction of many new Cases and Statutes the present Volume has, by the excision of obsolete matter, been kept within as reasonable bounds as may be, only exceeding the last Edition by sixty-four pages.

The Statutes and Cases have been brought up to and inclusive of the December Number of the Law Reports, 1886. References are given to the Law Journal as well as to the Law Reports. The General Index has been considerably amplified.

The Editor's thanks are due to the Hon. Mr. Justice Cave for many valuable notes of which he has permitted the Editor to make use.

The Editor has received the greatest assistance throughout the preparation of this Edition from his friend Mr. A. P. Perceval Keep, of the Midland Circuit, whose industry and knowledge have materially lightened the labour of editing a Work of so wide and varied a character.

H. S.

INNER TEMPLE,
January, 1887.

EXTRACT FROM THE PREFACE TO THE FIRST EDITION.

To those readers who are unacquainted with English law terms it may be desirable to explain, that the word Tort, handed down to us from our Norman jurists, is used in our law at the present day to denote a civil wrong, for which compensation in damages is recoverable, in contradistinction to a crime or misdemeanour, which is punished by the criminal law in the interests of society at large. Every invasion of a legal right, such as the right of property, or the rights incident to the possession of property, or the right of personal security, constitutes a Tort; and so does every neglect of a legal duty, and every injury to the person, or character, or reputation of another.

The Law of Torts, or civil wrongs, therefore, having for its object the protection of our property, and the security of our persons and reputation, is a branch of law of general interest and importance; and there are few persons of any property or station in the country to whom some knowledge of it does not become essential at some time or another, either for the purpose of maintaining themselves in their just rights, or for the purpose of ascertaining the nature and extent of their legal duties and responsibilities.

Torts, it has truly been observed, are infinitely various; and it would be an endless task to enumerate all the wrongs of which the law takes cognizance, and in respect of which redress, in the shape of compensation in damages, is afforded. It is not intended to treat herein of all civil wrongs of every sort and description, but of such wrongs and injuries to property, to the person, and to reputation, as constantly occur in the ordinary intercourse of mankind, and daily occupy the attention of the lawyer: such as wrongful infringements of the rights and privileges incident to the ownership and possession, and use and enjoyment, of landed property; nuisances and injuries arising from the negligent use and management of such property; injuries to lands and tenements from waste, negligence, and fire; injuries from trespasses and unlawful entry on land, in disturbance of the possessory and proprietary rights of occupiers and landlords; wrongful seizure and conversion of chattels; injuries from the negligent use and management of chattels, and the negligent performance of work; injuries from negligence and breach of duty on the part of bailees, common carriers, and common innkeepers; wrongful distress and sale of things distrained; assault and battery, and wrongful imprisonment; malicious arrest, malicious prosecution, and malicious abuse of legal process; trespasses and injuries committed in the execution of void or irregular legal process, or in the execution of warrants and orders of justices; injuries resulting from the exercise, or intended exercise, of statutory powers and authorities; injuries from libel and slander; fraudulent misrepresentation and deceit; fraudulent concealment, breach of warranty and false pretences; matrimonial and parental injuries; adultery and seduction.

In the following Treatise the Author has endeavoured to present to the reader an accurate view of the present state of the law on the subjects treated of, without burthening his mind with technical legal learning which is now obsolete, or unnecessarily perplexing his judgment with contradictory and conflicting decisions; and it is hoped that the task has been faithfully and carefully accomplished.

INNER TEMPLE,
June, 1860.

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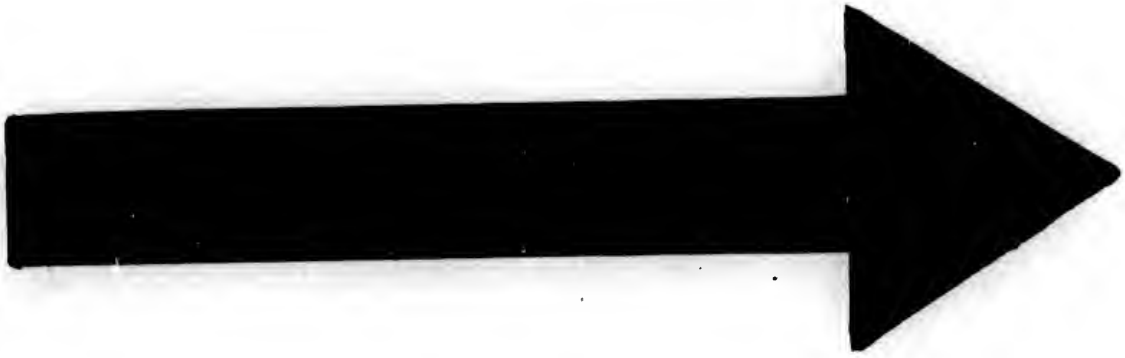

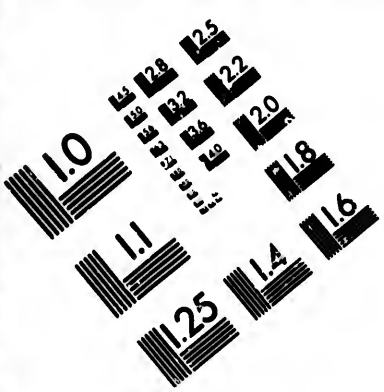

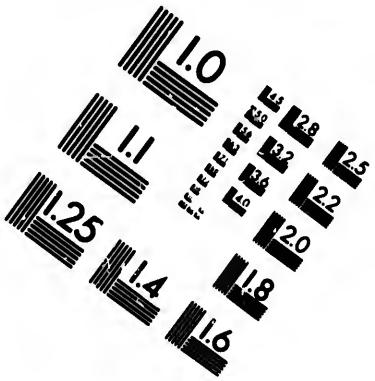

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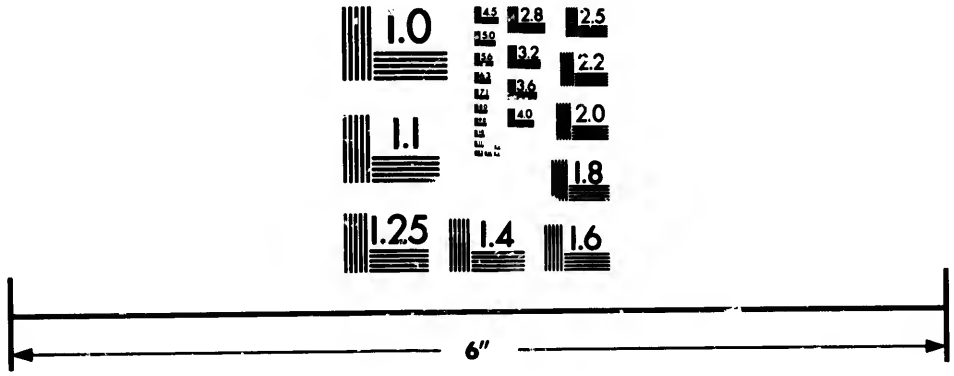

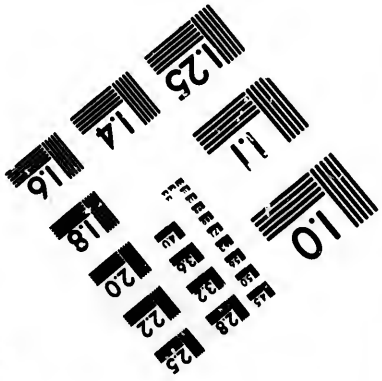

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THE LAW OF TORTS.

CHAPTER I.

THE NATURE OF TORTS.

SECTION I.

THE WRONGFUL ACT.

Definition of a tort.—A tort has been defined as a wrong independent of contract. It may also be defined as the infringement without lawful excuse of a right (*a*) vested in some determinate person, either personally or as a member of the community, and available against the world at large, or against some person or body exercising public functions as such, whereby damage is caused to such determinate person, either intentionally or as a natural consequence of the infringement. A tort is thus distinguishable from the breach of a contract or quasi contract, which is an interference with a right available only against some determinate person or body, and in which the community at large has no concern. To constitute a tort two things must concur, a wrongful act committed by the defendant and actual or legal damage to the plaintiff (*b*).

Ex damno sine injuriâ non oritur actio, is a very ancient rule or maxim of the common law. "There must," observes Hobart, C. J., "be a damage either already fallen upon the party or inevitable; there must also be a thing done amiss" (*c*). It is essential to an action of tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some

(*a*) To every right there is a corresponding duty; and, in the law of torts, right and duty are convertible terms. Where the right is a right to possess or enjoy something, or to do a certain class of acts to the exclusion of all other persons, it is more conveniently spoken of as a right. Where the right is a right to have some other person do a certain act, or abstain from a particular class of acts not being acts which the possessor of the right is entitled to do, it is more conveniently spoken of as a duty.

(*b*) Bayley, J., *R.* v. *Pagham Commissioners, &c.*, 8 B. & C. 362.

(*c*) *Waterer* v. *Freeman*, Hob. 266.

2 legal right; merely that it will, however directly, do him harm in his interests is not enough. Where, therefore, damage is done by a wrong-doer to a chattel, any one who has an immediate or reversionary property in the chattel, or a possessory right to it by reason of a contract attaching to the chattel itself, such as by lien or hypothecation, may sue for such damage as may have been done to his interest; but one who merely by contract with the owner has bound himself to an obligation which is rendered more onerous, or has secured to himself advantages which are rendered less beneficial, by the damage done to the chattel, has no right of action. Thus, where a waterworks company under their Act laid down a main under a turnpike road, the soil of which was vested in *B*, and negligently permitted the main to leak, whereby *C*, who had entered into a contract with *B* to make a tunnel under the road, was delayed in his work, so that his contract became unprofitable, it was held that *C* had no right of action against the company (*d*). So, also, an insurer cannot maintain, in his own name and without reference to the person insured, an action for damage to the thing insured (*e*).

If a landowner whose land is exposed to inroads of the sea, erects sea-walls, groins, or dams, for the protection of his land, and by so doing causes the tide, the current, or the waves, to flow against the land of his neighbour and wash it away, or cover it with water, the landowner so causing an injury to his neighbour is not responsible in damages to the latter, as he has done no wrong, having acted in self-defence, and having a right to protect his land and his crops from inundation (*f*). But, if he runs out

(*d*) *Cattle* v. *Stockton Waterworks Co.*, L. R., 10 Q. B. 453; 44 L. J., Q. B. 139. See Wood on Nuisances, p. 3. In a recent case in Pennsylvania, decided Oct. 4th, 1886, and reported in Central Rep., Vol. IV., p. 475, the Supreme Court of that State held that the maxim, *sic utere tuo ut alienum non ladas*, does not apply to landed property where the injury is caused by acts *necessary for the natural use of the land*, and that as the right to mine coal is a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with proper care, the owner cannot be held liable in damages to a riparian owner for permitting the natural flow of mine water over his own land into the water-course by means of which the water supply of such riparian owner is affected in quality or quantity; the mine owner introducing nothing into the water to corrupt it, and the impurities being from natural and not artificial causes, and the result being a mere personal injury and not affecting the general health and well-being of the community. This doctrine, qualified by the rule that the mine owner was not guilty of negligence in the matter, and worked the mine in the usual and in a proper manner, is undoubtedly correct. The principle upon which the doctrine of this case rests, has been recognized in numerous cases, both English and American: *Pixley* v. *Clark*, 32 Barb. (N. Y.) 268; *Phelps* v. *Nowlen*, 72 N. Y. 39; *Lossee* v. *Buchanan*, 51 N. Y. 476; *Marshall* v. *Welwood*, 38 N. J. L. 339; *Chatfield* v. *Wilson*, 28 Vt. 49. See also *Thurston* v. *Hancock*, 12 Mass. 220; *La Sala* v. *Holbrook*, 4 Paige Ch. (N. Y.) 169. A broad distinction exists, however, between injuries resulting from the ordinary or necessary uses of land, and those resulting from uses which are merely for the convenience of the owners, or for the improvement of the property: Wood on Nuisances, p. 120, *et seq.*

(*e*) *Simpson* v. *Thompson*, L. R., 3 App. Cas. 279. *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561; 50 L. J., Q. B. 329.

(*f*) *R.* v. *Pagham Commissioners, &c.*, 8 B. & C. 360.

a wharf or embankment into the stream, and encroaches upon the waterway of a navigable river, for the mere purpose of acquiring additional land, and improving the value of his property, and thereby gives a new direction to the current, and causes his neighbour's land to be washed away, he commits a tort or wrong, and is responsible for all its injurious consequences; for, "if an individual, for his own benefit, makes an improvement on his own land, and thereby unwittingly injures his neighbour, he is answerable" (*g*).

If a man sells a house commanding a fine sea view or a lovely prospect, and then builds on his own adjoining land, so as to shut out the sea view or the prospect, and thereby greatly diminishes the marketable value of the house he has just sold, a great damage is done to the purchaser thereof; but there is no

3 tort or wrong, as the vendor has done nothing which restrains him from interfering with his neighbour's prospect (*h*). So the

(*g*) Gibbs, C. J., *Sutton* v. *Clarke*, 6 Taunt. 44. *Post*, p. 271. *Whalley* v. *Lanc. & York. Rail. Co.*, *post*, p. 338.

(*h*) *Aldred's case*, 9 Co. 58 b. *Knowles* v. *Richardson*, 5 Mod. 55. *Att.-Gen.* v. *Doughty*, 2 Ves. senr. 453. *Harwood* v. *Tompkins*, 24 N. J. L. 425. The English doctrine, relative to ancient lights, which never had any foundation in reason, is generally repudiated by our courts as unsound in principle and unsuited to the habits and rapid growth of the country (*Myers* v. *Gemmel*, 10 Barb. (N. Y.) 537; *Morrison* v. *Marquardt*, 24 Iowa, 63; *Mullen* v. *Stricker*, 19 Ohio St. 135; *Oregon Iron Works* v. *Twillinger*, 3 Oreg. 1; *Klein* v. *Gehrung*, 25 Tex. 232; *Napier* v. *Bulwinkle*, 5 Rich. (S. C.) 311; *Hay* v. *Sterrett*, 2 Watts (Penn.) 331; *Cherry* v. *Stein*, 11 Md. 1; *Ward* v. *Neal*, 37 Ala. 501; *Pierre* v. *Fernald*, 26 Me. 436; *Guest* v. *Reynolds*, 68 Ill. 478); and no prescriptive right can be acquired to have the light and air enter the windows of a building laterally over the land of another: *Haverstick* v. *Sipe*, 33 Penn. St. 368; *Powell* v. *Sims*, 5 W. Va. 1; *Keats* v. *Hugo*, 115 Mass. 204; *Randall* v. *Sanderson*, 111 *Ib.* 114; *Keiper* v. *Klein*, 51 Ind. 316; *Doyle* v. *Lord*, 64 N. Y. 432. In *Napier* v. *Bulwinkle*, *ante*, the true principle, and the one generally adopted by our courts, relative to the acquisition of an easement, was announced. In that case, the plaintiff's house being the highest, his windows for more than twenty years overlooked the defendant's house. The defendant built a house and obstructed the plaintiff's windows. The plaintiff brought an action for the obstruction, and the court in denying the plaintiff's right of action, held that the enjoyment of an easement in order to vest a right thereto, must be adverse and such as to raise the presumption of a grant, and that such enjoyment must constitute a legal injury for which an action will lie, and that the mere circumstance of receiving light and air through a window opening out upon the lot of an adjoining owner, does not amount to such a legal injury, and consequently will not raise or support the presumption of a grant. See similar in principle as applied to lateral support of lands, *Mitchell* v. *Mayor of Rome*, 49 Ga. 19; *contra*, see *Stevenson* v. *Wallace*, 27 Gratt (Va.) 77; *Quiney* v. *Jones*, 76 Ill. 231. In New Jersey, *Robeson* v. *Pittinger*, 2 N. J. Eq. 57; *Barnett* v. *Johnson*, 15 *Ib.* 481; and in Louisiana by the Civil Code, this right is recognised: *Durant* v. *Riddel*, 12 La An. 746. The only instances in which this right can be said to exist is, where it arises under either an express or implied grant: *Jones* v. *Jenkins*, 34 Md. 1; *Thurston* v. *Minke*, 32 Md. 487. In some of the States it is held that the right cannot be implied (*Randall* v. *Sanderson*, 111 Mass. 114; *Keats* v. *Hugo*, 115 Mass. 204; *Keiper* v. *Klein*, 51 Ind. 316; *Morrison* v. *Marquardt*, 24 Iowa, 1; *Mullen* v. *Stricker*, 19 Ohio St. 135), while in others, it depends upon the question as to whether it is *necessary to supply* the building with light and air, and to its comfortable enjoyment: *White* v. *Bradley*, 66 Me. 254; *Doyle* v. *Lord*, 64 N. Y. 432; *Turner* v. *Thompson*, 58 Ga. 268; *Oregon Iron Co.* v. *Twillinger*, 3 Oreg. 1; *Morrison* v. *Marquardt*, 24 Iowa, 35; *Lampman* v. *Milks*, 21 N. Y. 505.

building of a gasometer, which obstructs the view by the public of the plaintiff's place of business, is not an actionable injury (*i*).

On the other hand an act which, *primâ facie*, would appear to be innocent and rightful, may become tortious, if it invades the right of another person. A familiar instance is the erection on one's own land of anything which obstructs the light of a neighbour's house. *Primâ facie*, it is lawful to erect what one pleases on one's own land; but, if by twenty years' enjoyment the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it is an invasion of the right, and so not only does damage, but is unlawful and injurious (*k*).

Rights.—Rights available against the world at large are very numerous and incapable of precise definition. They are ordinarily divided into private rights, or such as belong to a particular person to the exclusion of the world at large—such as, for instance, the rights of personal security and liberty, of reputation, and of property; and public rights, or such as belong in common to the members of the state generally—such as the right to use a highway or navigable river.

The term "rights" is applicable to civil *status* only, military *status* being a matter depending entirely on the will and pleasure of the Crown; and, therefore, although, where the civil rights of a person in the military service are affected by the judgment or sentence of a military tribunal, the courts will interfere to protect those rights, if that military tribunal is acting without or is exceeding its jurisdiction, yet, where the military *status* only of the applicant is concerned, the courts have no jurisdiction in the matter (*l*).

Private rights—Rights of personal security and liberty.—These consist in the right to the enjoyment of life, limbs, and bodily health, and in a man's right to move his body from place to place at his pleasure (so far as he can do so consistently with his legal obligations). Wherever personal security has been violated by an assault, or individual liberty has been infringed by unlawful restraint of the person, an action is maintainable, although the personal inconvenience and suffering may be of the slightest character; and, wherever the wrong is accompanied by circumstances of personal

4 insult, or by a false charge or accusation of some crime or mis-

(*i*) *Butt* v. *Imperial Gas Co.*, L. R., 2 Ch. 158.
(*k*) *Rogers* v. *Rajendro Dutt*, 13 Moo. P. C. 237.
(*l*) *In re Mansergh*, 1 B. & S. 400; 30 L. J., Q. B. 296.

demeanour, substantial damages will be recoverable (*m*). But the mere touching a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not a violation of the right of personal security, unless it is done in a hostile or insulting manner (*n*).

Private rights—Rights of reputation.—The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit or detriment; and, if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action (*o*). Rights of reputation are founded on the moral duty incumbent on every one to hurt no one by word, just as rights of personal security and liberty are founded on the moral duty to hurt no one by deed; and, therefore, if a false statement is maliciously made in any way affecting a man, although it is not to his discredit, and he thereby sustains damage, an action will lie. Thus it has been held that, where the defendant caused the intended husband to break a contract of marriage by falsely asserting that the woman was already married, the latter was entitled to maintain an action (*p*).

In order, however, to facilitate the administration of justice, false statements made by a witness in a court of justice do not render him liable to an action; and even a man who brings false charges against another in a criminal court is not answerable, unless he was actuated by malice. So, also, a conspiracy to institute legal proceedings and to obtain a judgment by means of false testimony, and the giving of such testimony, and the procurement of the judgment, to the pecuniary loss of the plaintiff, cannot be made the ground of an action for damages so long as the judgment remains unreversed, whether the judgment is the judgment of one of our own courts of justice or the judgment of a foreign tribunal, if it appears that the plaintiff had an opportunity, if he had thought fit to avail himself of it, of appearing and controverting the false testimony, or if it can be shown that he did appear and was heard, and that the matter was decided against him (*q*).

Where the plaintiff's declaration of his cause of action set forth that he was possessed of premises on which he carried on the business of a skin-dresser, and that the defendant and another person unlawfully and maliciously conspired together to procure possession of a portion of the said premises, and set up thereon

(*m*) *Post*, p. 163.
(*n*) *Coward* v. *Baddeley*, 4 H. & N. 481; 28 L. J., Ex. 261. *Post*, p. 139.
(*o*) *Post*, ch. 7.
(*p*) *Shepherd* v. *Wakeman*, 1 Sid. 79.
(*q*) *Castrique* v. *Benrens*, 3 El. & El. 709; 30 L. J., Q. B. 163.

5 a secret still for distilling spirits; that in pursuance of such conspiracy they induced the plaintiff to let to them a portion of the premises, by representing that they wanted them for the purpose of carrying on the business of ink manufacturers; and that having thereby got possession of that part of the premises, they set up thereon certain private stills, and illegally distilled spirits, and caused it to appear that the plaintiff had himself set up the stills, and was illegally distilling upon his premises, and that the plaintiff in consequence thereof was arrested, convicted, fined, and imprisoned, averring that the plaintiff was wholly ignorant of the stills being on his premises; it was held that the action was not maintainable, as it did not appear that the arrest, conviction, and imprisonment of the plaintiff were the direct result of the wrongful act of the defendant and the other person, or that the plaintiff should in anywise be made responsible for the illegal acts contemplated by them. The defendant's act of conspiring, it was observed, merely enabled him to obtain possession of part of the plaintiff's premises. The only ground of damage was the plaintiff's being illegally convicted. And, if it could have been shown that the conspiracy was entered into for the purpose of procuring a conviction of the plaintiff for having possession of a secret still, or for unlawfully distilling, the only remedy would have been an action for a malicious prosecution; and to such an action the conviction of the plaintiff would be an answer, for it must be assumed that the facts relied upon by him were brought before the tribunal for his exculpation, and were decided against him (*r*).

Private rights—Rights of property.—These are such rights as are in themselves capable of being transferred from one person to another, and possess a pecuniary value by reason of such capability. Rights of property are either rights which involve the enjoyment of some thing to the exclusion of other persons, such as rights to land or goods, or rights which do not involve the enjoyment of anything, and have no thing as their object, but which enable their possessor to do a class of acts to the exclusion of other persons, such as patent right or copyright.

Rights to the enjoyment of land are of a very complicated character, and will be treated in detail hereafter (*s*). A right to the enjoyment of land in its simplest form is a right to the exclusive possession and enjoyment of a definite piece of land, which is interfered with whenever another person enters upon or injures such land. Rights to land are capable of many divisions, both in respect of the nature and the duration of the enjoyment.

(*r*) *Barber* v. *Lesiter*, 7 C. B., N. S. 175; 29 L. J., C. P. 161.

(*s*) *Post*, ch. 8, sect. 2.

6 The right is divided in its nature, for instance, when *A* is entitled to enjoy a right of pasture or a right of way over a particular close, while *B* is entitled to enjoy all the other rights of ownership over it. The right is divided in its duration, when, for instance, *A* is entitled to enjoy it for a certain time, as for a certain number of years, or for his life, after which it passes to *B*.

Rights to movables are less complicated than rights to land, but, nevertheless, also admit of division. A right to a chattel in its simplest form is a right to the use and enjoyment of it to the exclusion of all other persons; but *A* may be entitled to the use of a chattel for a determinate period, or for particular purposes, subject to which right of *A* it may belong to *B*. Every meddling with the goods and chattels of another, by injuring, or destroying, or taking possession of them, or by laying hold of, removing, or carrying away inanimate things, or by striking, chasing, or driving cattle, sheep, or domestic animals in which the owner has a valuable property, is a violation of his right of property, and is *primâ facie* actionable (*t*).

Questions of proprietary right often involve nice distinctions. Thus, as regards the right of a landowner or occupier of lands to the preservation on his land of, and to the means of reducing into his possession, birds and animals *feræ naturæ*, it has been held that the owner of a decoy pond may maintain an action against a person who wilfully discharges guns near the decoy pond, and frightens away the wild fowl (*u*); because wild fowl were protected by the statute 25 Hen. 8, c. 11, and constitute a known article of food, and the keeping of a decoy pond is useful to the public, and a profitable mode of employing the land. So it is an actionable injury to fire off rockets to frighten your neighbour's grouse, and prevent his shooting (*x*). But no action is maintainable against a person who has wilfully and maliciously discharged guns near the plaintiff's rookery, and frightened away the rooks, and caused them to forsake the plaintiff's trees; for rooks have been declared to be a nuisance by the legislature; and no person can claim a right to have them resort to his lands, nor can any person become a wrong-doer by preventing their so doing (*y*).

Rights of property will be protected, not only against direct acts of violation, but also against false statements knowingly made for the purpose of prejudicing them. Thus, if persons conspire together to procure a forgery of title-deeds, and give them in evidence on a particular trial, and any person's land is thereby

(*t*) *Post*, p. 498.

(*u*) *Keble* v. *Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington* v. *Taylor*, 11 East, 571.

(*x*) *Ibbotson* v. *Peat*, 3 H. & C. 644; 34 L. J., Ex. 118.

(*y*) *Hannam* v. *Mockett*, 2 B. & C. 943.

7 lost, all the parties to the conspiracy are liable to an action for damages (*z*). And, where the defendant wrongfully and maliciously caused certain persons, who had agreed to sell goods to the plaintiff, to refuse to deliver them, by asserting that he had a lien upon them, and ordering those persons to retain the goods until further orders from him, he well knowing at the time that he had no lien, it was held that the action was maintainable, though the persons who had the goods were under no legal obligation to obey the orders of the defendant, and their refusal was their own spontaneous act (*a*).

Private rights—Rights of property—Rights of trading, &c.—In addition to the rights of property already referred to, the law recognizes the right of every person to endeavour to acquire property by carrying on any lawful business or occupation; and every interference with this right without lawful excuse is a tort, such as driving the plaintiff's tenants from their holdings by menaces (*b*), or preventing people by the use of threats and intimidation from trading with the plaintiff's vessel in a foreign port (*c*), or from dealing at the plaintiff's shop, or from sending their children to the plaintiff's school, or placing obstructions and impediments in the way of the exercise of the right of free access to a man's place of business (*d*).

Where the plaintiff's declaration of his cause of action set forth that he was a mason, and possessed of a stone quarry, and quarried and dug stones therefrom, as well to sell as to build stone buildings, and that the defendant, intending to deprive him of the benefit of his quarry, disturbed his workmen and all comers, threatening to maim and vex them with suits if they worked or bought stones there, whereupon all the buyers desisted from buying and the workmen from working there, it was held that this was a great damage to the plaintiff and a good cause of action (*e*). And, in a case of intimidation by trades' unionists, an injunction was granted against issuing placards enjoining workmen not to work for the plaintiff until the dispute between the plaintiff and the trade union was settled, on the ground that the act of such unionists tended to the destruction or deterioration of the plaintiff's property (*f*).

Where the plaintiff's declaration of his cause of action set forth that he exercised the profession of an actor, and was engaged to perform in the character of Hamlet, in Covent Garden Theatre,

(*z*) Fitz. N. B. 116 D.
(*a*) *Green* v. *Button*, 2 C. M. & R. 707. See *Wren* v. *Weild*, L. R., 4 Q. B. 730; 38 L. J., Q. B. 327.
(*b*) 1 Roll. Abr. 108, pl. 21.
(*c*) *Tarleton* v. *McGawley*, Peake, 270.
(*d*) *Bell* v. *Midland Rail. Co.*, 10 C. B., N. S. 337; 30 L. J., C. P. 273.
(*e*) *Garret* v. *Taylor*, Cro. Jac. 567.
(*f*) *Springhead Spinning Co.* v. *Riley*, L. R., 6 Eq. 551; 37 L. J., Ch. 889.

8 and that the defendants and others maliciously conspired together to prevent the plaintiff from so performing, and from exercising his profession in the theatre, and in pursuance of the conspiracy hired and procured divers persons to go to the theatre and hoot the plaintiff, and the persons so hired did in pursuance of the conspiracy go to the theatre and hoot the plaintiff, and interrupted his performance, and prevented him from exercising his profession, and thereby caused the plaintiff to lose his engagement and divers gains and emoluments, and to be brought into public scandal and disgrace, it was held that the declaration disclosed a good cause of action (*g*).

Interference with a man's trade by fair competition is never actionable. The loss in such a case is not, in fact, caused by wrong, but by another's exercise of his undoubted right; and in every complicated society the exercise, however legitimate, by each member of his particular rights, or the discharge, however legitimate, by each member of his particular duties, can hardly fail to cause conflicts of interest which will be detrimental to some. It is essential, therefore, to the maintenance of an action of tort, that the action complained of should be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will do him harm is not enough (*h*). Thus, where one schoolmaster sets up a new school to the damage of an ancient school, and thereby the old scholars are allured from the old school to come to the new school, an action is not maintainable (*i*). But, "if a man should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars" (*k*).

If a fisherman fits out a boat with lines and nets, and goes to fish in the high seas, and another fisherman comes and fishes beside him, and with tempting baits or other contrivances draws away the fish from the lines and nets of the first comer, with a view of catching them himself, damage may be done, but there is no tort or wrong; for the one had as much right to fish, and use fair and reasonable means to catch fish, as the other. But if the rival fisherman lays hold of the nets of the first comer, or violently disturbs the water and drives away the fish, and prevents the latter, by force or violence, from exercising his occupation and calling, there is then a wrong done to him, and he is entitled to compensation in damages (*l*).

(*g*) *Gregory* v. *Duke of Brunswick*, 6 M. & G. 205.

(*h*) *Rogers* v. *Rajendro Dutt*, 13 Moo. P. C. 241.

(*i*) 11 Hen. 4, fol. 47, pl. 21; fol. 14, pl. 23.

(*k*) Per Holt, C. J., *Keble* v. *Hickeringill*, 11 East, 576, n.

(*l*) *Young* v. *Hichens*, 6 Q. B. 606.

9 Where a municipal corporation having, under the provisions of an Act of Parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to persons residing in an adjoining township, in which another gas company already existed having similar powers, it was held that the last-named company were not entitled to maintain a suit to restrain the corporation from supplying gas within the township, on the ground that the injury complained of was merely the competition of a rival trading company (*m*).

But, although fair competition and the right of a trader to recommend his goods by advertisement or other fair means are recognized, yet a trader is not justified in preventing the public from dealing with a rival trader by false statements. Thus, where the defendants, falsely and without lawful occasion, published a statement disparaging the quality of the plaintiff's goods, and special damage resulted from the publication, it was held actionable (*n*). And even threats of legal proceedings are not justifiable, where they are made *malâ fide*, and there is no *bonâ fide* intention of following up the threats by taking proceedings (*o*). So, where the defendant stated in the hearing of several persons that the wife of the plaintiff, who assisted him in carrying on his business as a grocer and draper, had been guilty of adultery, in consequence of which customers ceased to deal at the shop, it was held that, as the damage sustained was the natural consequence of the words uttered, they were actionable (*p*).

Private rights — Rights of property — Rights of contract.— Whether a man is liable to an action, who with intent to injure the plaintiff, but without the use of violence or fraud, procures a third person to break a contract which he has made with the plaintiff, was for a long time a matter of doubt. In one case it was alleged that the lessee of a theatre had maliciously procured *W* (who had agreed with the plaintiff to perform and sing at his theatre and nowhere else for a certain term), to break her contract, and not to perform or sing at the plaintiff's theatre, and it was held that an action would lie. The majority of the judges were also of opinion that the procurement of the violation of a right was in all cases actionable, whether the right violated was a right available against all the world—such as rights of property or personal security; or merely a right available against an individual—such

(*m*) *Pudsey Coal Gas Co.* v. *Corporation of Bradford*, L. R., 15 Eq. 167; 42 L. J., Ch. 293.

(*n*) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, L. R., 9 Ex. 218; 43 L. J., Ex. 171.

(*o*) *Post*, p. 260.

(*p*) *Riding* v. *Smith*, L. R., 1 Ex. D. 91; 45 L. J., Ex. 281.

as a right of contract, on the ground that he who procures, for instance, the non-delivery of goods according to contract, may inflict an injury, the same as he who procures the abstraction of goods after delivery, and that both on the same ground ought to be made responsible. "The remedy on the contract," it was added, "may be inadequate, as where the measure of damages is restricted; or, in the case of non-payment of a debt, where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a given time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor" (*q*). This case has been recently followed, and the law must now be considered as settled (*r*).

Private rights—Rights in domestic relations.—The common law recognizes certain rights available against all the world arising from the *status* of husband, parent, or master. Thus, a husband has a right to the society of his wife, and a parent or master has a right to the services of his children or servants; and these rights are protected against intentional violation.

Public rights.—Hitherto we have been enumerating those private rights which are of the most importance; but besides these private rights which the individual possesses as an individual, there are other rights which each member of the community is entitled to enjoy in common with all the other members, such as the right to use a public highway for the purposes of passage, or a navigable river for the purposes of navigation. For an injury to these rights which affects all persons alike, such as an obstruction in a public thoroughfare, merely impeding the right of passage, and rendering the way less convenient, the only mode of proceeding is by indictment. For any special injury to himself, his trade, or calling, which affects an individual beyond his fellows, such as driving against an obstruction during a dark night, compensation in damages may be obtained (*s*).

Public rights—Actions for a public nuisance.—Whenever a special or particular damage is sustained by a private individual from a public nuisance, an action for damages is maintainable (*t*), provided

(*q*) Per Erle, J., *Lumley* v. *Gye*, 2 El. & Bl. 234; 22 L. J., Q. B. 463.
(*r*) *Bowen* v. *Hall*, 6 Q. B. D. 333; 50 L. J., Q. B. 305.
(*s*) *Post*, p. 617.
(*t*) *Soltau* v. *De Held*, 2 Sim., N. S.

11 the damage is direct and substantial (*u*). It has been held that the prevention of customers from coming to a colliery by obstructing a public highway, *per quod* the benefit of the colliery was lost, and the coals dug up depreciated in value, was such a special and particular damage as would enable the owner of the colliery to maintain an action for the private injury resulting from the public nuisance (*x*). So, where the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home, and was obliged, in consequence of the obstruction, to expend extra money in the discharge of his lawful calling, it was held that an action would lie (*y*). And where, from the too long standing of horses and waggons of the defendants in the highway opposite his house, the free passage of light and air to the plaintiff's premises was obstructed, and he was in consequence obliged to have gas nearly all day, it was held that an action would lie (*z*). So, if by reason of the access to the plaintiff's premises being obstructed for an unreasonable time and in an unreasonable manner his customers are prevented from coming to his coffee-shop, and he suffers a material diminution of trade, that will be a particular, direct, and substantial damage (*z*). But no one can have an action for a nuisance or obstruction in a common highway without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public (*a*); and the expense of removing the obstruction is not such damage (*b*).

Where the plaintiff, in an action for damages from an obstruction in a public, navigable, tidal river, declared that he carried on the business of an innkeeper in a house abutting upon the river, and that the defendant placed beams and spars in the water which floated backwards and forwards with the tide, and obstructed the access to the house at certain periods, whereby the plaintiff's customers were prevented from coming to his house to take refreshments, it was held that this was a specific, particular damage resulting to the plaintiff from the public nuisance, which entitled him to an action for damages (*c*). And so, where the plaintiff was navigating a public, navigable river with his barges laden with goods, and the barges were impeded in their progress by a vessel

145; 21 L. J., Ch. 159. *Whelan* v. *Heuson*, Ir. Rep., 6 C. L. 283. *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J., Ch. 321.

(*u*) *Benjamin* v. *Storr*, L. R., 9 C. P. 400; 43 L. J., C. P. 162.

(*x*) *Ireson* v. *Moore*, 1 Ld. Raym. 486; 1 Salk. 15; Carth. 451. *Green* v. *London General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*y*) *Hart* v. *Basset*, Sir J. Jones, 156; 4 Vin. Abr. 519. *Greasley* v. *Codling*, 2 Bing. 263. See also the observations of Willes, J., *Beckett* v. *Midland Rail. Co.*, L. R., 3 C. P. 82, 97; 37 L. J., C. P. 11.

(*z*) *Benjamin* v. *Storr*, L. R., 9 C. P. 400; 43 L. J., C. P. 162.

(*a*) *Chichester* v. *Lethbridge*, Willes, 73. *Hubert* v. *Groves*, 1 Esp. 148.

(*b*) *Winterbottom* v. *Lord Derby*, L. R., 2 Ex. 316; 36 L. J., Ex. 194.

(*c*) *Rose* v. *Groves*, 5 M. & G. 613; 6 Sc. N. R. 653.

12 which the defendant had wrongfully moored across the stream, and the plaintiff, in consequence of the obstruction, was compelled to unload his barges and carry his goods by land to their place of destination, it was held that the plaintiff was entitled to recover from the defendant all the expenses of the land carriage of the merchandise (*e*).

It has been held that there is no general common law right of bathing in the sea, and passing over every part of the shore for that purpose, independently of usage and custom (*f*); but such a right may exist by prescription or custom, and may be gained and retained by the owners and occupiers of houses on the sea-coast, or by the inhabitants of any village, parish, or district, so long as it can be exercised without creating any public nuisance (*g*). The existence and the extent of the right are to be collected in this, as in other instances of customary and prescriptive rights, from the manner in which the particular portions of the sea-shore throughout the kingdom have from time immemorial been used (*h*). "The right of bathing in the sea," observes Best, J. (*i*), "is as beneficial to the public as the right of fishing; and, unless I felt myself bound by an authority as strong and clear as an Act of Parliament, I would hold, on principles of public policy—I might say public necessity — that the interruption of free access to the sea is a public nuisance. In the first ages of all countries the sea and its shores were left open to public use. In all countries it has been matter of just complaint, that individuals have encroached on the rights of the people. In England our ancestors put the public rights in rivers under the safeguard of *Magna Charta*. If the principle of exclusive appropriation is extended so far as to touch the right of walking over the barren sands of the sea-shore, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours" (*k*).

There is no common law right of entering the land of another against his will for the purposes of the sport of fox-hunting (*l*).

Public rights—Breach of a public duty.—Hitherto we have dealt with rights available against the world at large. We proceed now to deal with breaches of public duties owing to the community. An important distinction between rights available against all the world and public duties is that, whereas the infringement of the

(*e*) *Rose* v. *Miles*, 4 M. & S. 101.
(*f*) *Blundell* v. *Catterall*, 5 B. & Ald. 268. See Hall on Sea Shores, p. 184 *et seq.*
(*g*) See *R.* v. *Crunden*, 2 Campb. 89.
(*h*) See *Mace* v. *Philcox*, 15 C. B., N.S. 600; 33 L. J., C. P. 124.
(*i*) In *Blundell* v. *Catterall*, differing, however, from the rest of the Court.
(*k*) *Blundell* v. *Catterall*, 5 B. & Ald. 287.
(*l*) *Paul* v. *Summerhayes*, 4 Q. B. D. 9; 48 L. J., M. C. 33.

13 former always involves an act of some kind or other, the breach of the latter may and frequently does consist in an omission. Public duties which exist at common law are chiefly those attached to public offices which are either judicial (*m*) or ministerial (*n*). There are also some quasi public offices such as that of a common carrier, or of a common innkeeper; the former of whom is obliged to carry, for every person who tenders him the proper charge, all goods which he has convenience for carrying, and in respect of which he holds himself out as a carrier; while the latter is compelled to afford such shelter and accommodation as he possesses to all who apply, and who are able and ready to pay the customary hire (*o*). The duties of common carriers and common innkeepers are, however, in other respects capable of being limited by their express contracts, so that it has been judged more convenient to treat of the whole under the law of contracts (*p*).

Public rights—Public officers (*q*).—When a person undertakes a public office, he is bound to perform the duties of the office; and, if he neglects or refuses so to do, and an individual in consequence sustains injury therefrom, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained (*r*). Where, however, the duty is not absolute, but judicial functions are to be performed, or a discretion has been confided, an erroneous exercise of jurisdiction or discretion, however plain the miscarriage may be, and however injurious the consequences, is not an actionable wrong. This follows from the very nature of the thing; it is implied in the nature of judicial authority, and in the nature of discretion where there is no such judicial authority. But, where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every person, whatever other functions of a judicial or of a discretionary nature he may have, is bound to obey; and, with the exception of the legislature and its branches, everybody is liable for the consequences of disobedience (*s*). Thus, an action will lie at the suit of the party injured for a refusal by a public officer to obey a writ of *mandamus*, or for a false return to the writ (*t*). So, where the plaintiff applied to a justice of the peace to take his examination under the statute of Elizabeth, the statute of Hue and Cry, and the justice refused to do so, and the plaintiff in consequence sustained injury by being thereby deprived of the

(*m*) *Post*, p. 651.
(*n*) *Post*, p. 682.
(*o*) *R.* v. *Ivens*, 7 C. & P. 219.
(*p*) See Addison on Contracts, 8th ed., bk. 2, ch. 1, sect. 1, and ch. 2, sect. 4.
(*q*) For further information on the duties of public officers, see *post*, ch. 11.
(*r*) *Sutton* v. *Johnstone*, 1 T. R. 493. *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & F. 251, 279. *Lane* v. *Cotton*, 1 Salk. 17.
(*s*) *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & F. 251, 290.
(*t*) *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & F. 251, 301.

14 right to bring a suit against the hundred, it was held that he was entitled to maintain an action against the justice for this neglect of his public duty (*u*).

Every one who is appointed to discharge a public duty, and receives a compensation, whether from the Crown or otherwise, is constituted a public officer (*x*). If a bishop, by neglecting to perform the plain duties of his office, inflicts an injury upon another, an action for damages is maintainable against him. And, if a clergyman wrongfully refuses to administer the sacrament to a man, who is thereby prejudiced in his civil rights, or if the registrar of births refuses to register the birth of a person, and so causes him to lose an estate, an action for damages will be maintainable. So, if a lord of a manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, an action for damages would lie against such lord (*y*).

So, too, all deputy postmasters are responsible for their own personal misfeazance; for they are all made public officers, and charged with a great public trust since the legislative establishment of the Post Office. Thus, a postmaster is bound to deliver letters at the respective places of abode of the persons to whom they are directed, and is liable to an action for substantial damages if he fails to do so. If a person to whom a letter is addressed cannot be found at the place indicated, it is the duty of the postmaster to make reasonable inquiry after him (*z*). So, if the man who carries the letters to the Post-office loses any of them, he is answerable; so is the sorter in the business of his department; so is the postmaster for any fault of his own (*a*). The collector of customs is, in like manner, responsible in damages to all who sustain a direct and immediate injury from a neglect by him to execute the duties of his office, as for refusing to sign a bill of entry which it was his duty to sign, or to make an order which it was his duty to make (*b*). But a surveyor of highways is not liable to an action by reason of his omission to repair the highways, as he is in fact only the servant of the parish, upon the inhabitants of which the duty of keeping the highways in repair really rests (*c*).

(*u*) *Green* v. *Bucklechurches*, 1 Leon., p. 323, c. 456.

(*x*) See *Irwin* v. *Grey*, L. R., 1 C. P. 171; 2 H. L. 20; 35 L. J., C. P. 43; 36 L. J., C. P. 148.

(*y*) *Henley* v. *Mayor of Lyme*, 5 Bing. 108. *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & F. 251.

(*z*) *Rowning* v. *Goodchild*, 2 W. Bl. 908. *Smith* v. *Powdich*, 1 Cowp. 182.

(*a*) *Whitfield* v. *Lord Le Despenser*, Cowp. 765.

(*b*) *Barry* v. *Arnaud*, 10 Ad. & E. 670.

(*c*) *Young* v. *Davis*, 7 H. & N. 760; 2 H. & C. 197; 31 L. J., Ex. 254. 5 & 6 Wm. 4, c. 50, ss. 20, 41. Powers and duties of surveyors are vested in urban authorities by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144.

15 *Statutory rights and duties.*—In addition to those rights and duties which exist at common law, there are many rights with their corresponding duties which are created by statute. Sometimes these duties are annexed to public offices newly created, sometimes they are substituted for duties previously existing at common law, and sometimes they are imposed in exchange for benefits conferred by statute. A person who seeks for and accepts some statutory benefit to which a burthen is attached, cannot take the benefit and reject the burthen. Where, therefore, the Crown, for the benefit of the public, has made a grant of any property, benefit, right, or privilege, imposing at the same time certain public duties or obligations, and the grant has been accepted, the public may enforce the performance of the duty by indictment, and individuals, peculiarly injured, by action (*d*). Thus, every person who accepts a grant of land from the Crown, accompanied by a command or direction to keep up, repair, and maintain certain buildings, sea-walls, ditches, and sluices, for the benefit of the public, takes the land subject to the servitude imposed thereon; and, if any private individual sustains a private and peculiar injury from the non-repair of the sea-walls, &c., he is entitled to an action against the grantee or his assigns, who have failed to fulfil the duty imposed upon him or them (*e*). When statutory powers and authorities are granted by permissive words, they are permissive only so long as the benefits they confer are not taken under them; for, as soon as the grantee takes the advantage of the statute, and acts on its powers, he takes all the burdens attached by the Act to the benefits, and is liable to an action at the suit of any person who has sustained special damage by the non-performance of the statutory duty (*f*).

Where an Act of Parliament prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. The plaintiff must, therefore, prove some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law (*g*).

Of so-called torts founded on contract.—A tort having been defined to be a wrong independent of contract, it follows that, if that definition is correct, there can be no tort founded on contract, and that so-called torts founded on contract are breaches of contract or quasi-contract, and not torts. There is, indeed, a large class of cases

(*d*) *Lyme Regis* (*Mayor of*) v. *Henley*, 1 Bing. N. C. 222; 2 Cl. & F. 331.
(*e*) *Henley* v. *Mayor of Lyme*, 5 Bing. 107.
(*f*) *Nicholl* v. *Allen*, 1 B. & S. 916; 31 L. J., Q. B. 283.
(*g*) *Chamberlaine* v. *Chester and Birkenhead Rail. Co.*, 1 Exch. 877.

16 known as implied contracts, where the law recognizes a duty or obligation sometimes arising out of a preceding contract, and sometimes arising independently of any contract. In all those cases where the duty or obligation arises out of a precedent contract, the violation of the duty is in truth a breach of contract; but, as these cases present some features in common with that other branch of implied contracts which embraces duties independent of any contract, it was usual under the old mode of pleading to state in both these classes the facts out of which the duty or obligation arose, with or without an allegation that such duty arose therefrom. This mode of pleading being similar to that adopted in the case of an ordinary tort, and differing from that adopted in the case of an express promise, where the promise and the breach of that promise were alleged, these cases acquired the name of torts founded upon contract. In the form of pleading they resembled an ordinary tort; but in their essence they were breaches of contract and not torts. An instance may be found in the case of an action against a common carrier for the loss of goods entrusted to him to carry. In this case from the facts that the defendant is a common carrier and that without any express contract goods have been received by him to carry for the owner, the law implies, it is said, a duty on the part of the common carrier to carry such goods safely to their destination; and a simple allegation of those facts, coupled with the further fact that the carrier had lost the goods, showed a cause of action, which, as the declaration contained no statement of any promise or contract, was said to be a declaration in tort as opposed to a declaration alleging an express promise and a breach of that promise. It is manifest, however, that in the case supposed the duty does in fact arise out of an unexpressed contract, that is, out of a concurrence of intention in both the sender and the carrier that the latter shall carry the goods for the former; and, indeed, a declaration alleging that, in consideration that the sender would deliver the goods to the carrier to be carried for hire, the carrier *promised* to carry them safely, was always held to be established by proof of a delivery of the goods to the carrier to be carried. The fact that the same cause of action could thus be stated in two different ways, and that in the one case it was called an action of tort and in the other an action of contract, led to some confusion as to the real nature of the action (*h*). But it had become well established, even before the abolition of the old forms of pleading, that the substance and not the form of the action was to be regarded (*i*); and, under the

(*h*) *Tattan* v. *Great Western Rail. Co.*, 2 El. & El. 844; 29 L. J., Q. B. 184. See *Fleming* v. *Manch. S. & L. Rail. Co.*, 4 Q. B. D. 81; *Foulkes* v. *Metrop. Rail. Co.*, 4 C. P. D. 267; 5 C. P. D. 157; 49 L. J., C. P. 361.

(*i*) *Legge* v. *Tucker*, 1 H. & N. 500;

17 present system of pleading, the old difficulty is hardly likely to recur.

Conflict of rights.—Unless they were modified and restricted by law, the rights of different individuals would in certain cases necessarily clash with one another. To prevent inconveniences of this nature, the law interferes and regulates these conflicting rights, sometimes subordinating one to the other, and at other times allowing both to exist together on the terms that either right shall only be exercised *bonâ fide* and with due care. Thus, the right of *A* to dig a hole in his own land is subordinated to the right of *B* to have his land supported by the adjoining land of *A*; and, if *A* digs a hole at the edge of his land and so near to *B*'s that the surface of *B*'s land gives way and subsides, *A* is responsible for the damage thereby caused to *B*. On the other hand, the right of *A* to use a public highway is not subordinated to, but exists concurrently with, the right of *B* to use it, the only restriction being, that each shall use the way *bonâ fide* and with due care. *A*, therefore, is not responsible for an injury done to *B* by his use of the highway, provided he uses it *bonâ fide* and with due care. If, however, *A*, driving along a highway, drives negligently so as to come into collision with *B*, he is responsible for the damage done; and he is also liable to an action, if, under pretence of using the highway himself, he maliciously obstructs *B* in the use of it.

The due regulation and subordination of conflicting rights constitute the chief part of the science of law. It is impossible to give any rule applicable to all cases which may arise except the general one that, whenever damage is caused by one man to another, the law, in deciding which shall bear the loss, is governed by principles of expediency modified by public sentiment.

Infringement of rights.—If *A* in doing an unlawful act causes damage to *B*, *A* is liable to an action, whether the damage was caused accidentally or intentionally, and whether the act was unlawful *per se*, or merely unlawful *sub modo*, that is, subordinated under certain circumstances to the conflicting right of *B*.

Infringement of rights—Accident.—No person may be excused of a trespass except it be adjudged to have been committed entirely without fault, or to have been an inevitable accident. "Looking into all the cases from the Year-book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be," observes Grose, J., "that, if the injury be done by the act of the party himself at the time, or he be the immediate cause of it,

26 L. J., Ex. 71. *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131. *Baylis* v. *Lintott*, L. R., 8 C. P. 345; 42 L. J., C. P. 113.

18 though it happen accidentally or by misfortune, yet he is answerable" (*k*). "By *injuria*," observes Willes, C. J., "is meant a tortious act; it need not be wilful and malicious; for, though it be accidental, an action will lie" (*l*). Thus, if the damage done is the immediate result of force exercised by the defendant, in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happen accidentally, or by misfortune (*m*), unless the force was used strictly in self-defence. As, where one shooting at butts for a trial of skill with the bow and arrow accidentally wounded a man, it was held that he was responsible in damages, though he was doing an act lawful in itself, and had no unlawful purpose in view (*n*). "So, if I turn suddenly round and knock a man down without intending it, I am responsible for the injury I do him" (*o*). Where to an action of trespass the defendant pleaded that he was a soldier of the trained bands, and was skirmishing with muskets charged with powder for exercise *in re militari*, and that in discharging his musket he accidentally and unintentionally injured the plaintiff, it was held that the plea, being a mere excuse and no justification, afforded no answer to the action (*p*). And, where the defendant was uncocking his gun, and the plaintiff was stooping to see it, and the gun went off and wounded the plaintiff, it was held that the plaintiff might maintain an action for the injury (*q*). So where, to an action of trespass for mowing the plaintiff's land and carrying away the grass, the defendant pleaded that he had land adjoining the plaintiff's, and, in mowing his own land, involuntarily and by mistake he mowed some of the plaintiff's land, intending only to mow his own land, it was held that this was no answer; for the act was voluntary, and the knowledge and intent of the defendant could not be ascertained and were immaterial (*r*). In the instances given above, the acts of shooting, or of moving one's body, or of mowing one's own grass, are in themselves lawful acts; but, when they conflict with the right of another to personal security or to the enjoyment of his property under the circumstances stated in the foregoing instances, they are subordinated to the last-named rights, and are under those circumstances unlawful acts.

If, on the other hand, *A* in doing a lawful act unintentionally causes damage to *B*, *A* is not liable to an action, unless, either he was not doing the act *bonâ fide* in the enjoyment of his right,

(*k*) *Leame* v. *Bray*, 3 East, 599.
(*l*) *Winemore* v. *Greenbank*, Willes, 577.
(*m*) *Dickenson* v. *Watson*, 2 Jones, 205.
(*n*) 21 Hen. 7, 28 a.
(*o*) Lawrence, J., *Leame* v. *Bray*, 3 East, 596. *Post*, p. 140.
(*p*) *Weaver* v. *Ward*, Hob. 134. *Dickenson* v. *Watson*, 2 Jones, 205.
(*q*) *Underwood* v. *Hewson*, 1 Str. 596.
(*r*) *Baseley* v. *Clarkson*, 3 Lev. 37. *Post*, p. 360.

19 but maliciously with intent to injure *B*, or in doing the act in question he was guilty of some negligence without which the damage would not have been caused. For a man may sustain grievous damage at the hands of another; and yet, if it is the result of a lawful act, done in a lawful manner, without any carelessness or negligence, there may be no legal injury, and no tort giving rise to an action for damages. An act of force, for example, done in necessary self-defence, causing injury to an innocent bystander, is *damnum sine injuriâ;* "for no man does wrong, or contracts guilt, in defending himself against an aggressor" (*s*). Thus, if a lighted firework is thrown into a coach full of company, and is flung out again in necessary self-defence, and falls against and burns a bystander, or explodes in his face and blinds him, the person throwing out the firework is not answerable for the damage, as he was acting in self-defence, and has done no wrong. The wrong-doer is the party who originally threw the burning material into the coach; and as against him there is that conjunction of damage and wrong which constitute a tort, and will support an action (*t*). So, where the owners of a canal, in protecting themselves from an overflow of water from a neighbouring river, augmented the damage to their neighbours, it was held that the latter had no right of action, as the canal owners in no sense brought the water or caused it to come to the place where the damage happened, and were

(*s*) Do Grey, C. J., *Scott* v. *Shepherd*, 3 Wils. 412; 2 W. Bl. 892.

(*t*) Gould, J., *Scott* v. *Shepherd*, 2 W. Bl. 892, 898; 3 Wils. 412. For the consequences of a lawful act, done in a lawful manner, no liability can attach, unless the party doing the act has been guilty of negligence which contributed to the injury (*Auburn, &c. Plank Road Co.* v. *Douglass*, 9 N. Y. 444; *La Sala* v. *Holbrook*, 4 Paige, Ch. (N. Y.) 169; *Thurston* v. *Hancock*, 12 Mass. 220; *Howe* v. *Young*, 16 Ind. 312; *Thomasson* v. *Agnew*, 24 Miss. 63; *Detroit Daily Post* v. *McArthur*, 16 Mich. 477; *Felin* v. *Reichardt*, 8 Wis. 255); and the same rule prevails where the injury results from an inevitable accident: *Vincent* v. *Stinchour*, 7 Vt. 62; *Bizzell* v. *Booker*, 16 Ark. 308; *Gault* v. *Hume*, 20 Md. 297; *Burton* v. *Davis*, 15 La. An. 448. But where an act is lawful, yet *if it is unnecessary and dangerous*, the person doing it cannot excuse himself against injuries resulting therefrom, upon the ground merely that they were accidental and unintentional. He must also show that he used extraordinary care to prevent injury to others. Thus, in *Welch* v. *Durand* (36 Conn. 182), the defendant fired a pistol at a mark, the ball of which glanced and hit the plaintiff, although it was shown that the injury was unintentional, yet the injury being the result of gross and culpable negligence on the part of the defendant, he was held liable therefor. *Butler, J.*, said: "Shooting at a mark is lawful but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." So, where a person, upon his own premises, fires a gun near a highway, whereby the horse of another passing over the highway is frightened, and injury results therefrom, he is liable, although he did not intend to frighten the horse, if the act can be said to be negligent: *Cole* v. *Fisher*, 11 Mass. 187. So, where a person who had ascended in a balloon came down in the plaintiff's garden, and a crowd of people was thereby attracted, who, in assisting the aeronaut, broke down the vegetables growing in the garden, it was held that the aeronaut was liable therefor, although his position was perilous: *Guille* v. *Swan*, 19 John. (N. Y.) 381. In order to excuse from liability, the accident producing the injury must be inevitable. That is, it must be one which happened without fault or blame on the part of the person through whose agency it occurred.

entitled to protect themselves against the common enemy (*u*). So, the defendant was held not to be liable, where the horse which he was driving, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*x*). So, "if I ride upon a horse, and J. S. whips the horse so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the assault and battery and not I" (*y*). If *A*'s horse runs away with him, and, in spite of his efforts to the contrary, strikes against the plaintiff, *A* is not liable, if he was lawfully driving along a highway and was not guilty of any negligence (*z*). Where one ship is, by the improper navigation of a second ship, compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course, and not that whose course was altered, is liable for the

20 damage (*a*). If instructions for an action are given, and through the mistake of the solicitor a wrong person is sued, and the latter fails to appear and plead, and judgment goes against him by default, and his goods are seized in execution, this is *damnum absque injuriâ*, and no action is maintainable. If he defends the action, and incurs costs which he cannot recover, he is in no better situation (*b*). But, although inevitable accident, or, as it is sometimes called, the act of God, is an answer where the different rights are co-ordinated by the common law, yet some of those rights which co-exist at common law may, by the express language of some statute, be subordinated to others. In such a case the words of the statute must receive their natural construction; and, if it appears clear that a liability is imposed, even for the result of inevitable accident, the courts cannot introduce any exception thereto by intendment of law. But, as such a construction may work injustice, it must appear clearly that the words of the statute were intended to create a liability without any restriction (*c*).

Infringement of rights—Negligence.—Whenever, in doing an act otherwise lawful, a man unintentionally causes damage to another, which with ordinary care could have been foreseen and guarded against, he will generally speaking be liable to an action, provided such other person was injured in the exercise of a right available against the world at large, or against the person guilty

(*u*) *Nield* v. *L. & N. W. Rail. Co.*, L. R., 10 Ex. 4; 44 L. J., Ex. 15.

(*x*) *Wakeman* v. *Robinson*, 1 Bing. 213; 8 Moore, 63. And see *Holmes* v. *Mather*, L. R., 10 Ex. 261; 44 L. J., Ex. 176.

(*y*) *Gibbons* v. *Pepper*, 1 Ld. Raym. 38.

(*z*) *Holmes* v. *Mather*, L. R., 10 Ex. 261; 44 L. J., Ex. 176.

(*a*) *The Sisters*, L. R., 1 P. D. 117; 45 L. J., Adm. 30.

(*b*) Rolfe, B., *Davies* v. *Jenkins*, 11 M. & W. 755.

(*c*) *River Wear Commissioners* v. *Adamson*, L. R., 2 App. Cas. 743; 47 L. J., Q. B. 193. *Brocklehurst* v. *Manchester, &c. Tramways Co.*, 17 Q. B. D. 118.

of the negligence. Where the declaration alleged that the defendant wrongfully and negligently hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be under the chandelier, and that if not properly hung it would probably fall upon them, and that the chandelier fell upon the plaintiff, it was held that the declaration did not disclose any duty by the defendant to the plaintiff for the breach of which an action could be maintained, as it did not appear that the plaintiff was in the public-house in the exercise of any right available against the defendant (*d*). Where a coach broke down through the negligence of the coach-maker, who had contracted with the owner of the coach to furnish him with sound, roadworthy coaches, and the coachman was seriously injured, it was held that he had no remedy against the coach-maker. "It is a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy; but by that consideration we ought not to be influenced" (*e*). "There would be no

21 end of actions if we were to hold that a person, having once done a piece of work carelessly, should, independently of honesty of purpose" (or of contract), "be fixed with liability in this way by reason of bad materials or insufficient fastening" (*f*). In a recent case the Master of the Rolls has laid down as law that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own 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 (*g*). Where a waterworks company under their Act laid down a main under a turnpike road, the soil of which and of the land on either side was vested in *B*, and negligently permitted the main to leak, whereby *C*, who had entered into a contract with *B* to make a tunnel under the road, was delayed in his work, so that his contract became unprofitable, it was held that *C* had no cause of action against the company (*h*). In that case, *B* having obtained the consent of the surveyor of the highways and of the road trustees, had made a cutting across part of the road, intending to build his tunnel below, to replace the soil, and make good the road

(*d*) *Collis* v. *Selden*, L. R., 3 C. P. 495; 37 L. J., C. P. 233. See, however, *Heaven* v. *Pender*, *infra*, and *Elliott* v. *Hall*, *infra*.

(*e*) *Winterbottom* v. *Wright*, 10 M. & W. 115. See, however, *Heaven* v. *Pender*, *infra*.

(*f*) Per Willes, J., *Collis* v. *Selden*, L. R., 3 C. P. 498; 37 L. J., C. P. 233.

(*g*) *Heaven* v. *Pender*, 11 Q. B. D. 503; 52 L. J., Q. B. 702. The other two learned judges did not concur on this point, but thought the case was one of a duty arising from invitation. See *post*, p. 314. See also *Elliott* v. *Hall*, 15 Q. B. D. 315.

(*h*) *Cattle* v. *Stockton Waterworks Co.*, L. R., 10 Q. B. 453; 44 L. J., Q. B. 139.

above it, and then to cut through the other part of the road and make the rest of the tunnel in the same manner; and, when *B* had cut through part of the road, the water, escaping from the leak, flowed down upon the work; and it was held that, assuming what *B* had done in obstructing the road to be indictable, the practical obstruction of the highway did not render the whole proceeding so illegal as to prevent those engaged in it from recovering damages for a wrong, although the court held upon the grounds already stated that *B* was not entitled to recover (*h*).

The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury (*i*). As a rule there must be affirmative proof of negligence on the part of the defendant to support an action; for, where it is a perfectly even balance on the evidence whether the injury has resulted from the want of proper care on the part of one side or the other, the party

22 who founds his claim on the imputation of negligence fails to establish it (*l*). However, where the actual thing causing the accident is solely under the management of the defendant, and the accident is one which would not, in all probability, happen if the person managing the thing was using due care, it has been held that the mere occurrence of the accident is sufficient *primâ facie* proof of negligence to impose on the defendant the onus of rebutting it (*m*).

Property adjoining a spot on which the public have a right to carry on their traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good; and he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief; for the owner incurs no liability merely because he is the owner. But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts

(*h*) See note (*h*), *supra*.

(*i*) Wilde, B., *Swan* v. *North British Australian Co.*, 7 H. & N. 603; 31 L. J., Ex. 437. It is, therefore, a relative term; and the term "gross negligence" is, it has been said, only ordinary negligence with a vituperative epithet. See *Grill* v. *General Iron Screw Collier Co.*, L. R., 1 C. P. 600; 35 L. J., C. P. 321.

(*l*) *Cotton* v. *Wood*, 8 C. B., N. S. 568; 29 L. J., C. P. 333. *Hammack* v. *White*, 11 C. B., N. S. 588; 31 L. J., C. P. 129. Ld. Wensleydale, *Morgan* v. *Sim*, 11 Moore, P. C. 312.

(*m*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; 34 L. J., Ex. 220. *Briggs* v. *Oliver*, 35 L. J., Ex. 163. *Czech* v. *General Steam Navigation Co.*, L. R., 3 C. P. 14; 37 L. J., C. P. 3. *Kearney* v. *Lond. & Brighton Rail. Co.*, L. R., 5 Q. B. 411; 6 *Ib.* 759; 39 L. J., Q. B. 200; 40 *Ib.* 285.

upon those in charge of a carriage on land, or a ship on the water, to take reasonable care and use reasonable skill to prevent it from doing injury, if he shows that this wilfulness or neglect caused the damage (*n*).

The state of mind called negligence may proceed either from heedlessness, where the negligent person has not in his mind the consequences of his act, or from rashness, where he has the consequences in his mind, but thinks on insufficient grounds that they will not follow. Negligence may consist in acts of commission or in acts of omission. A man is guilty of a negligent act of commission when, in the exercise of his rights, he does something which is unnecessary to the exercise of those rights, and which is likely to cause damage to others in the exercise of their rights. A man is guilty of an act of negligent omission when, in the exercise of his rights, he does something necessary to the exercise of those rights, and which is likely to cause damage to others in the exercise of their rights, and omits to take reasonable precautions against the occurrence of such damage. Thus, a man

23 who rides or drives furiously along a highway is guilty of an act of negligent commission, while a man who makes a dangerous excavation in his own land immediately adjoining a public footway, without fencing it off from the footway, is guilty of an act of negligent omission.

But, if a man is exercising a right with all proper care and precaution, and nevertheless unintentionally injures another, he is not liable to an action. Thus, where *A* was driving a carriage along the highway, and the horse being suddenly frightened ran away, and ran against *B*, it was held that *A* was not responsible, unless he either guided the horse against *B*, as, for instance, in the desire to escape from an alternative and greater evil, or was guilty of negligence in the management of the horse (*o*). In the case supposed, there was no act of *A*'s which directly caused the injury to *B*, and the act which indirectly caused it, the driving along the highway, was not unlawful, and was not performed negligently.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing something which a prudent and reasonable man would not do. A man may be liable for negligence, if, unintentionally, he omits to do that which a reasonable person would have done, or does that which a person taking reasonable precautions would not have

(*n*) Per Ld. Blackburn, *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743, 767; 47 L. J., Q. B. 193.

(*o*) *Holmes* v. *Mather*, L. R., 10 Ex. 261; 44 L. J., Ex. 176.

done. Where the defendants, a water company, having pipes of water laid in the streets, had provided against such frosts as experience would have led men acting prudently to provide against, it was held that they were not guilty of negligence because their precautions proved insufficient against the effects of a frost of extreme and very unusual severity (*p*). In order that an extraordinary natural event, such as a very high tide, should be, in the legal sense of the words, an act of God, it is not necessary that such an event should never have happened before. It is sufficient that its happening again could not have been reasonably expected. If such an event has happened once, but there is nothing to lead to the inference that it is likely to recur, it does not, if it happens a second time, cease to be an act of God (*q*).

Contributory negligence.—A plaintiff cannot recover damages, if, but for his own negligence, or that of the person who represents him, the accident would not have happened, though there

24 was negligence on the part of the defendant (*r*); for the plaintiff cannot complain of an injury which his own negligence and want of care have contributed to bring upon him (*s*). If a person of full age and mature judgment gets up into the defendant's cart, without any right so to do, and sustains an injury from the negligence of the defendant's servant, the person so trespassing is precluded from recovering damages from the defendant (*t*). "If," observes Domat, "any one goes across a public cricket-ground whilst people are playing there, and the ball, being struck, chances to hurt him, the injury is to be imputed to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball" (*u*). Where, the plaintiff and defendant being jointly interested in the pulling down and rebuilding of a party-wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and the plaintiff's house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. "Since the wall," observes Lord Ellenborough,

(*p*) *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; 25 L. J., Ex. 212.

(*q*) *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine's Docks Co.*, 9 Ch. D. 503.

(*r*) *Waite* v. *North Eastern Rail. Co.*, El. Bl. & El. 719; 27 L. J., Q. B. 417; 28 *Ib.* 258. *Tuff* v. *Warman*, 2 C. B., N. S. 740; 27 L. J., C. P. 322. *Senior* v. *Ward*, 1 El. & El. 385; 28 L. J., Q. B. 139. *Scott* v. *Dublin & Wicklow Rail. Co.*, 11 Ir. Com. Law Rep. 377. *Vaughan* v. *Cork & Youghal Rail. Co.*, 12 *Ib.* 297.

(*s*) Jervis, C. J., *Martin* v. *Great Northern Rail. Co.*, 16 C. B. 192; 24 L. J., C. P. 209. *Wise* v. *Great Western Rail. Co.*, 1 H. & N. 63; 25 L. J., Ex. 261.

(*t*) *Lygo* v. *Newbold*, 9 Exch. 306; 23 L. J., Ex. 109.

(*u*) Domat, liv. 2, tit. 8, s. 4.

"was taken down by both, neither could impute negligence to the other" (*x*). If an obstruction has been negligently placed in a public thoroughfare by the defendant, and the plaintiff has ridden against it, he cannot recover damages from the defendant if it appears that he was riding at an improper pace, or was intoxicated, and could have avoided the obstruction if he had ridden with reasonable and ordinary care (*y*). If the risk is obvious, the plaintiff ought not to incur it (*z*), but should proceed to remove the obstruction, or take legal proceedings for its removal, and for the recovery of the damages he has sustained by being deprived of the use of the thoroughfare. Wherever the immediate and proximate cause of the damage is the plaintiff's own supineness, carelessness, or unskilfulness, he has no ground of action against the defendant, though the primary and original cause of damage be the defendant's wrongful act (*a*). Thus,

25 where some bricklayers employed by the defendant had wrongfully laid several barrowfuls of lime rubbish before the defendant's door, by the side of a highway, and, while the plaintiff was passing in his chaise, the wind raised a whirlwind of this rubbish, which frightened the plaintiff's horse and caused it to start on one side, in the direction of an approaching waggon, and the plaintiff, to prevent the horse from running against the waggon, pulled him sharply round, and the horse then ran over a lime-heap lying before another man's door, and the shaft was broken by the shock, and the horse, being then still more frightened, ran away and upset the chaise, and threw the plaintiff out and injured him, it was held that, although the defendant was to blame for putting the rubbish by the side of the road, yet, if the plaintiff's running against the second heap of rubbish was owing to his pulling the horse round too sharply, the immediate cause of the injury was his own unskilfulness in the management of his horse, rather than the original wrongful act of the defendant (*b*).

But the negligence or misconduct on the part of the plaintiff disentitling him to an action for compensation must be such as he is legally responsible for, and such as the law recognises as a co-operative cause of the injury. Where the defendant left his horse and cart for a long time unattended in the street, where some little boys were at play, and some of the boys got into the cart, and another boy led the horse forward to give them a ride, and one boy fell off the shafts and got his leg crushed under the wheel,

(*x*) *Hill* v. *Warren*, 2 Stark. 378.
(*y*) *Butterfield* v. *Forrester*, 11 East, 60.
(*z*) *Clayards* v. *Dethick*, 12 Q. B. 446. *Thompson* v. *North Eastern Rail. Co.*, 2 B. & S. 106; 31 L. J., Q. B. 194. See *Wyatt* v. *Great Western Rail. Co.*, 6 B. & S. 709; 34 L. J., Q. B. 204.
(*a*) *Young* v. *Grote*, 4 Bing. 253; 12 Moore, 484. *Butterworth* v. *Brownlow*, 19 C. B., N. S. 409; 34 L. J., C. P. 266.
(*b*) *Flower* v. *Adam*, 2 Taunt. 314.

it was held that the defendant was responsible for the fall and the broken leg, as it was the natural result of his misconduct in leaving the cart unattended, and that the boy, in consequence of his tender years and natural instinct for play, and want of reflection and foresight, could not be considered legally responsible for the damage he had sustained, so as to be precluded from recovering compensation from the defendant (*c*). Where the defendant left the wooden covering of a cellar leaning against the wall, and the plaintiff, a child of seven years old, got upon it and jumped from it in play, by means of which it fell upon and injured him, it was held he could not recover (*d*). So, also, where the defendant exposed for sale, without superintendence, a machine which any passer by might set in motion, and which, when set in motion, was dangerous, and the plaintiff, a boy of four years old, by the direction of his brother, put his hands in the machine while his brother set it in motion, it was held he could not recover (*e*). It has also been held that, if

26 children stray upon a railway, and get injured by a passing train, damages cannot be recovered by them from the company (*f*).

Where negligence on the part of the plaintiff is remotely connected with the cause of the injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action (*g*). Though a plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him (*h*). Thus, where the plaintiff negligently left his donkey in a public highway, tied together by the fore-feet, and the defendant carelessly drove over and killed the donkey in broad daylight, the animal being unable to get out of the way of the defendant's waggon, it was held that the misconduct of the plaintiff, in leaving the donkey in the highway, was no answer to the action; for, although the donkey might have been wrongfully there, still the defendant was bound to go along the road with care, and at such a pace as would be likely to prevent mischief. "Were this not so, a man might

(*c*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*d*) *Abbott* v. *Macfie*, 2 H. & C. 744; 33 L. J., Ex. 177. As to two children playing together, see *S. C.*, *post*, p. 43.

(*e*) *Mangan* v. *Atterton*, L. R., 1 Ex. 239; 35 L. J., Ex. 161. This case was commented on in *Clark* v. *Chambers*, 3 Q. B. D. 327; 47 L. J., Q. B. 427. See *post*, p. 45. As to the death of a child between verdict and judgment, see *Kramer* v. *Waymark*, L. R., 1 Ex. 241; 35 L. J., Ex. 148.

(*f*) *Singleton* v. *Eastern Counties Rail. Co.*, 7 C. B., N. S. 287.

(*g*) *Greenland* v. *Chaplin*, 5 Exch. 248.

(*h*) *Radley* v. *L. & N. W. Rail. Co.*, 1 App. Cas. 754; 46 L. J., Ex. 573.

justify the driving over goods left in a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road" (*i*).

Contributory negligence on the part of the plaintiff, therefore, will not disentitle him to recover damages, unless it were such that, but for that negligence, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff (*k*).

Contributory negligence—Identification of the passenger with his driver.—When a collision between two carriages has been caused by negligent driving on both sides, neither party can recover damages from the other; and it has been held that every passenger who has selected the particular conveyance by which he travels is so far identified with the driver or director of its movements, that,

27 if any injury is sustained by him from collision with a rival vehicle, through the joint negligence of his own driver and that of the driver of the rival conveyance, precluding the former from maintaining an action against the latter, the passenger is himself equally precluded, and his only remedy is against his own driver, or the employer of the latter (*l*). But "it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachmen who drove them, so as to be restricted for remedy to actions against their own driver, or his employer. Why both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to

(*i*) *Davies* v. *Mann*, 10 M. & W. 549. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*k*) *Tuff* v. *Warman*, 5 C. B., N. S. 585; 27 L. J., C. P. 322. *Scott* v. *Dublin & Wicklow Rail. Co.*, 11 Ir. C. L. R. 396. This is the doctrine generally adopted by our courts: *Callahan* v. *Warner*, 40 Me. 131; *Wilds* v. *Hudson River R. R. Co.*, 24 N. Y. 430; *Williams* v. *Michigan Central R. R. Co.*, 2 Mich. 259; *Sleeper* v. *Sandown*, 52 N. H. 244; *Sutton* v. *Wanatossa*, 29 Wis. 21; *Lindsey* v. *Danville*, 45 Vt. 72; *Newhouse* v. *Miller*, 35 Ind. 463; *Walsh* v. *Miss. &c. R. R. Co.*, 52 Me. 434; *Richmond, &c. R. R. Co.* v. *Anderson*, 31 Gratt. (Va.), 812; *Tanner* v. *Louisville, &c. R. R. Co.*, 60 Ala. 621; *Meyers* v. *Chicago, &c. R. R. Co.*, 59 Me. 223; *Cleveland, &c. R. R. Co.* v. *Elliott*, 28 Ohio St. 340; *Manly* v. *Wilmington, &c. R. R. Co.*, 74 N. C. 655; *Kline* v. *Central Pacific R. R. Co.*, 37 Cal. 400; *Kennayde* v. *Pacific R. R. Co.*, 45 Mo. 255; *Johnson* v. *Canal, &c. R. R. Co.*, 27 La. An. 53. In Illinois, Georgia, and Kansas, the doctrine of comparative negligence prevails: *Macon, &c. R. R. Co.* v. *Johnson*, 38 Ga. 409; *Chicago, &c. R. R. Co.* v. *Gretzner*, 46 Ill. 74; *Kansas Pacific R. R. Co.* v. *Painter*, 14 Kan. 37.

(*l*) *Thorogood* v. *Bryan*, 8 C. B. 131. *Armstrong* v. *Lane. & York. Rail. Co.*, L. R., 10 Ex. 47; 44 L. J., Ex. 89. And see *Child* v. *Hearn* (L. R., 9 Ex. 176; 43 L. J., Ex. 100; *post*, p. 297) for a curious instance of the application of this rule. See also *The Bernina*, 11 P. D. 31. This is not the rule generally adopted in this country, and a passenger is not precluded from a recovery unless he has employed and has control over the driver, so that, for the time, the driver can be said to be his servant. This rule also applies where an injury results to a passenger over the railway of one company by the negligence of the servants of another company: *Transfer Co.* v. *Kelley*, 36 Ohio St. 86; *Cuddy* v. *Horn*, 46 Mich. 596; *Albion* v. *Hetrick*, 90 Ind. 545.

deserve more consideration than it has received" (*m*). Where the drivers of two rival omnibuses were competing for passengers, the one endeavouring to get before the other, and both driving at great speed, and, in trying to avoid a cart which got in their way, the wheel of the defendant's omnibus came in contact with the projecting step of the omnibus on which the plaintiff was riding, and caused it to swing against a lamp-post, and the plaintiff was thrown off and injured, it was held that he was not disentitled to recover damages from the proprietor of the rival omnibus, by reason of misconduct on the part of his own driver (*n*). The owner of a cargo on board a ship is entitled to recover compensation for damage sustained by collision through negligence. And the owner of a cargo on board of one of two delinquent ships is not precluded, according to the old rule in the Court of Admiralty, from recovering from the other delinquent ship a moiety of the damage he has sustained; for he is not considered to be in anywise identified with the negligent management of the ship he has selected to carry his goods, nor to be in anywise responsible for the collision (*o*).

Infringement of rights—Malice.—If a man, though professing to exercise a right, is not acting *bonâ fide* in the exercise of that right, but with the object of causing damage to another, or with

28 some other corrupt and improper motive, he is said to be actuated by malice, and will, generally speaking, be liable for the damage so caused (*p*). The word "malice" is used in two different senses with reference to a tort. Sometimes a malicious act is simply a wrongful act, likely to cause injury and done without lawful excuse, as where the publication of an untrue defamatory statement is said to be malicious, in which case "malice" means no more than the wrongful intention which the law always presumes as accompanying a wrongful act; and this is called malice in law. At other times, by a malicious act is meant an act done with the

(*m*) Note to *Ashby* v. *White*, 1 Smith's L. C., 6th ed. 227.

(*n*) *Rigby* v. *Hewitt*, 5 Exch. 240. *Greenland* v. *Chaplin*, *ib.* 247. And see the remarks of Dr. Lushington, *The Milan*, Lush. 388; 31 L. J., Adm. 112.

(*o*) *The Milan*, Lush. 388; 31 L. J., Adm. 112; see *post*, p. 629. As to what is "improper navigation" within the meaning of a deed of indemnity against the consequences of such navigation, see *Good* v. *The London Steam Shipowners' Mutual Protecting Association*, L. R., 6 C. P. 563. It has been held in Ireland that the owner of a ship is not so identified with a pilot compulsorily employed by him as to be disentitled to recover damages for an injury arising from negligence, where the negligence of the pilot has contributed to the injury. *Dudman* v. *Dublin Port and Docks Board*, Ir. Rep., 7 C. L. 518.

(*p*) *Tozer* v. *Child*, 7 El. & Bl. 381; 27 L. J., Q. B. 151. This does not apply to a lawful use of real property: *Chatfield* v. *Wilson*, 28 Vt. 49. In *Phelps* v. *Nowlen* (72 N. Y. 39), it was held that the maxim *sic utere*, *&c.* does not apply at all to an act lawful in itself, even though the act complained of is done with the express intention to injure the plaintiff. And as applied to the use of lands, this would seem to be a sensible rule: *Ross* v. *Butler*, 19 N. J., Eq. 294; *Frazier* v. *Brown*, 12 Ohio St. 294; *Mahon* v. *Brown*, 13 Wend. (N. Y.) 261; *Smith* v. *Bowler*, 2 Dis. (Ohio) 153.

object of causing annoyance or injury to another, as where an intentional trespass is said to be malicious (*q*). All torts are malicious in the former sense, but not in the latter; for malice in the latter sense is not a necessary ingredient in a wrong. For example, a battery or a trespass on land may be committed without any actual malice, and yet an action for damages may be maintained (*r*). Where, however, actual malice exists, an act which otherwise would not be wrongful may become the subject of an action; for actual malice aggravates an unlawful act, and makes most acts unlawful which would otherwise be lawful. Thus, if a free burgess of a corporation or any other person having an undoubted right at law to give his vote at an election of a burgess or knight to serve in parliament, is maliciously hindered or impeded in the exercise of his right, an action for damages is maintainable against the disturber (*s*). Any person has a right to stand for a place in parliament, or to offer himself as a candidate for a vacant office; and, if an election takes place, and it becomes difficult to determine who has the majority, he is entitled to demand a poll; and, if the public officer who ought to have granted the poll maliciously denies it, he is liable to an action for substantial damages (*t*); for, if public officers will maliciously infringe men's rights, and "refuse to receive a vote which the party tendering has a right to give, and if an action for it comes to be tried before me," observes Holt, C. J., "I will direct the jury to make them pay well for it" (*u*). In order to maintain the action, the plaintiff must show that the refusal was founded in malice; for, "if the returning officer has acted honestly and uprightly, according to the best of his judgment, he is not amenable to an action" (*x*). In the celebrated case of *Ashby* v.

29 *White*, where an action was brought against a returning officer for maliciously hindering an elector in the enjoyment of his electoral right, by refusing to receive his vote at an election, Lord Holt observes, "I do not find that the defendants did by force of arms drive the plaintiff away from the election, nor by menaces deter him, but I find they did maliciously hinder him; and so it is charged by the plaintiff in his declaration, and so found by the jury, that they did it by fraud and malice. And so the defendant is an offender within the very words of the statute of Westminster" (*y*). To put the criminal law in force maliciously and

(*q*) *Bromage* v. *Prosser*, 4 B. & C. 255.
(*r*) *Rogers* v. *Rajendro Dutt*, 13 Moo. P. C. 209.
(*s*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 954.
(*t*) *Starling* v. *Turner*, 2 Lev. 50.
(*u*) *Ashby* v. *White*, 2 Ld. Raym. 958. *Herring* v. *Finch*, *ib.* 250.
(*x*) Abbott, C. J., *Cullen* v. *Morris*, 2 Stark. 587.
(*y*) Lord Holt's judgment in *Ashby* v. *White*, cited in *Tozer* v. *Child*, 7 El. & Bl. 381; 26 L. J., Q. B. 151.

without any reasonable or probable cause, is wrongful; and, if thereby another is prejudiced in reputation, person or property, there is that conjunction of injury and loss which is the foundation of an action (*z*).

Infringement of rights—Malicious assertion of a legal right—Malicious and unfounded actions.—The malicious assertion of a legal right is not actionable. If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. So, if one man slanders another in an action in a proper court, no action will lie for it (*a*). There is a great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action, he claims a right to himself, or complains of an injury done to him; and, if a man fancies he has a cause of action, he may sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious, and frivolous and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action. If *A* sues an action against *B* for mere vexation, in some cases, upon particular damage, *B* may have an action: but it is not enough to say that *A* sued him *false et malitiose;* he must show the matter of the grievance specially, so that it may appear to the court to be manifestly vexatious (*b*).

Infringement of rights—Maliciously putting the process of the law in motion in the name of a pauper or insolvent—Champerty and maintenance.—No action will lie for improperly promoting a civil action in the name of a third person, unless it is alleged and proved to

30 have been done maliciously, and without reasonable or probable cause; but, if there is malice and want of reasonable or probable cause, the action will lie, provided there is also legal damage (*c*). It would seem that even where there is no directly malicious motive inducing the party to sustain the suit, yet if his acts tend to promote unnecessary litigation malice will be implied (*d*). If the plaintiff charges the defendant with having maliciously, and without any reasonable or probable cause, commenced and prose-

(*z*) *Post*, ch. 7, sect. 2, p. 219.

(*a*) *Beauchamp* v. *Croft*, Keilw. 26; Dyer, 285 a.

(*b*) *Savile* v. *Roberts*, 1 Ld. Raym. 374; 1 Salk. 13; 12 Mod. 208.

(*c*) Williams, J., in *Cotterell* v. *Jones*, 11 C. B. 730; 2 [illegible], C. P. 3. 1 Roll. Abr. Action sur Case, H. pl. 1, p. 101. *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Cas. 186. *Flight* v. *Leman*, 4 Q. B. 883.

(*d*) *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1; 52 L. J., Q. B. 454. See also *Harris* v. *Brisco*, *infra*.

cuted an action against him in the name of an insolvent person for his (the defendant's) own benefit, whereby the plaintiff has sustained damage, the action will be defeated, inasmuch as the award of costs upon the failure of the first action would have been a full compensation for the unjust vexation caused by the bringing of the action; but, if it appears that in the previous action there was judgment of nonsuit, with an award of costs, and that the plaintiff could pay no costs, and that the defendant knew of the insolvency of the plaintiff at the time he induced the latter to bring the action, and had himself no interest in the subject-matter of the suit, there would appear to be a good ground of action (*e*). But it is a good defence to an action for maintenance that the defendant assisted the third person from charitable motives, even though he may have done so rashly and without proper enquiry into the case (*ee*).

Infringement of rights—Maliciously issuing execution.—No man can be sued for the exercise of his legal right to issue execution on a judgment, although it is averred that he acted maliciously, and without reasonable and probable cause (*f*). Nor can the judgment creditor be rendered responsible in damages for issuing execution for more than is due upon the judgment, unless some actual damage can be shown to have been sustained by the plaintiff therefrom. "But it would not be creditable to our jurisprudence," observes Lord Campbell, "if the debtor had no remedy by action, where his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor" (*g*). If a defendant, from feelings of ill-will, and with a view to annoy and

31 injure the plaintiff, prays an extent to secure a debt due from the plaintiff to the crown, under the pretence that the debt is in danger of being lost to the crown, when he knows it not to be in danger, or has no reasonable or probable cause for believing it to be in danger, he will be responsible in damages in an action for a malicious prosecution. Such a proceeding is calculated to affect the plaintiff's credit, and bring demands upon him, and be productive of injurious and even ruinous consequences to him. In the action for the malicious prosecution, the law requires that the writ of extent should be traced to its close; and that may be done by

(*e*) *Cotterell* v. *Jones*, 11 C. B. 728, 730; 21 L. J., C. P. 3. *Atwood* v. *Monger*, Styles, 378. *Watever* v. *Freeman*, Hob. 266. *Savile* v. *Roberts*, 1 Ld. Raym. 378; 12 Mod. 208; 1 Salk. 13. *Pechell* v. *Watson*, 8 M. & W. 691.

(*ee*) *Harris* v. *Brisco*, 17 Q. B. D. 504.

(*f*) *Rovet* v. *Lewis*, 5 D. & L. 373. *Magnay* v. *Burt*, 5 Q. B. 394.

(*g*) *Churchill* v. *Siggers*, 3 El. & Bl. 938; 23 L. J., Q. B. 308. *Jennings* v. *Florence*, 2 C. B., N. S. 467; 26 L. J., C. P. 277. *Wentworth* v. *Bullen*, 9 B. & C. 849. *Saxon* v. *Castle*, 6 Ad. & E. 659.

showing it to be discharged by the court, though upon an arrangement, and by consent (*h*).

Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. Thus, where the defendant having instituted legal proceedings against the plaintiff, and caused a writ to be issued against him, employed the officer charged with the execution of the process to do a specific thing which he was not warranted by the writ to do, viz., to use it as a means of compelling the plaintiff to give up a ship's register, it was held that the defendant was responsible in damages to the plaintiff for causing him to be arrested and detained until he had given up the register, and for the injury he had sustained in being deprived of the register which he had given up to obtain his release from custody. And, when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action, or whether the suit was legally terminated or not (*i*). Where the wrong ship is arrested owing to the *mala fides* of the plaintiff, or to such *crassa negligentia* as implies malice, the owners will be entitled to damages for the wrongful arrest (*k*).

Infringement of rights—Malicious prosecution by court-martial.—An action for a malicious prosecution will not lie at the suit of a subordinate officer against his commanding officer for maliciously, and without reasonable or probable cause, bringing him to a court-martial, as it is an act done in the course of discipline, and under the powers legally incident to his situation in the public service (*l*). And, although an officer is arrested and kept in confinement for an intentional act of discourtesy to his superior officer, for several

32 days, and is not ultimately brought to a court-martial, no action lies, even though it is done maliciously and without reasonable or probable cause, if the matter of complaint arises between military men subject to the Articles of War, and is fairly cognisable before a military tribunal (*m*).

An action cannot be brought by a private soldier against his commanding officer for a malicious discharge (*n*), or for reducing him on the field of battle from a sergeant to the ranks, although

(*h*) *Craig* v. *Hasell*, 4 Q. B. 499.
(*i*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; 5 Sc. 580. *Heywood* v. *Collinge*, 9 Ad. & E. 274. See *Keighly* v. *Bell*, 4 F. & F. 763.
(*k*) *The Evangelismos*, 12 Moo. P. C. 352. *The Strathnaver*, 1 App. Cas. 58.
(*l*) *Johnstone* v. *Sutton*, 1 T. R. 548. *Sutton* v. *Johnstone*, 1 Bro. P. C. 76. *Floyd* v. *Barker*, 12 Rep. 23. *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806.
(*m*) *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806. *Dawkins* v. *Lord Paulet*, L. R., 5 Q. B. 94; 39 L. J., Q. B. 53.
(*n*) *Freer* v. *Marshall*, 4 F. & F. 485.

the act is alleged to have been done maliciously and without any reasonable and probable cause (*o*).

Infringement of rights—Continuing injuries.—An injury may be of a continuing nature, that is to say, it may be such that the damage arising therefrom is continuing, as where a building has been wrongfully erected on the plaintiff's land, where the damage continues as long as the building remains; or the injury may be one in which the damages, when they accrue, accrue once for all, as in the case of an assault. A continuing obstruction to a watercourse and flow of water is a continuing injury (*p*).

Infringement of rights—Money obtained by force.—If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, not the money of the wrong-doer, but of the injured person, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession (*q*). Thus, money may be recovered back which has been paid under the following circumstances: where a man, having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is strictly entitled to claim, or, having no lien at all upon them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods or securities, is obliged to satisfy the extortionate demand (*r*); where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignor in order to procure them to carry the goods, or the consignee, in order to get possession of the goods, pays the extortionate demand (*s*); where a married man, pretend-

33 ing to be single, marries a lady, and, under colour of such pretended marriage, gets possession of her estates and receives the rents (*t*); where a man claims and receives rents or money under a false or pretended authority (*u*); or under the coercion of threatened legal proceedings (*x*); or wrongfully usurps the office of another, and receives the fees annexed thereto (*y*); where a steward of a manor demands and receives an extravagant charge, as the condi-

(*o*) *Barnes* v. *Keppel*, 2 Wils. 314.

(*p*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305. See *post*, p. 56.

(*q*) *Neate* v. *Harding*, 6 Exch. 349; 20 L. J., Ex. 250. *Chowne* v. *Baylis*, 31 Beav. 351; 31 L. J., Ch. 757.

(*r*) *Astley* v. *Reynolds*, 2 Str. 915. *Shaw* v. *Woodcock*, 9 D. & R. 889, 892.

(*s*) *Ashmole* v. *Wainwright*, 2 Q. B. 837. *Kent* v. *Great Western Rail. Co.*, 3 C. B. 715. *Parker* v. *Bristol & Exeter Rail. Co.*, 6 Exch. 702; 30 L. J., Ex. 442. *Baxendale* v. *Great Western Rail. Co.*, 16 C. B., N. S. 137; 32 L. J., C. P. 225; 33 *Ib.* 197. *Tanvaco* v. *Simpson*, 19 C. B., N. S. 453; 34 L. J., C. P. 268. *Great Western Rail. Co.* v. *Sutton*, L. R., 4 H. L. 226; 38 L. J., Ex. 177.

(*t*) *Hasser* v. *Wallis*, Salk. 28.

(*u*) *Robson* v. *Eaton*, 1 T. R. 62. *Dupen* v. *Keeling*, 4 C. & P. 102.

(*x*) *Unwin* v. *Leaper*, 1 M. & G. 752.

(*y*) *Howard* v. *Wood*, 2 Lev. 245; 2 Jones, 127. *Arris* v. *Stukeley*, 2 Mod. 263. *Hall* v. *Swansea*, 5 Q. B. 548. *Bowter* v. *Dodsworth*, 6 T. R. 681.

tion of his producing deeds and court rolls in his custody, which the party paying the money could not do without, and which the steward ought to have produced on tender of a reasonable compensation (*z*); where a broker in possession of goods under a distress demands and receives unauthorized charges (*a*); where a distrainor demands and obtains an excessive sum to release an impounded animal (*b*); where a sheriff exacts a larger fee than the law allows for executing the Queen's writ (*c*), or obtains money under the pressure of an illegal arrest (*d*), or under a threat to sell goods seized under a *fi. fa.* which he has no right to sell (*e*); where a justice of the peace exacts a fee from a publican as the condition of granting him a licence (*f*); where a toll-collector exacts an illegal or unauthorized toll (*g*); where an overseer of the poor levies money by seizing and selling goods upon a magistrate's conviction which is afterwards quashed (*h*); where a revenue officer unlawfully seizes goods as forfeited, and unlawfully detains them, and takes money which he has no right to take as the condition of their release (*i*); where a nurse, upon the death of a person she attended, carried away his money (*k*); or where a creditor has received money as the condition of his signing a bankrupt's certificate (*l*), or as the price of the bankrupt's discharge from an arrest, having at the time notice of the bankruptcy (*m*). Such an action also lies against all persons who extort money for doing what they are by law bound to do without payment or reward (*n*), or who receive, and have in their possession, and wrongfully detain, the money of

34 another; "for," as it has been observed, "no man will venture to take, if he knows that he is liable to refund" (*o*).

Statutory exemption from liability.—An action will not lie on behalf of a person who has sustained injury from the execution of powers and authorities given by an Act of Parliament, those powers being exercised with judgment and caution (*p*). "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far

(*z*) *Spry* v. *Pigott*, cited 2 Esp. 723.
(*a*) *Hills* v. *Street*, 2 Moo. & P. 103.
(*b*) *Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J., Q. B. 435.
(*c*) *Dew* v. *Parsons*, 2 B. & Ald. 562.
(*d*) *Payne* v. *Chapman*, 4 Ad. & E. 364. *Baron de Mesnil* v. *Dakin*, L. R., 3 Q. B. 18; 37 L. J., Q. B. 42.
(*e*) *Valpy* v. *Manley*, 1 C. B. 602.
(*f*) *Morgan* v. *Palmer*, 2 B. & C. 729; 4 D. & R. 283.
(*g*) *Lewis* v. *Hammond*, 2 B. & A. 206. *Waterhouse* v. *Keen*, 4 B. & C. 200; 6 D. & R. 257.
(*h*) *Feltham* v. *Terry*, Bull. N. P. 131 a, cited 1 T. R. 387; 1 Cowp. 419.
(*i*) *Irving* v. *Wilson*, 4 T. R. 485. *Atlee* v. *Backhouse*, 3 M. & W. 645.
(*k*) *Thomas* v. *Whip*, Bull. N. P. 130 a.
(*l*) *Smith* v. *Bromley*, 2 Doug. 697, note. *Sievers* v. *Boswell*, 3 M. & G. 524; 4 Sc. N. R. 173.
(*m*) *Follett* v. *Hoppe*, 5 C. B. 226; 17 L. J., C. P. 76.
(*n*) *Parker* v. *Great Western Rail. Co.*, 7 M. & G. 253; 7 Sc. N. R. 835, 874.
(*o*) *Jones* v. *Barkley*, 2 Doug. 690.
(*p*) Ld. Truro, *L. & N. W. Rail. Co.* v. *Bradley*, 3 Mac. & G. 341; 6 Rail. Cas. 551. *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. App. 246. *Boulton* v. *Crowther*, 2 B. & C. 706. *Cracknell* v. *Mayor of Thetford*, L. R., 4 C. P. 629; 38 L. J., C. P. 353.

as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act" (*q*). If no compensation is given, that affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done without injury to others (*r*). But if the statutory powers are exceeded, or are not strictly pursued (*s*), or the things authorized to be done are carelessly or negligently done, an action is maintainable for damages. "Powers given by statute," observes Watson, B., "are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause damage to others" (*t*). And, if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is negligence within this rule not to make such reasonable exercise of their powers (*u*).

Where a canal company was authorized by a statute to intersect highways with their canal, carrying the highway over the canal by means of bridges, it was held that they were bound to erect proper and suitable bridges, sufficient for all the requirements of an increasing traffic, and were bound to put up proper lights, fences, and guards for the protection of the public; and that, if they erected a swing-bridge, they must use all due and proper precautions for the protection of the public while the bridge was open. And, if such a bridge is left open by boatmen using the canal, and a passenger traversing the highway falls into

35 the canal and is injured, the canal company will be responsible for the injury in an action for negligence (*x*). Where a municipal corporation was authorized by statute to lay down gas-pipes, and an action was brought against them for an injury to the plaintiff's eye, by reason of the negligence of a servant of the corporation, who had been employed by them to chip a gas-pipe, and the corporation pleaded that the injury was done in the execution of their Local Improvement Act, and without any neglect or mismanagement of the defendants otherwise than by their workman, and that the workman employed by them was

(*q*) *Duncan* v. *Findlater*, 6 Cl. & F. 908.

(*r*) *Hammersmith Rail. Co.* v. *Brand*, L. R., 4 H. L. C. 171. *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; 50 L. J., Q. B. 353. As to statutory compensation, see *post*, ch. 13.

(*s*) *Brownlow* v. *Metropolitan Board*, 16 C. B., N. S. 546; 33 L. J., C. P. 233. *Reg.* v. *Darlington Local Board*, 5 B. & S. 515; 6 *Ib.* 562; 33 L. J., Q. B. 305; 35 *Ib.* 45.

(*t*) *Manley* v. *St. Helen's Canal & Rail. Co.*, 2 H. & N. 840; 27 L. J., Ex. 164.

(*u*) *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430.

(*x*) *Manley* v. *St. Helen's Canal & Rail. Co.*, 2 H. & N. 840; 27 L. J., Ex. 164.

well skilled and qualified, it was held that the plea was no answer to the action (*y*). Where an Act of Parliament imposed upon a waterworks company the duty of repairing, renewing, and keeping certain fire-plugs in proper order, it was held that it was no answer to an action for damages resulting from a breach of this duty, to show that the fire-plugs were the property of another public body which was required to pay the costs and charges of keeping them in repair (*z*).

If persons authorized by statute temporarily to close a public highway have by mistake stopped up the wrong thoroughfare, or if they have continued an obstruction in a public thoroughfare beyond the time authorized by statute, or have obstructed it in an unreasonable manner, and an adjoining householder or shopkeeper sustains a particular injury beyond what is sustained by the public at large, for instance, if he loses his customers, or his trade is injured by the unauthorized obstruction, there is a remedy by action for damages (*a*).

Where a railway company were authorized to make an embankment for carrying their railway across a valley, through which the waste waters from the adjoining land flowed away, and the embankment was made without proper openings and culverts for the passage of the waste water, by reason whereof the flood water was penned back after heavy rains, and forced upon the plaintiff's land, and injured his crops, it was held that the plaintiff was entitled to an action for damages. "It is contended by the defendants," observes Patteson, J., "that they have constructed their railway according to the provisions of their Act of Parliament, and that they are not liable for any consequences which may follow to the damage of the plaintiff; and the question is, whether the company

36 are protected by their Act? Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained; and we think that the want of such caution is sufficient to sustain the action" (*b*). And this is so, even though the injury might not have happened but for the fault of others in not keeping an outfall for the water of the dimensions which they, and not the defendants, were bound to keep it (*c*). Where a trading company was incorporated by statute

(*y*) *Scott* v. *Mayor, &c. of Manchester*, 2 H. & N. 204; 26 L. J., Ex. 406.

(*z*) *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J., Ex. 7.

(*a*) *Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281; 2 Sc. 462, 463. See as to this case, *Ricket* v. *Metropolitan Rail. Co.*, L. R., 2 H. L. 188; 36 L. J., Q. B. 205. *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J., Ch. 321.

(*b*) *Lawrence* v. *Great Northern Rail. Co.*, 16 Q. B. 653, 654; 20 L. J., Q. B. 293. *Broadbent* v. *Imperial Gas Co.*, 26 L. J., Ch. 281. *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 369. *Sutton* v. *Clarke*, 6 Taunt. 29. *Grocers' Co.* v. *Donne*, 3 Bing. N. C. 34; 3 Sc. 357. *Brine* v. *Great Western Rail. Co.*, 2 B. & S. 402; 31 L. J., Q. B. 101.

(*c*) *Harrison* v. *Great Northern Rail. Co.*, 3 H. & C. 231; 33 L. J., Ex. 266.

for the purpose of manufacturing gas, and was authorized to make gas to light the streets of a town, it was held that the statute did not authorize the company to make gas so as to create a nuisance, and therefore that they were liable, notwithstanding the statute, to an action for damages for making gas so as to create a nuisance (*d*).

Statutory exemptions—Nuisances from railways.—Where the legislature authorized a railway company to lay down a railway alongside a public highway, it was held that the legislature must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highroad, and that such persons must submit to the inconvenience necessarily resulting from the working of the railway (*e*). And, where a railway company was authorized to lay down a railway across a public thoroughfare, and have gates across the highroad to prevent persons from passing along the road at the time when it would be dangerous by reason of trains being near at hand, it was held that a person, who had been delayed and impeded in his journey along the highroad by reason of the necessary closing of the gates, had no right of action against the railway company for the injury he had sustained. Neither has the owner of an estate any right of action against a railway company for laying down a railway across a turnpike road close to the entrance of his estate under the powers of an Act of Parliament, by means whereof he is impeded and hindered in going from and returning to his house, and his horses are frightened and become ungovernable from the noise of the trains (*f*). And where a railway company were by their Act authorized to carry cattle, and to provide places for keeping them, and they used land adjoining one of their stations as a cattle yard, and the noise was a nuisance which, but for the Act, would have been actionable, it was held that the adjoining owners were not entitled, in the absence of

37 negligence, to an injunction (*g*). But these cases only decide that where the statute expressly contemplates the creation of a nuisance no action will lie. And it does not follow that, because a railway company is authorized to carry its railway across or alongside a public carriage road, it is thereby authorized to conduct its traffic so as to create a nuisance. If the engine-driver unnecessarily puts on the whistle, or unnecessarily lets off steam, or discharges mud or water when crossing or running alongside a public carriage-road, and by so doing frightens horses lawfully traversing the

(*d*) *Broadbent* v. *Imperial Gas Light Co.*, 26 L. J., Ch. 280.

(*e*) *R.* v. *Pease*, 4 B. & Ad. 42. This is the rule in this country. For a full discussion of this topic and the doctrine held by our courts, see Wood on Nuisances, Chap. XXIII.

(*f*) *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. App. 229.

(*g*) *L. B. & S. C. Rail. Co.* v. *Truman*, 11 App. Cas. 45; 55 L. J., Ch. 354.

highway, and causes them to upset a carriage, the railway company will be responsible for the damage done (*h*). So, if the property of the plaintiff adjoining a railway has been set on fire and destroyed by a spark from a locomotive engine and furnace, which the railway company is authorized by statute to use on their railway, the railway company is *primâ facie* responsible for the damage done; for the Acts of Parliament authorizing railway companies to run locomotive steam furnaces through the country, do not authorize them to scatter sparks or lighted coals upon the adjoining land, to the injury of the proprietors thereof, if by due care their engines can be prevented from so doing (*i*). And in the case of traction engines on highways, under the Locomotive Acts, the owners are not relieved in any way from their common law liability (*k*).

Statutory exemptions—Nuisances from canals.—It has been held that, if a canal company has been authorized by statute to make and use a canal, and the canal is made in the usual manner, and water leaks out and comes upon the plaintiff's premises, without any negligence or breach of duty on the part of the canal company, the company will not be responsible in damages for the injury (*l*); but every canal company is bound to maintain and keep its canal in good order, and manage it so that it may not become a source of injury to the adjoining landowners; and, if the water can be prevented from escaping from the canal, it is the duty of the company to adopt the necessary measures for the purpose (*m*). Where a canal company were empowered to take the water of a certain brook, which was then pure, but subsequently became polluted by drains, &c., and the company by using and penning back the water of the

38 brook in the canal after it had become so polluted created a nuisance, it was held that they were responsible (*n*).

(*h*) *Manchester South Junction Rail. Co.* v. *Fullarton*, 14 C. B., N. S. 54.

(*i*) *Fremantle* v. *L. & N. W. Rail. Co.*, 10 C. B., N. S. 89; 31 L. J., C. P. 12. *Dimmock* v. *North Staffordshire Rail. Co.*, 4 F. & F. 1058. *Vaughan* v. *Taff Vale Rail. Co.*, 5 H. & N. 685. *L. B. & S. C. Rail. Co.* v. *Truman*, *supra*.

(*k*) *Powell* v. *Fall*, 5 Q. B. D. 597.

(*l*) *Whitehouse* v. *Birmingham Canal Co.*, 27 L. J., Ex. 25.

(*m*) *Lawrence* v. *Great Northern Rail. Co.*, 16 Q. B. 653; 20 L. J., Q. B. 293. *Bagnall* v. *L. & N. W. Rail. Co.*, 1 H. & C. 544; 31 L. J., Ex. 480. *Barber* v. *Nottingham & Grantham Rail. Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193.

(*n*) *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631; 34 L. J., Q. B. 191. *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430.

SECTION II.

THE DAMAGE.

Wrong without damage.—There may be a wrong done to another, but, if it has not caused what the law terms actual legal damage to the plaintiff, there is no tort in respect of which an action is maintainable. Thus, in cases of slander by word of mouth, where the words do not convey any imputation of an indictable offence, there is no cause of action in respect of them, unless the injured party has sustained some pecuniary loss, or has been deprived of some gainful occupation and employment, or has been injured in his trade, occupation, or profession, or means of livelihood, or has lost a marriage by reason of the slander (*o*). An imputation, for example, by words, however gross, and on an occasion however public, on the chastity of a modest matron or a pure virgin is not actionable, without proof that it has actually produced special, temporal damage to her (*p*); neither is it actionable to call a man a swindler or a cheat, a blackguard, or a rogue, or to say that he is a low fellow, a disgrace to the town, and unfit for decent society, unless it can be proved that actual legal damage has resulted to the plaintiff from the slander (*q*). To be actionable, damage must be the necessary, probable, or intended result of some unlawful act, or of some act, lawful *per se*, but done negligently or maliciously.

Legal damage.—It is not necessary to show that actual pecuniary damage has been sustained in order to establish that conjunction of damage and wrong which is necessary to create a tort; for a party may be legally damnified, although he has sustained no pecuniary loss. "The damage," observes Lord Holt, "is not merely pecuniary; for, if a man gets a cuff on the ear from

39 another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage." So, a man shall have an action against another for riding over his

(*o*) *Post*, p. 170.

(*p*) Ld. Wensleydale, *Lynch* v. *Knight*, 9 H. L. C. 577. *Wilby* v. *Elston*, 8 C. B. 142. The loss of the hospitality of friends is, however, sufficient special damage to maintain an action. *Davies* v. *Solomon*, L. R., 7 Q. B. 112; 41 L. J., Q. B. 10. Whether the loss of the *consortium* of the husband is sufficient is doubtful. *Ib.* But a mere risk of temporal loss is not sufficient special damage to support an action for slander. *Chamberlain* v. *Boyd*, 11 Q. B. D. 407; 52 L. J., Q. B. 277.

(*q*) *Post*, p. 170.

ground, though it do him no pecuniary injury; for it is an invasion of his property, and the other had no right to come there (*r*); and, if the trespasser wilfully perseveres in trespassing after being warned off, exemplary damages will be recovered (*s*).

Every unauthorized interference by one man with the goods and chattels and personal property of another constitutes a tort, and gives rise to a cause of action, although no pecuniary damage may be sustained (*t*). If a man, without having any legal authority to excuse or justify the act, writes any remarks or observations upon a cabdriver's licence, or upon another man's certificate of character or good conduct, he is guilty of a tort, and is responsible in damages, although no pecuniary loss has been incurred (*u*).

Every injury to a right which would be evidence in future in favour of a wrongdoer imports a damage, though it does not cost the party one farthing (*x*); for, wherever the plaintiff establishes some legal right or title in himself which has been invaded, weakened, or destroyed by the unlawful act of the defendant, there is a wrong and damage in law resulting therefrom, in respect of which an action is maintainable, though no actual pecuniary loss can be proved (*y*). "Whenever," observes Parke, B., "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" (*z*).

Where a man is entitled to have a stream of water flowing through his land, he may maintain an action for the diversion of the water, though he has not used, and does not want to use, the water (*a*). So, where a tenant makes material alterations in property demised to him, by opening new doors, putting up new buildings, taking down partitions, or changing the form and appearance of a house without the consent of the landlord, he is responsible in damages for infringing upon the proprietary rights of the latter, although the premises may be improved and rendered more valuable by the alterations (*b*).

(*r*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 955. *Sears* v. *Lyons*, 2 Stark. 318. *Post*, p. 360.

(*s*) *Merest* v. *Harvey*, 5 Taunt. 441.

(*t*) *Post*, p. 509. The rule is that, where a right is invaded, even though there is no actual damage, or even though a positive benefit therefrom, yet damages are recoverable to protect the right. *Francis* v. *Schoelkopf*, 53 N. Y. 152; *Cory* v. *Silcox*, 6 Ind. 39; *Paul* v. *Slason*, 22 Vt. 231; *Webb* v. *Portland Manufacturing Co.*, 3 Sum. (U. S.) 139.

(*u*) *Rogers* v. *Macnamara*, 14 C. B. 37; 23 L. J., C. P. 1.

(*x*) *Bonomi* v. *Backhouse*, El. Bl. & El. 657; 28 L. J., Q. B. 378. Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 954.

(*y*) *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J., Ex. 212. *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Sc. 526. *Rochdale Canal Co.* v. *King*, 14 Q. B. 135. *Cooper* v. *Crabtree*, 20 Ch. D. 589; 51 L. J., Ch. 189. *Webb* v. *Portland Manufacturing Co.*, 3 Sum. (U. S.) 197. *Post*, p. 388.

(*z*) *Nicklin* v. *Williams*, 10 Exch. 227. But see this case commented upon in *Darley Main Coll. Co.* v. *Mitchell*, 11 App. Cas. 127.

(*a*) *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J., Ex. 212. *Post*, p. 274.

(*b*) *Cole* v. *Green*, 1 Lev. 309.

40 So, where an inventor or manufacturer adopts a particular trade-mark, and the defendant imitates it and uses it for the purpose of palming off his own goods as the goods of the plaintiff, the plaintiff is entitled to nominal damages at all events, as his right has been invaded, although no specific damage is proved (*c*). And there is nothing to prevent the jury from giving more than nominal damages (*d*).

Remoteness of damage.—The rule of our law is that the immediate cause, the *causa proxima*, of the damage, and not the remote cause, is to be looked at; for, as Lord Bacon says: "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree" (*e*). The general rule of law is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act. If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined, or "concatenated as cause and effect to support an action" (*f*), unless it is shown that the wrong-doer knew, or had reasonable means of knowing, that consequences not usually resulting from his act were, by reason of some existing cause, likely to intervene so as to cause damage to another (*g*). 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 it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrong-doer liable to an action. "I entertain," observes Pollock, C.B., "considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to

(*c*) *Blofield* v. *Payne*, 4 B. & Ad. 410. *Braham* v. *Beachim*, 7 Ch. D. 848; 47 L. J., Ch. 348.

(*d*) *Rodgers* v. *Nowill*, 5 C. B. 125. *Post*, p. 575. The rules stated in this section are generally accepted by our courts.

(*e*) Bac. Max. Reg. 1.

(*f*) Ld. Campbell, *Gerhard* v. *Bates*, 2 El. & Bl. 490. *Francis* v. *Schoelkopf*, 53 N. Y. 152.

(*g*) *Sharp* v. *Powell*, L. R., 7 C. P. 253; 41 L. J., C. P. 95.

41 consider the rule of law to be this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur" (*h*).

A person who has, without malice or intention, but through negligence, inflicted a wrong upon the property of another, will in general not be liable for any consequential damage which the plaintiff might have averted by the exercise of ordinary skill and courage. Thus, if after a collision the vessel injured is abandoned, when by the exercise of ordinary skill and courage she might have been saved, the owner of the vessel which did the damage will not be responsible for the total loss, but only for the probable cost of restoring the injured vessel to the condition in which she was previous to the collision (*i*).

If the natural result of a wrongful act committed by a defendant has been to plunge the plaintiff into a law suit, and thereby to cause him to incur costs and expenses, whatever may be the event of the suit, there is that conjunction of wrong and damage which will give the plaintiff a good cause of action (*k*). If a seaman, or a passenger on board ship, engages in acts of smuggling, and thereby causes the vessel to be condemned and forfeited, the shipowner is entitled to recover the value of the vessel from the wrong-doer who has caused the loss; and it is no answer to the action to show that the plaintiff's servants on board participated in the illegal transaction (*l*). So, where by the negligence of the servants of a railway company, the plaintiff's cattle, as they were crossing the line on the level, were frightened and scattered, so that the plaintiff's drovers lost control over them, and some of them ran into danger and were killed before they could be got back under control, it was held that their death was a natural consequence of the negligence which caused the drovers to lose control over them (*m*). And where the defendant's vessel, owing to the negligence of his servants, struck on a sand-bank, and becoming from that cause unmanageable, was driven by the wind and tide upon a sea-wall of the plaintiff, which it damaged, it was held that the defendant was liable for the damage so caused (*n*). So, too, where a brig, by the negligence of those on board her, came into collision and damaged a bark, and, the wind increasing in violence, the bark was driven ashore the following day, and some of her crew

(*h*) *Greenland* v. *Chaplin*, 5 Exch. 248. *Bank of Ireland* v. *Trustees of Evans's Charities*, 5 H. L. C. 411.

(*i*) *The Thuringia*, 41 L. J., Adm. 44. And see *ante*, p. 23, as to contributory negligence.

(*k*) *Dixon* v. *Fawcus*, 3 El. & El. 537; 30 L. J., Q. B. 137.

(*l*) *Blewitt* v. *Hill*, 13 East, 14.

(*m*) *Sneesby* v. *Lancs. & Yorks. Rail. Co.*, L. R., 9 Q. B. 263; 1 Q. B. D. 42; 43 L. J., Q. B. 69.

(*n*) *Bailiffs of Romney Marsh* v. *Trinity House*, L. R., 5 Ex. 204; 7 Ex. 247; 41 L. J., Ex. 106.

42 were drowned, it was held the loss of life was occasioned by the collision (*o*). So, if, by the misconduct of A., B. is placed in such a position as to oblige him either to remain in a position of danger or to incur danger in attempting to escape from that position, and B. adopts the latter alternative, and is injured in endeavouring to escape, A. will be liable (*p*); but, if B. is only suffering some inconvenience, and to avoid that he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of A.'s misconduct (*q*).

There is, as might not unnaturally be expected, considerable difficulty in applying the foregoing principles, where the act complained of would not have occas' ed any injury but for the intermediate act of some third p In *Scott* v. *Shepherd* (*r*), the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which, in self-defence, took it up and threw it across the market-house. It then fell upon another standing, the owner of which, in self-defence, took it up and threw it to another part of the market-house; and in its course it struck the plaintiff, exploded, and put out his eye. The defendant was held liable, although, without the intervention of a third person, the squib would not have injured the plaintiff. "All the injury," observes De Grey, C. J., "was done by the first act of the defendant. That and all the intervening acts of throwing must be considered as one single act. It is the same as if a cracker had been flung which had bounded and rebounded again and again before it had struck out the plaintiff's eye" (*s*). In *Dixon* v. *Bell* (*t*), the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was, to remove the priming, which the latter, as he thought, did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off and injured the child. The defendant was held liable. "As by this want of care," said Lord Ellenborough, that is, by leaving the gun without drawing the charge or seeing that the priming had been properly removed, "the instrument

(*o*) *The George and Richard*, L. R., 3 A. & E. 466.

(*p*) *Jones* v. *Boyce*, 1 Stark. 493. *Clayards* v. *Dethick*, 12 Q. B. 439.

(*q*) *Adams* v. *Lancs. & Yorks. Rail. Co.*, L. R., 4 C. P. 739; 38 L. J., C. P. 277. See remarks of Lord Bramwell, Smith on Negligence, Appendix B.

(*r*) 3 Wils. 403; 2 W. Bl. 892.

(*s*) So, in an American case, where the defendant, having had a quarrel with a boy in the street, took up a pickaxe, and pursued the boy, and the boy ran for safety into a wine-shop, and upset a cask of wine, it was held that the defendant, the pursuer of the boy, was responsible in damages for the loss of the wine. *Vanderburgh* v. *Truax*, 4 Denio, U. S. R. 464.

(*t*) 5 M. & S. 198.

43 was left in a state capable of doing mischief, the law will hold the defendant responsible." In *Illidge* v. *Goodwin* (*u*), the defendant's cart and horse were left standing in the street without anyone to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But Tindal, C. J., ruled that, even if this were believed, it would not avail as a defence. "If," he says, "a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." In *Lynch* v. *Nurdin* (*x*), Lord Denman observes, "if I am guilty of negligence in leaving anything dangerous, where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a play-ground where school-boys were at play, and one of the boys in play letting it off and wounding another. "I think it will not be doubted," says Lord Denman, "that the gamekeeper must answer in damages to the wounded party." In *Daniels* v. *Potter* (*y*), the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendant's men were lowering casks into it, as the plaintiff contended, without proper care having been taken to secure it. The flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up as a defence that its fall had been caused by some children playing with it. But the only question left to the jury by Tindal, C. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence. In *Abbot* v. *Macfie* (*z*), the defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright, with its lower face, on which there were cross-bars, towards the street, had gone away. A child five years old got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child, the plaintiff, so as to injure both of them. It was held that the plaintiff

(*u*) 5 C. & P. 192.
(*x*) 1 Q. B. 29.
(*y*) 4 C. & P. 262.
(*z*) 2 H. & C. 744; 33 L. J., Ex. 177.

44 could recover, provided he had not been playing with the other child so as to be a joint actor with him. In *Hill* v. *The New River Company* (*a*), the defendant created a nuisance in a public highway by allowing a stream of water to spout up, open and unfenced, in the road. The plaintiff's horses passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting, which had been made by contractors, who were constructing a sewer, and which had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell and injured themselves and the carriage. It was contended that the remedy, if any, was against the contractors; but it was held that the plaintiff was entitled to recover against the company. In *Collins* v. *The Middle Level Commissioners* (*b*), the defendants were bound under an Act of Parliament 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 off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective 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 proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evil to themselves, re-opened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendants sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the substantial cause of the mischief. "The defendants," says M. Smith, J., "cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case." "The primary and substantial cause of the injury," says Brett, J., "was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequences of their wrongful act, by what some one else did." In *Harrison* v. *The Great Northern Rail. Co.* (*c*), the defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain

(*a*) 9 B. & S. 303.
(*b*) L. R., 4 C. P. 279; 38 L. J., C. P. 236.
(*c*) 3 H. & C. 231; 33 L. J., Ex. 266.

45 commissioners, appointed under an Act of Parliament, were bound to maintain the navigation of the river Witham, with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition; but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back, owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless the defendants were held liable. In *Clark* v. *Chambers* (*d*), the defendant was in the occupation of certain premises abutting on a private road, consisting of a carriage and footway, which premises he used for the purpose of athletic sports, and had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises, and overlooking the sports. In the middle of this barrier was a gap, which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that the defendant had no legal right to erect this barrier. Some person, without the defendant's authority, removed a part of the barrier armed with spikes from the carriage-way, where the defendant had placed it, and put it in an upright position across the footpath. The plaintiff, on a dark night, was lawfully passing along the road, when his eye came in contact with one of the spikes, and was injured. It was held that the defendant, having unlawfully placed a dangerous instrument in the road, was liable (*e*).

On the other hand, in *Sharp* v. *Powell* (*f*), the defendant had, contrary to the provisions of the Police Act (*g*), washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating, through which water flowing down the gutter passed into the sewer, had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence, and was injured. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the

(*d*) 3 Q. B. D. 327; 47 L. J., Q. B. 427.

(*e*) See particularly the judgment of Cockburn, C. J., in this case, from which the above and the following paragraphs are taken.

(*f*) L. R., 7 C. P. 253; 41 L. J., C. P. 95.

(*g*) 2 & 3 Vict. c. 47, s. 54.

46 grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act, he was not responsible for what had happened. So, where the manager of a theatre brought an action against the defendant for a libel on an opera-singer, who had been engaged by him to sing at his theatre, and who had been deterred from singing by reason of the publication of the libel, whereby the plaintiff lost the benefit of her services, it was held that the damage was too remote, and was not recoverable by the plaintiff; for the opera-singer was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill-treat her (*h*).

If the wrong would not have been followed by the damage if other circumstances had not intervened, for which circumstances the defendant is not responsible, the damage is not the proximate result of the wrong, and is not sufficiently "concatenated" therewith (*i*). Thus, in actions for slander, where a defendant is proved to have uttered slanderous words in respect of the plaintiff, not imputing to him any indictable offence, and creating a cause of action only in case the utterance of the slander has caused actual legal damage to the plaintiff, and no such damage has accrued to the plaintiff directly from the utterance of the words, and they would have failed to produce any injurious consequences to the plaintiff if they had not been repeated by another person, the injury resulting from the intervention of that other person cannot be visited upon the defendant (*k*).

(*h*) *Ashley* v. *Harrison*, 1 Esp. 49. *Haddon* v. *Lott*, 15 C. B. 411; 24 L. J., C. P. 49.

(*i*) *Hoey* v. *Felton*, 11 C. B., N. S. 146; 31 L. J., C. P. 105.

(*k*) *Post*, p. 179.

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CHAPTER II.

THE JUSTIFICATION OF TORTS.

SECTION I.

DEFENCE OF PERSON OR PROPERTY OR REPUTATION.

An assault committed in self-defence is justifiable (*a*) if the assault by the plaintiff is commensurate with that of the defendant; but it is not every trifling assault which will excuse the defendant (*b*). And to justify an assault the provocation must have been immediate (*c*).

So, also, an assault in defence of house or property is sometimes justifiable (*d*), and a man may justify turning another out of his house if he will not go peaceably (*e*). And if another comes forcibly to take my goods I may resist him (*f*). But no more force must be used than is necessary to overcome resistance (*g*).

So, also, an assault may be justified if made in defence of relations or friends (*h*).

An assault may also be justified if it is made with a view to the preservation of the peace (*i*). And the breaking and entering a dwelling-house may be justified without warrant to arrest a felon, or prevent a murder, under certain circumstances (*k*).

In the same way a trespass to land may be justified as having been done in self-defence, in order to escape from some pressing

(*a*) *Dale* v. *Wood*, 7 Moore, 33. *Oaks* v. *Wood*, 3 M. & W. 150.

(*b*) *Dean* v. *Taylor*, 11 Exch. 68.

(*c*) *Reg.* v. *Driscoll*, Car. & M. 214. *Cockcroft* v. *Smith*, 11 Mod. 43; 2 Salk. 641.

(*d*) *Jackson* v. *Courtenay*, 8 El. & Bl. 8; 27 L. J., Q. B. 37. *Roberts* v. *Taylor*, 1 C. B. 117; 14 L. J., C. P. 87.

(*e*) *Weaver* v. *Bush*, 8 T. R. 78. *Polkinghorn* v. *Wright*, 8 Q. B. 197; 15 L. J., Q. B. 70.

(*f*) *Green* v. *Goddard*, 2 Salk. 640. *Roberts* v. *Taylor*, *supra*.

(*g*) *Gregory* v. *Hill*, 8 T. R. 299. *Oaks* v. *Wood*, *supra*. The setting of spring guns to shoot trespassers does not seem to be justifiable. See *Bird* v. *Holbrook*, 4 Bing. 628. *Ilott* v. *Wilkes*, 3 B. & Ald. 304.

(*h*) *Leward* v. *Basely*, 1 Ld. Raym. 62; 1 Salk. 407; 3 Salk. 46.

(*i*) *Noden* v. *Johnson*, 16 Q. B. 218. *Timothy* v. *Simpson*, 6 C. & P. 499.

(*k*) *Smith* v. *Shirley*, 3 C. B. 142. *Handcock* v. *Baker*, 2 B. & P. 260.

48 danger, or to recover, or in defence of the possession of, a man's goods and chattels (*l*), or to rescue cattle, sheep, or domestic animals (*m*), or in order to abate a nuisance (*n*).

An assault may also be justified by a parent or master, when it is committed for the benefit of the child, scholar, or apprentice (*o*), or by a master of a ship when the sailor is mutinous or disorderly (*p*). So, also, a churchwarden may turn a person out of a church who is misbehaving himself (*q*). But an innkeeper cannot justify an assault by detaining a person for a debt (*r*).

A tenant may justify removing tenant's fixtures, or trade fixtures from his landlord's premises, doing as little damage as possible (*s*).

A private individual may abate a nuisance on a highway if it interferes with the enjoyment of his right to pass and repass upon the road (*t*), or an obstruction of a navigable river (*u*). And where a highway is obstructed, persons are justified in deviating upon the land of him who caused the obstruction, if it is necessary for them to do so (*x*).

So a man had at Common Law a right to enter upon land with force and arms if he had a right to the possession of it, and he cannot, it seems, be treated as a trespasser in any case (*y*), though he may be indictable under statute for a forcible entry (*z*).

So, also, a trespasser upon land may be removed from the land (*a*).

Animals trespassing, or, as it is called *damage feasant*, may be distrained by the person upon whose land they are trespassing, if taken at the time of the trespass (*b*); and other things *damage feasant* may be distrained, such as dogs, pigeons, snares and nets, &c. (*c*).

A man may, as we shall see, justify inflicting an injury upon the reputation of another, whether by word or by writing, by

(*l*) 2 Roll. Abr. 565. *R.* v. *Pagham Commissioners*, 8 B. & C. 360; see *Whalley* v. *Lane. & York. Rail. Co.*, *post*, p. 369.

(*m*) *Goodwin* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298.

(*n*) See *post*, p. 396.

(*o*) *Winterburn* v. *Brooks*, 2 C. & K. 16. *Penn* v. *Ward*, 2 C. M. & R. 338. *Fitzgerald* v. *Northcote*, 4 F. & F. 656.

(*p*) *Lamb* v. *Burnett*, 1 Cr. & J. 295. *Noden* v. *Johnson*, 16 Q. B. 218.

(*q*) *Burton* v. *Henson*, 10 M. & W. 105. *Worth* v. *Terrington*, 13 M. & W. 781.

(*r*) *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*s*) See *post*, ch. 8, sect. 3, p. 526.

(*t*) *Bateman* v. *Bluck*, 18 Q. B. 876; 21 L. J., Q. B. 406. *Dimes* v. *Petley*, 15 Q. B. 283. *Davies* v. *Mann*, 10 M. & W. 546.

(*u*) *Eastern Counties Rail. Co.* v. *Dorling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202, *post*, p. 498.

(*x*) *Duncomb's case*, Cro. Car. 366. *Absor* v. *French*, 2 Show. 28. *Steel* v. *Prickett*, 2 Stark. 463; except in the case of a limited dedication, see *Arnold* v. *Holbrook*, L. R., 8 Q. B. 96; 42 L. J., Q. B. 40.

(*y*) *Davison* v. *Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196. *Pollen* v. *Brewer*, 7 C. B., N. S. 373.

(*z*) *Newton* v. *Harland*, 1 M. & Gr. 644.

(*a*) *Browne* v. *Dawson*, 12 Ad. & E. 629.

(*b*) *Wormer* v. *Biggs*, 2 C. & K. 31.

(*c*) Bac. Abr., Distress F. In some cases the shooting of a dog in pursuit of game may be justified, see *post*, pp. 498, 508.

49 showing that the words were spoken or written upon a privileged occasion (*d*), or upon matters of public interest (*e*), without malice, or that the words were true (*f*).

So, also, the taking of another before magistrates and prosecuting him for an offence against the law may be justified by showing that there was reasonable and probable cause for such prosecution (*g*), and even if he fails in showing that, yet he may justify the prosecution if the jury think he acted *bonâ fide*, and without malice.

SECTION II.

LEGAL AUTHORITY.

Arrests and imprisonments may be made justifiably under various statutes, or by reason of some legal authority where offences against the law have been committed, or where there is reasonable and probable cause to suspect that a felony has been committed (*h*), and recruits and deserters who are soldiers may be detained (*i*). So lunatics may be imprisoned (*k*), and bail may arrest their principal for the purpose of surrendering him into the custody of the law (*l*).

An entry upon land by an execution creditor under a *fi. fa.* or *ca. sa.* may be justified (*m*). And an entry may be justified under a warrant of justices under the Small Tenements Act, or in case of deserted premises (*n*).

An entry upon land in pursuance of a warrant of a county court under 19 & 20 Vict. c. 108, s. 5, is not justifiable, unless the party has a lawful right to the possession (*o*).

The demolition of houses may be justified under local Acts of Parliament, and so, also, many acts, which would at law be torts, may be justified under the provisions of particular statutes (*oo*).

So, also, a trespass may be justified under a custom to commit the act complained of, as where booths are erected on a highway (*p*), or where a commoner removes an obstruction to his right

(*d*) *Post*, ch. 7, "Privileged Communications."
(*e*) *Post*, ch. 7.
(*f*) *Lord Northampton's case*, 12 Coke, 134. *Alexander* v. *North Eastern Rail. Co.*, 6 B. & S. 340.
(*g*) *Post*, ch. 7, "Malicious Prosecution—Reasonable and Probable Cause."
(*h*) See *post*, ch. 6, "False Imprisonment."
(*i*) *Wolton* v. *Gavin*, 16 Q. B. 48.
(*k*) See *post*, p. 162.
(*l*) *Ex parte Lyne*, 3 Stark. 132. *Horn* v. *Swinford*, D. & Ry. N. P. C. 20.
(*m*) *Andrews* v. *Marris*, 1 Q. B. 3. *Collett* v. *Foster*, 26 L. J., Ex. 412.
(*n*) *Melling* v. *Leak*, 16 C. B. 652. *Edwards* v. *Hodges*, 15 C. B. 477.
(*o*) See *Hodson* v. *Walker*, L. R., 7 Ex. 55; 41 L. J., Ex. 51.
(*oo*) See *post*, p. 382.
(*p*) *Tyson* v. *Smith*, 9 Ad. & E. 406.

50 of common (*q*). And where a person having a limited right exercises it in excess to the injury of another, that other may justify the stopping even the limited user of the right until such user has been reduced to its proper limits (*qq*). So, also, a trespass by fishing may be justified under a prescriptive right of fishing (*r*).

There are many cases in which justices and other public officers are justified in acts which injuriously and wrongfully affect others, but which they have done *bonâ fide* under the belief that they are acting within their powers and in accordance with justice (*s*).

SECTION III.

LEAVE AND LICENCE.

The defendant in an action may justify what would otherwise be a trespass to land by proving that he had the leave and licence of the plaintiff. This may be shown either by express permission or by circumstances (*t*). So, also, the defendant may justify an assault upon the person of the plaintiff by proving that the act was done with the plaintiff's consent (*u*).

SECTION IV.

INEVITABLE ACCIDENT.

An injury inflicted by the defendant upon the plaintiff may be justified upon the ground of inevitable accident. A person is liable for an injury done, though it be done accidentally, as we have seen (*x*), and even in doing an act lawful in itself where it infringes a paramount right (*y*). But where the accident is caused by what is called *vis major*, or the "act of God," the defendant is not liable. Instances of this are to be found in cases of unusual

(*q*) *Arlett* v. *Ellis*, 7 B. & C. 346.
(*qq*) *Post*, p. 397.
(*r*) *Mannall* v. *Fisher*, 5 C. B., N. S. 856. *Richardson* v. *Orford*, 2 H. Bl. 182. *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135. *Corporation of Saltash* v. *Goodman*, 7 Q. B. D. 106.
(*s*) See *post*, ch. 11, "Duties of Public Officers."
(*t*) *Kavanagh* v. *Gudge*, 7 M. & G. 316. *Ditcham* v. *Bond*, 3 Camp. 524. And see these cases, *post*, p. 384.
(*u*) *Christopherson* v. *Bare*, 11 Q. B. 477. *Latter* v. *Braddell*, 50 L. J., Q. B. 166, 448. This was formerly proved under the general plea of not guilty, and not by special plea of justification.
(*x*) *Ante*, p. 17.
(*y*) *Weaver* v. *Ward*, Hob. 134.

51 floods, snow storms, &c. (*z*). The express language, however, of a statute may impose a liability upon persons for even an inevitable accident, provided the language is very clear to that effect (*a*). A shipowner is not liable for a collision arising from inevitable accident (*b*), nor generally for collisions where a compulsory pilot is on board (*c*).

SECTION V.

ACT OF PLAINTIFF HIMSELF.

Where the tort complained of turns out to be really the act of the plaintiff himself he cannot of course recover. This point arises in questions of negligence, where the plaintiff alleges that he has been injured by the negligence of the defendant, to which the defendant replies that the plaintiff has been guilty of "contributory negligence," which is as much as to say that his act was the cause of the injury (*d*).

(*z*) *Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J., Ex. 174. *Nugent* v. *Smith*, 1 C. P. D. 423.

(*a*) *River Wear Commissioners* v. *Adamson*, 2 App. Cas. 743; 47 L. J., Q. B. 193.

(*b*) *The Marpesia*, L. R., 4 P. C. 212. *Doward* v. *Lindsay*, L. R., 5 P. C. 338.

(*c*) *Post*, ch. 10, "Compulsory Pilotage."

(*d*) See Horace Smith on Negligence, 2nd ed., pp. 226 *et seq.*

CHAPTER III.

THE DISCHARGE OF TORTS.

Discharge by the act of parties—Waiver of torts.—If a man has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act, and treat him as a wrong-doer, and sue him, or he may affirm his act, and treat him as his agent, and claim the benefit of the transaction (*a*). Thus, if one man takes and wrongfully pledges (*b*), or sells, the goods of another, and receives the price, the latter may maintain an action to recover the money so received (*c*). But, if he has once affirmed the acts of the wrong-doer and treated him as an agent, he cannot afterwards treat him as a wrong-doer; nor can he affirm his acts in part, and avoid them as to the rest. If, therefore, goods have been sold, or minerals or the produce of the soil have been wrongfully severed and carried away and converted into money, by a wrong-doer, the owner may sue for the sum for which they were sold (*d*); but, if he thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong (*e*).

Discharge by the act of parties—Accord and satisfaction.—Whenever the plaintiff has consented to receive, and has actually received, satisfaction and recompense for the injury he has sustained, the cause of action is discharged, although the satisfaction and recompense were not one hundredth part of the value of his loss; for, by his own accord and agreement, the injury is dispensed with; and in all actions in which nothing but amends are to be recovered in damages, there a concord carried into execution is a good plea (*f*). But the satisfaction must have been given and accepted in respect of the identical cause of

(*a*) *Powell* v. *Rees*, 7 Ad. & E. 428. *Bailey* v. *Birtles*, T. Raym. 71. *Perkinson* v. *Gilford*, Cro. Car. 539. The doctrines laid down in this chapter are identical with those held by our courts.

(*b*) *Allanson* v. *Atkinson*, 1 M. & S. 583.

(*c*) *Lamnie* v. *Dorrell*, 2 Ld. Raym. 1216. *Edwards* v. *Scarsbrook*, 3 B. & S. 280; 32 L. J., Q. B. 45.

(*d*) *Rodgers* v. *Maw*, 15 M. & W. 448.

(*e*) *Smith* v. *Hodson*, 2 Sm. L. C. 6th ed. 119. *Brewer* v. *Sparrow*, 7 B. & C. 310. *Lythgoe* v. *Vernon*, 5 H. & N. 180; 29 L. J., Ex. 164. *Smith* v. *Baker*, L. R., 8 C. P. 350; 42 L. J., C. P. 155.

(*f*) *Andrew* v. *Boughey*, Dyer, 75 b.

53 action complained of; for, where a plaintiff who had received some internal injury in a railway collision, but was not aware of it, accepted a small sum of money as compensation for damage done to his clothes and hat, and then brought an action for the injury to the person, it was held that such cause of action was untouched by the accord and satisfaction in respect of the injury to the clothes (*g*). And in cases where the person injured has been induced by the false representations of the medical officers of the railway company to accept a small and almost nominal sum in full of all demands, and to give a receipt for the same, there is no accord and satisfaction (*h*). A receipt for money expressed to have been received in full satisfaction and discharge of a cause of action, as, for instance, of injuries received in a railway collision, is not conclusive proof of an accord and satisfaction. The receipt is not an estoppel; and the question still remains whether the mind of the plaintiff went with the terms of the receipt, that is, was he aware of their import and effect at the time he signed the receipt (*i*).

Either money or chattels, railway bonds or negotiable securities or an estate or interest in land, or a mere agreement only, may be given, granted, or surrendered, and accepted, by way of compensation and amends for the damages that may have been sustained. If goods of the defendant are in the hands of the plaintiff, and it is agreed between the plaintiff and defendant that the plaintiff shall retain these goods as his own property, in satisfaction and discharge of the cause of action, and the goods are accordingly retained and accepted by the plaintiff in satisfaction, this is a valid accord executed (*k*). But the delivery and acceptance of a man's own goods and chattels constitute no satisfaction. Thus, in an action of trespass against a defendant in respect of an entry by him upon the plaintiff's land, the defendant said that after the entry there was an accord between them that the plaintiff should re-enter into the same land, and should enjoy it without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title deeds concerning the said land, that the plaintiff had re-entered, and that the defendant had delivered t[illegible]e deeds; and it was held that this was no answer, for it must be intended that the title-deeds were the plaintiff's own title [illegible]s, and then to deliver him his own deeds, and put him in possession of his own land, was no satisfaction of the wrong done before in keeping him out; but it was admitted that,

(*g*) *Roberts* v. *Eastern Counties Rail. Co.*, 1 F. & F. 460.
(*h*) *Stewart* v. *Great Western Rail. Co.*, 2 De G. J. & S. 319.
(*i*) *Lee* v. *Lancashire and Yorkshire Rail. Co.*, L. R., 6 Ch. 527. *Rideal* v. *Great Western Rail. Co.*, 1 F. & F. 706.
(*k*) *Jones* v. *Sawkins*, 5 C. B. 142.

54 if the defendant had shown any title in himself to the possession of the deeds, then his delivering them up would have been a good bar to the action (*l*).

The meaning of an accord and satisfaction is, that there has been an agreement for something to be done in satisfaction and discharge of the cause of action, and that the agreement has been completely performed, so that there is a total extinguishment of the original cause of action (*m*). Where the defendant had slandered the plaintiff, and after the utterance of the slander the plaintiff and defendant met, and it was agreed that certain letters and documents in the handwriting of the plaintiff, in the possession of the defendant, containing certain proofs against the plaintiff of the truth of the charges made by the defendant, should be burnt, and that no action should be brought, and the letters were burnt, but the plaintiff, nevertheless, brought an action, it was held that the accord executed was a bar to the action (*n*).

Discharge by the operation of law—Judgment recovered (*o*).—Whenever judgment has been recovered in an action of tort, the judgment is a bar to any subsequent action for the same wrong; "for you shall not bring the same cause of action twice to a final determination; *nemo debet bis vexari pro eâdem causâ:* and what is the same cause of action is, where the same evidence will support both actions" (*p*). But by allowing judgment to go by default in an action to which there is a good defence, the defendant is not precluded from setting up such defence in any subsequent action in which the matter may arise between the same parties (*q*). In an action for slander you cannot have an action twice over against the same person for the utterance of the same words on the same occasion; but every fresh utterance and publication of the slander create a fresh cause of action, so that you may have two actions for words spoken at different times, conveying distinct imputations upon the plaintiff; and judgment recovered in the first action would be no bar to the second action. The recovery of damages from a servant for leaving the service of his master, has been held to be a bar to a second action against another person for seducing the servant away from his master's service, because the damage for the loss of service was compensated for in the first action (*r*). And accepting a sum of

(*l*) Bro. Abr. ACCORD, 1.
(*m*) *Gabriel* v. *Dresser*, 15 C. B. 622.
(*n*) *Lane* v. *Applegate*, 1 Stark. 97. As to an agreement for the making and acceptance of a public apology, *Boosey* v. *Wood*, 3 H. & C. 484; 34 L. J., C. P. 65.
(*o*) As to the effect of a foreign judgment *in rem*, see *Castrique* v. *Imrie*, L. R., 4 H. L. 414; 39 L. J., C. P. 350.
(*p*) *Kitchen* v. *Campbell*, 3 Wils. 304; W. Bl. 827.
(*q*) *Howlett* v. *Tarte*, 10 C. B., N. S. 818; 31 L. J., C. P. 150.
(*r*) *Bird* v. *Randall*, 3 Burr. 1345.

55 money awarded by a magistrate was held a bar to an action against the owners of an omnibus for negligence (*s*).

Whenever the cause of action in the two suits is identical, the recovery of judgment in the one is a bar to the other (*t*). A judgment, therefore, in a county court, is a bar to an action on the same subject-matter in any other court (*u*). But where damage to goods and injury to the person was caused by the same wrongful act, recovery in the county court in an action for compensation for damage to the goods was held no bar to an action subsequently commenced in the High Court for injury to the person (*x*). A judgment obtained upon some technical collateral point, not touching the substantial cause of action between the parties, is no bar to a subsequent action. "Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the second action to show that they are not the same" (*y*). The plaintiff who brings a second action, ought not to leave it to nice investigation to see whether the two causes of action are the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first. Whenever the same point was not in issue in the prior action, the judgment in such prior action can have no effect upon the second action (*z*); but, when the pleading and the state of the record are such that the plaintiff might, if he had thought fit, have recovered his whole demand in the first action, he cannot afterwards be allowed to recover it in a second action.

A plea of the recovery of judgment and damages in an action for a false imprisonment upon a charge of felony, is no answer to an action for a malicious prosecution for the same felony. "It is altogether," observes Parke, B., "a different cause of action. The taking a man upon a charge of felony is distinct from the act of going before a grand jury and falsely and maliciously taking an oath to get a bill found against him for the same felony, and then going before a petty jury and trying to induce them to find him guilty" (*a*).

Where the second action is founded upon some special damage

(*s*) *Wright* v. *General Omnibus Co.*, 2 Q. B. D. 271; 46 L. J., Q. B. 429.

(*t*) *Slade's case*, 4 Co. 94 b. *Phillips* v. *Berryman*, 3 Doug. 288. If the record, when produced, shows on the face of it that the cause of action in the second suit is not the same as that for which judgment was recovered in the former action, the record at once disproves the plea, and the plaintiff will be entitled to a verdict. *Wadsworth* v. *Bentley*, 23 L. J., Q. B. 3; 1 B. C. C. 203.

(*u*) *Austin* v. *Mills*, 9 Exch. 288; 23 L. J., Ex. 42.

(*x*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141.

(*y*) *Bagot* (*Lord*) v. *Williams*, 3 B. & C. 239.

(*z*) *Carter* v. *James*, 13 M. & W. 137. *Howlett* v. *Tarte*, 10 C. B., N. S. 813; 31 L. J., C. P. 146.

(*a*) *Guest* v. *Warren*, 9 Exch. 379; 23 L. J., Ex. 121.

56 flowing from the original wrong, the judgment recovered in an action for such original wrong will be a bar to such second action, unless the special damage is shown to constitute a new cause of action. Thus, where the plaintiff in his declaration alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action of assault and battery for that and recovered damages, and that since the recovery of such damages, by reason of the same battery, a piece of the plaintiff's skull had come out, and the defendant pleaded in bar the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery (*b*).

Discharge by operation of law—Continuing injuries.—But, where the injury is of a continuing nature, the bringing of an action and the recovery of damages for the perpetration of the original wrong do not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and the plaintiff has brought an action and recovered damages for the trespass, he is not thereby precluded from bringing a fresh action and recovering fresh damages for the continuance of the erection. If the defendant, for example, has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible from day to day until they are removed. Thus, where the trustees of a turnpike road built buttresses on the land of the plaintiff to support the road, and the plaintiff thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass, it was held that, after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar (*c*).

So, where an action was brought against the defendant for obstructing an ancient window of the plaintiff's house, by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, and a former judgment recovered by the plaintiff against the defendant for the same grievance was pleaded in bar, and the plaintiff replied that the grievances were not the same, and issue was joined thereupon, and it appeared that on a former trial,

(*b*) *Fetter* v. *Beale*, 1 Salk. 11; 1 Ld. Raym. 339, 92.

(*c*) *Holmes* v. *Wilson*, 10 Ad. & E. 503.

57 between the same parties, of an action for an injury to the plaintiff's reversion in the same premises by erecting and keeping up the roof, the plaintiff recovered damages, it was held that such recovery was no bar to the second action; for, if the erection of the roof in the first instance was an injury to the reversion, the continuance of it subsequently to the first action was a fresh injury to the reversioner, in respect of which a fresh action was maintainable (*d*).

If a man has dug a pit, or made a trench in another's land, and an action has been brought and damages have been recovered for the injury, such recovery of damages is a complete satisfaction for the wrong done in cutting into the plaintiff's land, and no other action is maintainable (*e*); but, where a man digs a trench or deepens a ditch in his own land, which has the effect of injuriously diverting water from his neighbour's stream, or of diminishing the supply of water to a neighbour's mill, then there is a continuing injury so long as the trench remains open, and the ditch deepened, and the diverted water is allowed to run through it to the injury of the neighbouring proprietor. Where damages had been recovered for injury to houses by a subsidence of land through coal workings, and after fourteen years there was another subsidence, it was held that this was a new cause of action, and that the Statute of Limitations did not apply (*f*).

Discharge by operation of law—Double remedy.—Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of the remedies may, if he does not get thereby fully satisfied, resort to the other (*g*).

Under the Metropolis Local Management Act (25 & 26 Vict. c. 102) ss. 77 and 96, which make certain paving expenses recoverable by the vestry against the present or future owner of the premises, or from any tenant who subsequently occupies them, an unsatisfied judgment against a former owner is no bar to an action against the occupying tenant of a succeeding owner (*h*).

Discharge by operation of law—Discharge by death.—It was a maxim of the common law that a personal action did not survive on the death, either of the person who did, or of the person who sustained, the wrong—*actio personalis moritur cum personâ;* and, although this maxim has been modified in many instances by statute, yet, in the absence of statutory provision to the contrary, it still prevails, unless the estate is affected by the tort (*i*).

(*d*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97.

(*e*) *Clegg* v. *Dearden*, 12 Q. B. 591.

(*f*) *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, L. J.

(*g*) *The Orient*, L. R., 3 P. C. 696; 40 L. J., P. C. 29. *Nelson* v. *Couch*, 15 C. B., N. S. 99; 33 L. J., C. P. 46.

(*h*) *Bermondsey Vestry* v. *Ramsay*, L. R., 6 C. P. 247; 40 L. J., C. P. 206.

(*i*) *Twycross* v. *Grant*, 4 C. P. D. 40; 48 L. J., C. P. 1. *Ashley* v. *Taylor*, 10 Ch. D. 768; 48 L. J., Ch. 406.

58 *Discharge by operation of law—Death of the person injured.*—In consequence of this maxim executors and administrators cannot maintain an action for an assault upon or false imprisonment of their deceased testator or intestate, or for a libel upon him, or for any act of negligence or violence not ending in death. So, formerly, when damage done to real property accrued wholly in the lifetime of the testator, the heir-at-law, devisee, or remainderman, could not sue in respect of it; neither could the personal representative, in consequence of the old maxim of the common law, *actio personalis moritur cum personâ*. Thus, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit, or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him (*k*). But by the 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, it is enacted that an action of trespass or case may be maintained by the executors or administrators of any person deceased for any injury to the real estate or such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person.

On the death of an owner of goods and chattels in the hands of bailees and depositaries, the right of property in the chattels vests in the personal representatives; and, if the bailee has no lien upon them, or interest in them, or right to detain them as against the owner, the personal representatives may demand possession of them; and, if the bailee refuses to deliver them, he may be sued for the detention or conversion of the property (*l*). Being themselves the owners of the property on the death of the testator or intestate, they are the proper persons to sue in respect of trespasses committed by persons who take the goods out of their actual or constructive possession, or out of the custody of their servants or agents (*m*); but they could not, at common law, sue in respect of any detention or conversion of the property in the lifetime of the deceased owner, nor for a trespass in taking it away, by reason of the maxim *actio personalis moritur cum per-*

(*k*) *Adam* v. *Bristol*, 2 Ad. & E. 389. *Raymond* v. *Fitch*, 2 C. M. & R. 597.
(*l*) *Hollis* v. *Smith*, 10 East, 292.
(*m*) *Adams* v. *Chevered*, Cro. Jac. 113.

59 *sond.* To remedy this it was enacted by the 4 Ed. 3, c. 7, that executors shall have actions for a trespass done to their testators in respect of the goods and chattels of the said testators carried away in their lifetime, and recover their damages in like manner as they whose executors they be should have had if they were in life. By the 25 Ed. 3, c. 5, the benefit of this statute is extended to the executors of executors; and administrators are within the equity of the statute. It has been held that an action is maintainable by executors under this statute against a defendant for cutting down and carrying away a growing crop of wheat from the testator's land in his lifetime, because corn growing is a chattel (*n*). It has also been held that, under these statutes (which, being remedial in their nature, have been construed very liberally), an action will lie at the suit of an executor against a sheriff for a false return in the lifetime of the testator (*o*), and also for an escape (*p*), on the ground that by these wrongs the value of the testator's personal estate is diminished. So, where an action had been brought to recover from the promoters of a public company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them omitted (in breach of sect. 38 of the Companies Act, 1867) to disclose certain contracts which had been specified therein, and, after judgment and pending an appeal to the House of Lords, the plaintiff died, it was held that the plaintiff's interest in the action survived and was capable of transmission to his personal representatives (*q*). But an executor cannot sue in respect of damage to his testator's estate, such as loss of wages sustained, and medical expenses incurred by the testator in consequence of personal injuries arising from a pure tort (*r*).

Where an action for tort had been referred to an arbitrator with the usual agreement that he should deliver his award to the personal representatives of either party dying before the making of the award, and one of them died, it was held that the agreement simply referred to the mode of procedure, and that the clause was inoperative in the case of an action of tort (*s*).

Discharge by death—Continuing injuries.—All causes of action in respect of injuries of a continuing nature to real property descend with the property to the heir-at-law on the death of the ancestor, or vest in the devisee, remainderman, or personal repre-

(*n*) *Emerson* v. *Emerson*, 1 Vent. 187.
(*o*) *Williams* v. *Cary*, 4 Mod. 403; 12 Mod. 71.
(*p*) *Berwick* v. *Andrews*, 2 Ld. Raym. 971, 973.
(*q*) *Twycross* v. *Grant*, *ante*, p. 57.
(*r*) *Pulling* v. *Great Eastern Rail. Co.*, 9 Q. B. D. 110; 51 L. J., Q. B. 543.
(*s*) *Bowker* v. *Evans*, 15 Q. B. D. 565; 54 L. J., Q. B. 421.

60 sentative, in whom the legal estate in the land may be vested by deed, will, or administration (*t*).

The heir-at-law is the proper person to maintain an action for the entire damage resulting from a nuisance of a continuing nature to land which comes into his possession by descent. Thus, where one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs-at-law, and the heir of John, on request made to him by the heir of Richard, did not reform the wrong, whereupon the latter brought an action against the heir of John, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not on request reform the nuisance which his father had made, but suffered it to continue, to the prejudice and damage of the plaintiff, son and heir of him to whom the wrong was done (*u*). So, where a nuisance erected on the land of a devisor in the lifetime of such devisor was continued afterwards in the time of the devisee, it was held that the devisee should have an action for it, for the continuance of it is a new erecting of such nuisance (*x*).

When the reversionary interest of a deceased leaseholder, who has underlet the premises demised to him, becomes vested in his personal representatives, they are, of course, the proper persons to sue for damages in respect of permanent injuries to the property of a continuing nature, which diminish the value of their reversionary estate.

Discharge by operation of law—Death of the tort-feasor.—An action did not in general lie at common law against executors to recover damages for waste committed by their testator, it being a tort which died with the person (*y*). They were not responsible in damages for injuries done by their testator in cutting down another man's trees, or for trespasses committed by him in entering in his lifetime upon another man's land, and prostrating fences, or digging therein, where the wrong-doer acquired no gain to himself from the commission of the wrong; but, wherever by the wrong done property was acquired which benefited the testator, there an action for the value of the property survived against the executor. So far as the tort itself went, the executor was not liable; but, so far as the act of the offender was beneficial to his personal estate,

(*t*) *Vivian* v. *Champion*, 2 Ld. Raym. 1126.

(*u*) 2 Hen. 413. 31 Ed. 3, Voucher, 272, cited in *Penruddock's case*, 5 Co. 205. *Gillon* v. *Boddington*, cited 5 B. & C. 268.

(*x*) *Some* v. *Barwish*, Cro. Jac. 231.

(*y*) 2 Inst. 301.

61 his assets were answerable, and his executor was charged. Where, therefore, trees, coals, or minerals wrongfully severed by one man from the soil and freehold of another, have been sold by the wrong-doer, and the latter dies, his estate, in the hands of his executor, is answerable for the price; and an action for money had and received may be maintained against the executor for the recovery thereof (*z*).

Personal representatives were not at common law responsible for a conversion or unlawful detention by their testator or intestate in his lifetime of another man's chattels, the private wrong being, as we have seen, buried with the offender. But, where there had been a conversion of property by the deceased, which had benefited his personal estate, the personal representative might, in general, have been sued (*a*). If a man takes a horse from another, and brings him back again, an action for the trespass will not lie against his executor; but an action for the use and hire of the horse by the deceased may be maintained (*b*). Where the plaintiff declared that he was possessed of a cow which he delivered to the testator to keep for him, and that the testator sold the cow, and converted and disposed of the money to his own use, it was held that the executor was not responsible in trover for the conversion of the beast by the testator, but that he might be made liable for the value of it in an action for money had and received (*c*).

No action lies against an executor of a deceased sheriff, gaoler, or officer, for an escape suffered or permitted by his testator, or by reason of his testator's having neglected to attend and give evidence in a cause in obedience to a subpœna served upon him in his lifetime (*d*); nor are executors liable for the negligence of their testator (*e*); or for his fraud, if his estate has derived no benefit therefrom (*f*).

By the 3 & 4 Wm. 4, c. 42, s. 2, reciting that there was no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal, it is enacted that an action of trespass or case may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such

(*z*) *Powell* v. *Rees*, 7 Ad. & E. 428.

(*a*) *Ashley* v. *Taylor*, 10 Ch. D. 768. See, however, *Phillips* v. *Homfray*, 24 Ch. D. 439; 52 L. J., Ch. 833; 11 App. Cas. 466, where Cotton and Bowen, L.JJ., held that a personal representative could not be sued unless property belonging to another person had been appropriated by the deceased.

(*b*) *Hambly* v. *Trott*, Cowp. 375.

(*c*) *Bailey* v. *Birtles*, Sir T. Raym. 71. *Perkinson* v. *Gilford*, Cro. Car. 539.

(*d*) Williams on Executors, 8th ed., pt. 4, bk. 2.

(*e*) *Overend & Co.* v. *Gurney*, L. R., 4 Ch. 701; 39 L. J., Ch. 45.

(*f*) *Peek* v. *Gurney*, L. R., 6 H. L. 377; 43 L. J., Ch. 19.

62 injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damage to be recovered in such actions shall be payable in like order of administration as the simple contract debts of such person. Where a watch was shown to have been in the possession of a testatrix more than six months before her decease, and she was asked within the six months to give it up, and wrongfully refused, this was held to be evidence of a conversion within six months of her death (*g*).

Permissive waste by a tenant for life is within the statute (*h*). Where the plaintiff brought his action for damages and injunction against T., who died more than six months after the commission of the acts complained of and the commencement of the action, it was held that the action could not be continued against his executors (*i*).

Discharge by operation of law—Discharge by marriage—Marriage of a woman who has been injured.—Formerly where a wrong was done to a single woman who afterwards married, the right to recover damages for the wrong was a *chose in action* which vested in the husband, subject to his reducing it into his possession during the coverture. But now by the Married Women's Property Act, 1882, sect. 1, sub-sect. 2 (*k*), a married woman is capable of suing or being sued either in contract or in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her or made a party to any action brought by or against her; and it has been held that this section applies to an action brought by a married woman for a tort committed before the Act came into operation (*l*).

And where an action for trespass was brought by a married woman against a person who with the authority of her husband entered a house of which she was in sole occupation, and which she had bought with her own earnings, since the Married Women's Property Act, 1870 (*m*), it was held that she could sue alone (*n*).

The effect of the section has been to release a woman who is the subject of a wrong from coverture, in the sense which incapacitated her from suing; and so where a married woman brought an action for assault and false imprisonment committed before 1883, it was held that the four years fixed by the Statute of Limitations (*o*) for

(*g*) *Richmond* v. *Nicholson*, 8 Sc. 137.
(*h*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J., Q. B. 609.
(*i*) *Kirk* v. *Todd*, 21 Ch. D. 484; 52 L. J., Ch. 224.
(*k*) 45 & 46 Vict. c. 75.
(*l*) *Weldon* v. *Winslow*, 13 Q. B. D. 784; 53 L. J., Q. B. 528.
(*m*) 33 & 34 Vict. c. 93.
(*n*) *Weldon* v. *De Bathe*, 14 Q. B. D. 339; 54 L. J., Q. B. 113.
(*o*) 21 Jac. 1, c. 16.

63 bringing such an action, began to run from January 1st, 1883, when the Act came into operation (*p*).

Discharge by operation of law—Marriage of a female wrong-doer.—At common law the husband took the wife with all her obligations and liabilities, and became answerable for all torts committed by her when single; but by the 37 & 38 Vict. c. 50, it was enacted (*q*) that the husband shall, in any action brought for damages sustained by reason of any tort committed by the wife before marriage, be liable for the damages to the extent only of the following assets:—(1) The value of the personal estate in possession of the wife, which shall have vested in the husband; (2) The value of the *choses* in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession; (3) The value of the chattels real of the wife which shall be vested in the husband and wife; (4) The value of the rents and profits of the real estate of the wife which the husband shall have received or with reasonable diligence might have received; (5) The value of the husband's estate or interest, real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or any other person; (6) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors. But it was provided that, when the husband after marriage paid any debt of his wife or had a judgment *bonâ fide* recovered against him in any such action as in the Act mentioned (*r*), then to the extent of such payment or judgment the husband should not in any subsequent action be liable.

By 45 & 46 Vict. c. 75, s. 14, a husband married since January 1st, 1883 (*s*), is liable for wrongs committed by his wife before marriage (*t*) to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to, from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any debts, contracts or wrongs, for or in respect of which his wife was liable before her marriage; but no further; and the court has power to direct an inquiry to ascertain the value, nature, and amount of such property.

(*p*) *Lowe* v. *Fox*, 15 Q. B. D. 667; 54 L. J., Q. B. 561.

(*q*) Sect. 2. This Act was repealed by the Married Women's Property Act, 1882.

(*r*) That is, any action for a debt of his wife contracted, or for a tort committed, or the breach of a contract made, by her before the marriage.

(*s*) See the proviso to the section.

(*t*) As to his liability for her torts committed after her marriage, see *post*, p. 122.

64 By sect. 13 of the same Act it is provided, that a married woman may be sued alone for wrongs committed by her before marriage, and any damages and costs recovered against her shall be payable out of her separate estate and not otherwise.

If, however, a husband and wife married since January 1st, 1883, are sued jointly and for a tort committed by the wife before marriage, and it is found that the husband is not liable in respect of any property acquired by him or to which he has become entitled through his wife, then the husband shall have his costs of defence whatever may be the result against the wife (*u*).

A husband and wife cannot, however, sue each other in tort except under special circumstances (*x*).

Discharge by operation of law—Discharge by bankruptcy—Bankruptcy of the person injured.—The property of bankrupts vests in the trustee, who, where any portion of the property of the bankrupt consists of things in action, may institute suits to recover them; and such things are for the purposes of the action to be deemed to be assignable at law, and to have been duly assigned to such trustee (*y*). The trustee, therefore, is the proper party to maintain an action for injuries done to real or personal property, which has become vested by reason of the bankruptcy (*z*); but he cannot maintain an action for injuries to the person or personal feelings of the bankrupt (*a*). He cannot sue, for example, for damages for a libel upon the bankrupt, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy; nor can he sue for damages for an assault upon the bankrupt, or for the seduction of his servant (*b*); and, if in these cases a consequential damage to the personal estate follows from the injury to the person, that damage may, nevertheless, be so dependent upon, and inseparable from, the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the trustee. But, where the primary and substantial cause of action is not, properly speaking, personal to the bankrupt, but the injury to the person is the consequence of an injury to the personal estate, the injury to the personal estate is the primary and substantial cause of action, and such right of action will pass to the trustees as part of the personal estate (*c*). Thus, damages for the wrongful dismissal of the bankrupt are recoverable by the trustee (*d*).

(*u*) Sect. 15.
(*x*) Sect. 12.
(*y*) 46 & 47 Vict. c. 52, s. 44.
(*z*) *Michell* v. *Hughes*, 6 Bing. 689.
(*a*) *Stanton* v. *Collier*, 23 L. J., Q. B. 116.
(*b*) *Howard* v. *Crowther*, 8 M. & W. 601. *Ex parte Vine*, 8 Ch. D. 364; 47 L. J., Bk. 116.
(*c*) *Drake* v. *Beekham*, 11 M. & W. 319; 2 H. L. C. 579. *Hodgson* v. *Sidney*, L. R., 1 Ex. 313; 35 L. J., Ex. 182.
(*d*) *Emden* v. *Carte*, 17 Ch. D. 169, 768; *Wadling* v. *Oliphant*, 1 Q. B. D. 145; 45 L. J., Q. B. 173.

65 Where a plaintiff who had become bankrupt complained that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises certain of his lodgers, being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held that, as the jury were entitled upon the declaration as it stood to give vindictive damages for the personal injury far beyond the mere value of the goods, a plea of the bankruptcy of the plaintiff, and of the transfer of the causes of action to the assignees, afforded no answer to the plaintiff's claim (*e*). "There is no doubt," observes Lord Campbell, "that a cause of action which is exclusively confined to injury to property will pass to the assignees; but there is a difficulty when there is a mixed case of injury to the person and injury to property. It may be that in such a case the law will give an action to the bankrupt for the personal injury sustained by him, and an action to the assignees for the injury done to the property" (*f*).

If the bankrupt, notwithstanding his bankruptcy, continues in the possession and occupation of land which has been demised to him, he may maintain an action for trespasses or injuries done to the land, if the trustee does not interpose and take the lease (*g*). But, if he goes away and abandons the possession of the premises, he has no right of action (*h*), unless he returns and resumes possession, with the assent of the trustee or the landlord, before any other person has entered and become the occupier of the property (*i*). If the trustee thinks fit to take to the lease, he is then the proper party to sue for any trespass or injury committed upon the demised premises (*k*).

Discharge by the operation of law—Transfer of the bankrupt's wife's choses in action.—When a right of action of the bankrupt's wife is of such a character that, if vested in the bankrupt alone, it would have passed to the trustee, such right of action passes to the trustee, subject to the condition that it is reduced into possession by him during the joint lives of the husband and wife; and that may be done in a joint action by the trustee and the wife (*l*). But

(*e*) *Brewer* v. *Drew*, 11 M. & W. 625.
(*f*) *Rogers* v. *Spence*, 12 Cl. & Fin. 720. But see per Bramwell, B., in *Hodgson* v. *Sidney*, *ante*, p. 64, and *Morgan* v. *Stable*, L. R., 7 Q. B. 611; 41 L. J., Q. B. 260.
(*g*) See 46 & 47 Vict. c. 52, s. 55, which provides that, if the trustees disclaim any lease or other onerous property, such disclaimer is to operate from the date of the disclaimer.
(*h*) *Clark* v. *Calvert*, 8 Taunt. 752.
(*i*) *Topham* v. *Dent*, 6 Bing. 515.
(*k*) *Hancock* v. *Caffyn*, 8 Bing. 367.
(*l*) *Richbell* v. *Alexander*, 10 C. B., N. S. 324; 30 L. J., C. P. 268.

66 a woman married after the 1st of January, 1883, will be entitled to hold all property as her separate property (*m*).

Where a husband verbally agreed that a sum of money at a bank, standing to the credit of his wife in her maiden name should be her separate property, and she received the interest on it for two years, it was held that the facts disclosed a gift by the husband to the wife after the marriage, that he had become a trustee for her, and that it did not pass to his trustee in liquidation, but remained her separate property (*n*).

Discharge by operation of law—Bankruptcy of the wrong-doer.—The Bankruptcy Act does not exempt a bankrupt from actions for damages in respect of wrongs done by him prior to, or during, the bankruptcy; for the damages do not constitute a debt, until the amount of them has been ascertained by a verdict and final judgment (*o*), or by a reference and award (*p*), or by agreement (*q*). The 37th section of the 46 & 47 Vict. c. 52, enacts that demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, or breach of trust shall not be proveable in bankruptcy.

Under the old law damages in an action of tort were not a proveable debt in bankruptcy until judgment had been signed. This is not altered by the 37th section; and, consequently, when judgment for such damages is signed after the adjudication, the amount cannot be proved in, and the liability to pay them is not discharged by, the bankruptcy (*r*).

Where a verdict was obtained for damages for detention of goods in default of a return, and before execution issued the defendant became bankrupt, it was held that the plaintiff was not a creditor for the amount of the damages, as until execution the property in the goods remained in him (*s*).

Discharge by operation of law—The Statutes of Limitation.—By the 21 Jac. 1, c. 16, s. 3, it is enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin, for taking away of goods and cattle, all actions upon the case, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time and limitation thereafter expressed, and not after; that is to say, the said actions upon the case other than for slander, and the said

(*m*) Married Women's Property Act, 1882, s. 2.

(*n*) *Ex parte Whitehead*, 14 Q. B. D. 419; 54 L. J., Q. B. 539. *Ex parte Siboth*, 14 Q. B. D. 417; 54 L. J., Q. B. 322.

(*o*) *Lloyd* v. *Peell*, 3 B. & Ald. 408. *Parker* v. *Crole*, 5 Bing. 63. *Parker* v. *Norton*, 6 T. R. 699. *Re Scarth*, L. R., 10 Ch. 234; 44 L. J., Bk. 29.

(*p*) *Ex parte Harding*, 5 D. M. & G. 368. *Ex parte Todd*, 6 D. M. & G. 744.

(*q*) *Ex parte Mumford*, 15 Ves. 289.

(*r*) *Ex parte Newman*, 3 Ch. D. 494. *Ex parte Muirhead*, 2 Ch. D. 22; 45 L. J., Bk. 65.

(*s*) *Re Scarth*, L. R., 10 Ch. 234; 44 L. J., Bk. 29.

67 actions for trespass, detinue, and replevin, for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within two years next after the words spoken, and not after. But (s. 4), if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint or writ, the plaintiff, his heirs, executors, &c., may commence a new action within a year after such judgment reversed, or given against the plaintiff, and not after. If the person entitled to any such action is at the time the action accrues within the age of twenty-one years, or *feme covert*, or *non compos mentis*, such person is at liberty to bring the same actions so as they are commenced within the time of limitation after the coming to, or being of, full age, discovert, or of sound mind (*t*). By the 19 & 20 Vict. c. 97, s. 10, absence beyond seas and imprisonment of the plaintiff at the time of the accrual of the cause of action are no longer to have the effect of extending the period of limitation. This section is retrospective (*u*). By the 4 & 5 Ann. c. 16, s. 19, it is enacted that if any person or persons against whom there shall be any cause of action of trespass, detinue, actions *sur* trover, or replevin for taking away goods or cattle, or of action upon the case, or assault, menace, battery, wounding and imprisonment, or any of them be or shall be at the time of any such action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this Act and by the 21 Jac. 1, c. 16. By the 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, are to be deemed to be beyond seas within the meaning of the 4 & 5 Ann. c. 16. The words "beyond the seas" are synonymous with "out of the realm, or territories," and are not to be construed literally (*x*).

(*t*) 21 Jac. 1, c. 16, s. 7. As to *feme covert*, see *ante*, p. 62.

(*u*) *Cornill* v. *Hudson*, 8 El. & Bl. 429; 27 L. J., Q. B. 8. *Pardo* v. *Bingham*, L. R., 4 Ch. 735; 39 L. J., Ch. 170.

(*x*) *Ruckmaloye* v. *Lullobhoy Mottichund*, 8 Moo. P. C. 4.

68 *Discharge by operation of law—Commencement of the period of limitation.*—The time of limitation begins to run from the accrual of the cause of action; and, when an act has been done which is actionable only in case it causes damage and injury to another, the time of limitation will run, not from the period of the doing of the act, but from the time of the accrual of the damage. Thus, where one person is possessed of the surface of land, and another is owner of the subsoil, and the owner of the subsoil excavates therein for minerals, without causing any immediate apparent injury to the surface, but damage ultimately ensues, and the surface subsides, the time of limitation will begin to run from the time when the damage manifested itself, and not from the period of the making of the excavation (*y*). If a man, by digging and constructing basins and canals on his own land, causes a stream of water to flow against his neighbour's wall, and gradually to undermine it, so that at last the wall falls, the period of limitation runs from the time of the falling of the wall, and not from the time of the construction of the basins and canals (*z*). And, if a man, by digging on his own land, wrongfully lays open the foundations of his neighbour's wall, and causes them to be gradually weakened by the effect of flowing water, rain, and frost, so that at last the wall falls, the time of limitation runs from the time of the falling of the wall, and not from the time of the excavation of the soil (*a*). Where slanderous words are uttered which create no cause of action unless they are followed by special damage, the period of limitation runs from the time that special damage accrues, and not from the time of the utterance of the words (*b*).

Whenever one person does anything or permits anything to be done on his own land which causes injury to his neighbour, and the injury is of a continuing nature, the cause of action, as we have seen (*bb*), continues, and is renewed, *de die in diem*, as long as the cause of the continuing damage is allowed to continue (*c*). Where an action is brought for a false imprisonment, every continuance of the imprisonment *de die in diem* is, in point of law, a new imprisonment, and, therefore, the time of limitation runs from the last day of such imprisonment, and not from the time of its commencement (*d*).

(*y*) *Bonomi* v. *Backhouse*, El. Bl. & El. 662; 28 L. J., Q. B. 378; 34 *ib.* 181. Ld. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 L. J., Q. B. 965. *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127. But *contra*, holding that the time of limitation commences from the time when the nuisance is created, see *Powers* v. *Council Bluffs*, 45 Iowa, 652. The doctrine of this case, however, to this extent, is believed to be unsound, and not expressive of the true rule.

(*z*) *Gillon* v. *Boddington*, Ry. & M. 161.

(*a*) *Roberts* v. *Read*, 16 East, 217.

(*b*) *Saunders* v. *Edwards*, 1 Sid. 95.

(*bb*) *Ante*, p. 56.

(*c*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305.

(*d*) *Hardy* v. *Ryle*, 9 B. & C. 608. *Massey* v. *Johnson*, 12 East, 68.

As a general rule, the period of limitation runs from the time of the commission of the wrongful act, and not from the time of

69 the knowledge of that act by the plaintiff, there being no proof of any fraud practised by the defendant in order to conceal that knowledge from the plaintiff (*e*). Thus, in actions for negligence, the cause of action accrues at the time of the occurrence of the act of negligence, and not from the period of its discovery by the plaintiff. But in actions of detinue, where the defendant has goods under his charge under an implied contract to re-deliver them on request, and has wrongfully dealt with them without the knowledge of the owner, the period of limitation runs, either from the date of such conversion, or, at the option of the owner, from the date of the defendant's breach of duty by refusing to deliver on request (*f*). Wherever there is fraud, the statute begins to run only from the time when the fraud was, or with reasonable diligence might have been, discovered (*g*).

Discharge by operation of law—Extension of the period of limitation in certain cases.—Formerly when the action abated by the death of the plaintiff, or was abated without default of the plaintiff by the act of God, and the period of limitation had run out before the commencement of a fresh action, the courts indulged the plaintiff with the liberty of suing out a new writ, so that he did it within a reasonable time. One mode of measuring the time was with reference to the time it would occupy in getting to the place where a new writ was to be obtained. Hence the writ got the name of a writ of journey's accounts. But there was no exact limit of time to govern the court in saying what was a reasonable time in getting the writ; and the question was, whether the action was, under the particular circumstances of the case, brought within a reasonable period after the expiration of the time of limitation (*h*). Now, however, an action is not abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survives or continues (*i*).

Discharge by operation of law—Limitation of actions in respect of things done under local and personal statutes.—By the 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action

(*e*) *Granger* v. *George*, 5 B. & C. 149; 7 D. & R. 730.

(*f*) *Wilkinson* v. *Verity*, L. R., 6 C. P. 206; 40 L. J., C. P. 141. *Reeve* v. *Palmer*, 5 C. B., N. S. 84, 91; 28 L. J., C. P. 168.

(*g*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J., Q. B. 313. This is not generally the rule in this country, although the doctrine is held in some of the states; *Fears* v. *Sykes*, 35 Miss. 633; *Simons* v. *Fox*, 12 Rich. (S. C.) L. 392; *Clarke* v. *Reeder*, 1 Speers (S. C.), 398. But in others the statute expressly provides therefor.

(*h*) *Curlewis* v. *Mornington*, 27 L. J., Q. B. 439.

(*i*) And in case of death between verdict and judgment there is no abatement. Order XVII. r. 1.

may be brought for anything done under the authority or in pursuance of any local and personal Acts (*k*), shall be two years, or, in case of continuing damage, then the action must be brought within one year after such damage shall have ceased; and so much

70 of any enactment as appoints any other period of limitation is repealed.

Limitation of actions against persons acting under the Municipal Corporations Act, 1882.—No action will lie against any person for any act done in pursuance or execution, or intended execution of this Act, or in respect of any alleged neglect or default in the execution of the Act, unless it is commenced within six months next after the act or thing is done or omitted, or in case of a continuance of injury or damage, within six months next after the ceasing thereof (*l*).

(*k*) *Cock* v. *Gent*, 12 M. & W. 234; 13 L. J., Ex. 24.

(*l*) 45 & 46 Vict. c. 50, s. 226.

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CHAPTER IV.

OF REMEDIES.

SECTION I.

ABATEMENT.

Some wrongs are capable of remedy by abatement. Thus, nuisances may in many cases be removed by the person injuriously affected by them, provided he exercises proper care and discretion in his mode of removal; and he may justify, as we have seen (*a*), a peaceable entry (*b*) upon his neighbour's land for that purpose (*c*); but he should give notice to the person creating the nuisance, and require him to abate it (*d*). So, also, encroachments, such as houses, gates, fences, &c., upon commons may be abated (*e*). And where a right or easement is exercised in an unreasonable manner, or in excess of the privilege, the right or easement may, if necessary, be entirely abated until the excess is done away (*f*), taking care to do as little damage as possible (*g*). In order to justify the abatement of a public nuisance by a private individual, he must show that he is specially injured by the nuisance, and that his own special right is interfered with (*h*).

(*a*) *Ante*, p. 48.
(*b*) *Beddall* v. *Maitland*, 17 Ch. D. 188.
(*c*) *Davies* v. *Williams*, 16 Q. B. 556. See Wood on Nuisances, 976.
(*d*) *Perry* v. *Fitzhowe*, 8 Q. B. 776. *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506.
(*e*) *Davies* v. *Williams*, 16 Q. B. 546. *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506. See *post*, ch. 8, sect. 2.
(*f*) *Cawkwell* v. *Russell*, 26 L. J., Ex. 34. *Greenslade* v. *Halliday*, 6 Bing. 379.
(*g*) *Roberts* v. *Rose*, L. R., 1 Ex. 82; 33 L. J., Ex. 35, 62.
(*h*) *Arnold* v. *Holbrook*, L. R., 8 Q. B. 100. *Roberts* v. *Rose*, 3 H. & C. 162; L. R., 1 Ex. 82; 33 L. J., Ex. 35. See Wood on Nuisances, 794—819.

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SECTION II.

DISTRESS.

Akin to the right of abatement of a nuisance is the right to seize, remove, and impound cattle *damage feasant* (*i*). But this right is restricted to such animals and chattels as are not in the actual possession and use, and under the actual personal control of some person. So, if a man rides over my corn I cannot take his horse, for that would lead to a breach of the peace (*k*), but a dog within whistle is not under actual personal control (*l*). It is said that domestic pigeons may be shot *damage feasant* (*m*). It was held in one case that a railway company had a common law right to distrain *damage feasant* engines and trucks encumbering their line (*n*).

SECTION III.

ACTION.

No wrong without a remedy.—"It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal" (*o*). The maxim of the law, "*ubi jus, ibi remedium*," has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case, where the novelty of the complaint is no objection to the action, provided an injury cognizable by law, is shown to have been inflicted on the plaintiff (*p*); for "this form of action was introduced for the reason that the law would never suffer a wrong and a damage without a remedy" (*q*); but there are cases where persons have suffered serious injury from the acts and doings of others of which the law, from reasons of public policy, takes no cognizance. An action, for example, cannot be maintained against a commanding officer in the army or navy for maliciously accusing, arresting, and bringing to a court-martial a subordinate officer,

(*i*) See *post*, ch. 8, sect. 2.
(*k*) 9 Vin. Abr. 121, Distress A., pl. 4. *Field* v. *Adames*, 12 Ad. & E. 649.
(*l*) *Bunch* v. *Kennington*, 1 Q. B. 680. As to fishing, see Bac. Abr., Distress F.
(*m*) *Dewell* v. *Sanders*, Cro. Jac. 490. *Hannam* v. *Mockett*, 2 B. & C. 939.
(*n*) *Ambergate Rail. Co.* v. *Midland Rail. Co.*, 2 El. & Bl. 793.
(*o*) Holt, C. J., *Ashby* v. *White*, 2 Ld. Raym. 953.
(*p*) See the note to *Ashby* v. *White*, 1 Smith's L. C. 213—223.
(*q*) Willes, C. J., *Winsmore* v. *Greenbank*, Willes, 577.

73 however great may have been the perversion of his authority, and however false and unfounded the charge (*r*). No action will lie against a witness for uttering false statements in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously, and without any reasonable or probable cause (*s*). These, however, are only apparent, and not real, exceptions to the maxim; for, although in these cases damage is inflicted, yet from reasons of public policy there is in law no *injuria* or wrongful act.

Wherever a statute creates a right, or a duty, or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to that right or obligation follows as an incident (*t*). The statute of Westminster the second (1 stat. 13 Ed. 1), c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any obligation or duty created or imposed by statute (*u*); and, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law" (*x*). But when the right or duty is entirely the creature of the statute, and a specific remedy is provided by the statute for its enforcement, that remedy, and that only, must be pursued (*y*), unless the remedy does not cover the entire right (*z*). The 68th section of the Railways Clauses Act, 1845, (8 & 9 Vict. c. 20,) enacts that the company shall maintain certain works for the accommodation of the owners and occupiers of lands adjoining the railway, such as gates, fences, culverts, drains, watering-places for cattle in certain cases, &c.; and the 69th section enacts that, if any difference arises between the company and such owners or occupiers as to the kind, number, size, maintenance, &c., of such works, it shall be determined by two justices. The court, therefore, will, as a rule, refuse to interfere in such cases (*a*).

So, whenever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary (*b*), or provides some

(*r*) *Ante*, p. 31.

(*s*) Erle, C. J., *Barber* v. *Lesiter*, 7 C. B., N. S. 187; 29 L. J., C. P. 161.

(*t*) Maule, B., *Braithwaite* v. *Skinner*, 5 M. & W. 327.

(*u*) 2 Instit. 486.

(*x*) Com. Dig. Action upon Statute, F.

(*y*) *Stevens* v. *Evans*, 2 Burr. 1157. *Underhill* v. *Ellicombe*, M'Clel. & Y. 455. *Doe* v. *Bridges*, 1 B. & Ad. 859. *Dundalk Western Rail. Co.* v. *Tupster*, 1 Q. B. 667. *Stevens* v. *Jeacocke*, 11 Q. B. 741. *Per* L. J., Q. B. 163. *St. Paneras Vestry* v. *Batterbury*, 2 C. B., N. S. 477; 26 L. J., C. P. 243.

(*z*) *Shepherd* v. *Hills*, 11 Exch. 67. Williams, J., *St. Paneras Vestry* v. *Batterbury*, *supra*.

(*a*) *Hood* v. *North-Eastern Rail. Co.*, L. R., 11 Eq. 116; 40 L. J., Ch. 17.

(*b*) Parke, B., *Shepherd* v. *Hills*, 11 Exch. 67. *Tilson* v. *Warwick Gas Light Co.*, 4 B. & C. 967; 7 D. & R. 376.

74 specific remedy, or particular mode of proceeding for the recovery of the money, and there is no contract or obligation to pay independently of the statute.

Where a statute vests a right generally in a person, or imposes some new duty upon one party for the benefit of another, and gives a penalty against those who infringe the right or neglect the duty, and, by reason of the infringement of the right or the neglect of the duty, a special and particular damage has resulted to the plaintiff, the annexation by the statute of the penalty for the offence recoverable by a common informer does not preclude the plaintiff from his common law remedy by action for damages (*c*), although it is competent to him, if he is first in the field, to sue for the penalty (*d*). But a person is not necessarily entitled to maintain an action because he can show that he has sustained injuries from the non-performance of a statutory duty. Whether in such a case an action is maintainable must depend, to a great extent, upon the purview of the legislature in the particular statute and the language there employed. Where no specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favour of the plaintiff has been imposed, but the statute merely prohibits a thing from being done under a penalty for doing it, an action for damages is not maintainable. Thus, where statutory regulations were established for the management of the pilchard fishery, and specific penalties appointed for the breach of each regulation, and the plaintiff, a fisherman, brought an action for damages for the breach by the defendant of one of the regulations, whereby the plaintiff lost his proper turn and station in fishing, and the defendant was enabled to make a valuable capture of fish, which would otherwise have fallen to the lot of the plaintiff, it was held that the action was not maintainable, as no particular right was created and vested in the plaintiff, nor any particular duty in his favour imposed upon the defendant. The latter was merely prohibited from doing a particular act under pain of incurring a penalty for disobedience; and the enforcement of the penalty was the only mode of proceeding against him (*e*). So, where the plaintiff brought an action against a waterworks company for not keeping their pipes charged as required by the Waterworks Clauses Act, 1847, whereby his premises were burnt down, it was held that the statute gave him no right of action (*f*). Where, on the other

Cane v. *Chapman*, 5 Ad. & E. 659. *Lloyd* v. *Burrup*, L. R., 4 Ex. 63; 38 L. J., Ex. 25. *Richardson* v. *Willis*, L. R., 8 Ex. 69; 42 L. J., Ex. 68.

(*c*) *Couch* v. *Steel*, 3 El. & Bl. 414. *Rowning* v. *Goodchild*, 2 W. Bl. 906.

(*d*) *Beckford* v. *Hood*, 7 T. R. 627.

(*e*) *Stevens* v. *Jeacocke*, 11 Q. B. 741.

(*f*) *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; 46 L. J., Ex. 775.

75 hand, a statute (*g*) imposed upon a shipowner the duty of keeping a constant supply of medicines on board for the use of sick seamen, and appointed a penalty for every default, recoverable by the first person who sued for it, the amount, when recovered, to be divided between the informer and the seamen's hospital, and the medicines were not kept, and the plaintiff, being a seaman on board, and having contracted a fever, was deprived of the benefit of the medicines, and in consequence thereof sustained a long and dangerous illness, it was held that he was entitled to maintain an action for damages, notwithstanding the imposition of the penalty (*h*). Where a statute creates a duty with the object of preventing a mischief of a particular kind, a person, who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. Thus, where the defendant, a shipowner, undertook to carry the plaintiff's sheep from a foreign port to England, and 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 Privy Council made under the authority of the Contagious Diseases (Animals) Act, 1869, it was held that, the object of the statute and of the order being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the plaintiff could not recover (*i*).

When a duty or obligation exists at common law independently of the statute, a new remedy given by the statute is simply cumulative, and does not preclude the ordinary common law remedy by way of action, unless there are express words to that effect (*k*). By the 10 & 11 Vict. c. 15, for comprising in one general Act sundry provisions to be contained in Acts of Parliament thereafter passed, authorizing the construction of gas-works for supplying towns with gas, penalties are imposed upon persons authorized by statute to construct gas-works, for nuisances of different kinds (*l*). By s. 29, it is enacted that nothing in that or the special Act contained shall prevent the undertakers (the persons authorized to construct the gas-works and make gas) from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas. The ordinary remedy by action for damages, therefore, is main-

(*g*) 7 & 8 Vict. c. 112, s. 18 (repealed). And see the 30 & 31 Vict. c. 124, ss. 4, 5, 6.

(*h*) *Couch* v. *Steel*, 3 El. & Bl. 410. See, however, *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2 Ex. D. 441; 46 L. J., Ex. 775), where the law laid down in *Couch* v. *Steel* is doubted.

(*i*) *Gorris* v. *Scott*, L. R., 9 Ex. 125; 43 L. J., Ex. 92.

(*k*) Com. Dig. Action upon Statute, *C. Chapman* v. *Pickersgill*, 2 Wils. 145.

(*l*) See sects. 11, 21, 22, 23, 25; and *Hipkins* v. *Birmingham, &c., Gas Light Co.*, 6 H. & N. 250; 30 L. J., Ex. 60.

76 tainable for a nuisance arising from gas-works, notwithstanding the existence of the penal clauses in this statute (*m*).

By-laws founded on statute, imposing penalties for the supression of certain torts, are cumulative upon the ordinary common law remedy by way of action, and do not prevent a plaintiff who has sustained damage from an injury to his property or person or an infringement of his legal right, from bringing his action just the same as if no by-law had ever been made; for, "wherever an action lies at common law, the penalty is accumulative" (*n*).

Suspension of the remedy.—There are many *dicta* of high authority to the effect that, when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence, before he can pursue his remedy by action for the private injury (*o*). The plaintiff, however, has been held to have discharged this duty, not only when the felon was convicted (*p*), but also when he had been acquitted (*q*), or when a bill of indictment had been preferred but had been thrown out or not proceeded with at the suggestion of the judge (*r*). And the rule did not extend beyond the felon himself, so that, if stolen property were innocently taken in pledge by a pawnbroker or purchased out of market overt, an action might be brought against the pawnbroker or purchaser before the institution of any prosecution for the felony (*s*). In two recent cases, however, some doubt has been thrown on the *dicta* above referred to; and it was held that the omission to prosecute could not form the subject of a plea in bar of the action (*t*). The duty, if it exists, is confined to felonies, and does not extend to a misdemeanour (*u*).

Remedy by action—Of the joinder of plaintiffs in actions—Parties jointly interested.—Formerly two or more persons could only be joined in an action as plaintiffs where they had a joint interest. Thus, if slander was published concerning two partners, containing imputations, injurious to them in their trade and affecting their joint interests, they might sue jointly for damages (*x*). So, also, tenants in common could be joined as plaintiffs in actions for

(*m*) Willes, J., *Broadbent* v. *Imperial Gas Light Co.*, 26 L. J., Ch. 280. See also 34 & 35 Vict. c. 41, s. 9.

(*n*) *Rowning* v. *Goodchild*, 2 W. Bl. 910. *Beckford* v. *Hood*, 7 T. R. 627. *Couch* v. *Steel*, 3 El. & Bl. 414.

(*o*) *Markham* v. *Cobb*, Sir W. Jones, 447. *Higgins* v. *Butcher*, Yelv. 89. *Dawkes* v. *Covenegh*, Sty. 346. *Crosby* v. *Leng*, 12 East, 413; 1 Hale, P. C. 543.

(*p*) *Dawkes* v. *Covenegh*, Sty. 346.

(*q*) *Crosby* v. *Leng*, 12 East, 413.

(*r*) *Hartley* v. *West Bromwich Banking Co.*, 1 Spittle, 1 J. & H. 14.

(*s*) *White* v. *Spettigue*, 13 M. & W. 603, overruling *Gimson* v. *Woodfull*, 2 C. & P. 41. *Osborn* v. *Gillett*, L. R., 8 Ex. 88; 42 L. J., Ex. 53. *Appleby* v. *Franklin*, 17 Q. B. D. 93.

(*t*) *Wells* v. *Abrahams*, L. R., 7 Q. B. 554; 41 L. J., Q. B. 296. *Ex parte Ball*, 10 Ch. D. 667.

(*u*) *Reg.* v. *Hardey*, 14 Q. B. 541.

(*x*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637. *Cork* v. *Batchelor*, 3 B. & S. 150.

77 injuries to their common property, such as trespasses upon their land, or nuisances to their estates; because, though their estates are several, yet the damages survive to all (*y*); and, if a nuisance to the land of two tenants in common was continued after the death of one of them, the devisee of the deceased tenant in common could join the survivor in an action for such nuisance (*z*). But, where the wrong done to one was no wrong done to the other, as in the case of false imprisonment, or assault and battery, where what one man suffers is altogether different from the injury that accrues to another from the same cause, separate actions must have been brought. Now, however, it has been held that, by the operation of the Judicature Act (*a*), two or more persons may join in an action, although they are not jointly entitled to the relief claimed, and the damages are several only (*b*).

Where two persons were owners of a ship in unequal proportions as tenants in common, *A* being the owner of a fourth part, and the plaintiff of the remaining three-fourths, and the former brought an action against the defendants, the owners of another ship, for wrongfully running down and injuring the vessel in which they were mutually interested, and the defendants omitted to plead the non-joinder of the other part-owner in abatement, and *A* had judgment, and obtained full satisfaction for all the damage that he had sustained to his share of the ship, and afterwards the plaintiff, the owner of the remaining three-fourths of the ship, sued the same defendants for the damage he had sustained, and the defendants pleaded the non-joinder of *A* in abatement, and the plaintiff then set forth in his replication the proceedings in the former action, it was held that, as the other part-owner had already received satisfaction, he could not be entitled to any part of the damages to be recovered in that action, and that he need not, consequently, be joined as a plaintiff (*c*).

Remedy by action—Husband and wife.—Formerly it was necessary in actions for the recovery of damages for personal wrong or violence done to a married woman, that the husband and wife should be joined as plaintiffs, where the action would survive to her on the death of her husband; but, since the coming into operation of the Married Women's Property Act, 1882, a married woman is as capable of suing as though she were a *feme sole*, and all damages and costs recovered by her are her separate property, and there is no need for joining her husband with her as a

(*y*) *Hare* v. *Celey*, Cro. Eliz. 143. *Some* v. *Barwish*, Cro. Jac. 231.
(*z*) Bac. Abr., Joint-tenants, &c., K.
(*a*) Order XVI. r. 1.
(*b*) *Booth* v. *Briscoe*, 2 Q. B. D. 496. *Gort* v. *Rowney*, 17 Q. B. D. 625.
(*c*) *Sedgworth* v. *Overend*, 7 T. R. 280. *Bloxam* v. *Hubbard*, 5 East, 420.

78 plaintiff (*d*). It would appear from the Act that if the wife elects not to sue for a tort committed against her, her husband cannot sue in her stead.

Remedy by action—Damages.—In actions of tort a greater latitude is allowed by the court to a jury in the assessment of damages than is allowed in actions of contract (*e*). "The damages must be excessive and outrageous to warrant a new trial" (*f*); "for it is not to be expected that a jury will measure their verdict so nicely as in cases of contract" (*g*).

The court will not in general interfere with the damages, unless the finding has proceeded from some mistake, or the jury have acted from some sinister feeling, and the judge is dissatisfied with their verdict (*h*). If the jury give the plaintiff more damages than by his own showing he ought to recover, the damages so assessed cannot be recovered (*i*).

As against a manifest wrong-doer a jury is justified in making the strongest presumptions, so that, if an article of value, such as a diamond necklace, has been taken away, and part of it is traced to the possession of the defendant, the jury may reasonably infer that the whole thing has come into his hands, and give damages accordingly (*k*). Where the plaintiff, by his own dealings and acts, renders the nature of his interest in the property and the extent of the damages altogether doubtful, he may vacate his whole claim, or destroy his right to more than nominal damages (*l*).

Remedy by action—Special damages.—All damages which ordinarily and in the natural course of things have resulted, from the commission of the wrongful act, are recoverable (*m*).

In an action for breaking and entering the plaintiff's dwelling-house, and assaulting and beating him, Lord Ellenborough allowed the plaintiff to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died soon afterwards, not as a substantive ground of damage, but for the purpose of showing how outrageous and violent had been the conduct of the defendant (*n*). "But I entertain considerable doubt," observes Pollock, C. B., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of

(*d*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. See *ante*, p. 62.

(*e*) De Grey, C. J., *Sharpe* v. *Brice*, 2 W. Bl. 942.

(*f*) *Huckle* v. *Money*, 2 Wils. 205.

(*g*) Cresswell, J., *Williams* v. *Currie*, 1 C. B. 848. *Fabrigas* v. *Mostyn*, 2 W. Bl. 928.

(*h*) *Wallington* v. *Wood*, C. P. Nov. 8th, 1860. *Britton* v. *South Wales Rail. Co.*, 27 L. J., Ex. 355.

(*i*) *Hambleton* v. *Vecre*, 2 Wms. Saund. 170.

(*k*) *Mortimer* v. *Cradock*, 12 L. J., C. P. 166.

(*l*) *Pringle* v. *Taylor*, 2 Taunt. 150.

(*m*) Pollock, C. B., *Rigby* v. *Hewitt*, 5 Exch. 242. *Workman* v. *Great Northern Rail. Co.*, 32 L. J., Q. B. 279. *Gilbertson* v. *Richardson*, 5 C. B. 502.

(*n*) *Huxley* v. *Berg*, 1 Stark. 98. *Bracegirdle* v. *Orford*, 2 M. & S. 77.

79 mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated" (*o*).

Remedy by action—Costs of legal proceedings.—In an action for running down a ship, in which it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Admiralty Court against the plaintiff, who paid 20*l.*, and the court ultimately decreed the payment of 45*l.*, with costs, to the salvors, and the plaintiff sought to recover these costs as part of the damage he had sustained, it was held that the proper question for the jury was, whether the plaintiff, in paying only 20*l.* into court, and risking the costs of the action, had pursued the course which a prudent and reasonable man would take in his own case, and that, if the jury thought he had, the costs of the suit might be recovered (*p*); but "no person has a right to inflame his own account against another by incurring expenses in an unrighteous resistance to an action which he cannot defend with any prospect of success" (*q*). If the costs have been taxed, the taxed costs only can be recovered (*r*).

If the costs incurred in legal proceedings are not part of the consequences of the wrong done (*s*), or if they are the remote, unexpected, and unusual consequence of the wrong such as costs incurred in upholding a defence which is manifestly wholly untenable (*t*), they are not recoverable (*u*).

The expense incurred by a plaintiff in consulting a solicitor and obtaining a legal opinion upon the validity of his claim, is not recoverable as part of the damages. "Parties must do what they think is right; and the expense of getting the experience of attorneys to advise is not to be repaid by the other party. Nothing of that sort can be allowed in damages; and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs" (*x*).

Remedy by action—Medical expenses.—Where the plaintiff had been wounded by the negligence of the defendant in the management of a gun, and had employed a surgeon and physician for the cure of the injury he had sustained, Lord Ellenborough told the jury, that as to the surgeon's bill they were to consider the amount

(*o*) *Greenland* v. *Chaplin*, 5 Exch. 248. But see *Smith* v. *L. & S. W. Rail. Co.*, L. R., 6 C. P. 14; 40 L. J., C. P. 21.

(*p*) *Tindal* v. *Bell*, 11 M. & W. 228. *Mors-le-Blanch* v. *Wilson*, L. R., 8 C. P. 227; 42 L. J., C. P. 70.

(*q*) Ld. Denman, C. J., *Short* v. *Kalloway*, 11 Ad. & E. 31.

(*r*) *Grace* v. *Morgan*, 2 Bing. N. C. 534; 2 Sc. 793. But see per Martin, B., in *Howard* v. *Lovegrove*, L. R., 6 Ex. 45; 40 L. J., Ex. 13.

(*s*) *Holloway* v. *Turner*, 6 Q. B. 928.

(*t*) *Ronneberg* v. *Falkland Islands Co.*, 17 C. B., N. S. 1; 34 L. J., C. P. 34.

(*u*) *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J., Q. B. 256. *Richardson* v. *Dunn*, 8 C. B., N. S. 655; 30 L. J., C. P. 44.

(*x*) *Clare* v. *Maynard*, 7 C. & P. 743.

80 as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt (*y*).

Remedy by action—Prospective damages.—Although a plaintiff is not to be compensated for uncertain and doubtful consequences which may never ensue, yet he is entitled to compensation for losses which will "almost to a certainty happen." The jury may take into their consideration, in making up their minds on the damages, losses which will in all probability be sustained by the plaintiff; for "when the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by the act of the defendant, it would be most 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 bring a second, a third, or a fourth action for the recovery of your damages" (*z*).

In all cases of serious assault the jury should take into their consideration, in assessing the damages, the probable future injury that will result to the plaintiff from the act of violence perpetrated by the defendant; for the damages, when given, are taken to embrace all the injurious consequences of the wrongful act, unknown as well as known, which may arise hereafter, as well as those which have arisen, so that the right of action is satisfied by one recovery. Thus, where the plaintiff had received a blow on the head, and sustained little apparent injury, and recovered small damages, and afterwards, and in consequence of the blow, a portion of his skull came away, and it then appeared that the skull had been fractured, and he then brought a second action, which was attempted to be supported on the ground that the former recovery was for a mere battery and this for *maihem*, it was held that no action lay, for there was but one blow, and that was the cause of action in both suits, and not the consequences. And the distinction was pointed out between this case and one of continuing nuisance, where each continuance is a fresh nuisance (*a*). No fresh action, therefore, arises by reason of subsequent new damage resulting from the wrongful act, if the act itself was actionable; for, if the action was brought, all the damages which he ever could recover for that injury could be recovered by the plaintiff in that action if he succeeded (*b*).

In estimating the damages in an action for a libel against a trader, the jury may take into consideration the prospective injury

(*y*) *Dixon* v. *Bell*, 1 Stark. 289. *Loosemore* v. *Radford*, 9 M. & W. 657. *Spark* v. *Heslop*, 1 El. & El. 563; 28 L. J., Q. B. 197.

(*z*) Best, C. J., *Richardson* v. *Mellish*, 2 Bing. 240. *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 301.

(*a*) *Fetter* v. *Beal*, 1 Ld. Raym. 339, 92; 1 Salk. 11.

(*b*) Coleridge, J., *Bonomi* v. *Backhouse*, 27 L. J., Q. B. 390.

81 which will probably accrue to the trader from the publication of the libel (*c*). It has been said that the damage sustained at the time of the commencement of the action is all that the plaintiff can recover, and that the jury cannot take into account the prospective injury; "but it appears to me," observes Bosanquet, J., "that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period" (*d*). And the jury may, it seems, give damages for the mental suffering arising from the apprehension of the future consequences of the publication of the libel (*e*).

In an action for injury to the plaintiff's land and buildings, by removal of support through mining operations carried on by the defendant, it was held that damage was recoverable in the action for a fresh subsidence occurring fourteen years after a judgment recovered for the original subsidence (*f*).

Remedy by action—Exemplary and vindictive damages.—In all cases of malicious injuries and trespasses accompanied by personal insult, or oppressive and cruel conduct, juries are told to give what are called exemplary damages, although the actual personal injury, measured by any pecuniary standard, may be but small. "It tends," observes Heath, J., "to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages. I remember a case where a jury gave 500*l.* damages for knocking a man's hat off, and the court refused a new trial" (*g*). "Where," observes Gibbs, C. J., "a man is disposed to disregard every principle which actuates the conduct of a gentleman, what is to restrain him except large damages?" (*h*). So, where an action was brought by the plaintiff for the seduction of his daughter, and damages were recovered, and a motion for a new trial was grounded on circumstances showing the damages to be excessive, Wilmot, C. J., stated that "actions for seduction are brought for *example's* sake; and although the plaintiff's loss in this case may not really amount to the value of 20*s.*, yet the jury have done right in giving liberal damages" (*i*).

Wherever the wrong or injury is of a grievous nature, done

(*c*) *Gregory* v. *Williams*, 1 C. & K. 568.
(*d*) *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Sc. 477.
(*e*) *Goslin* v. *Corry*, 7 M. & G. 342; 8 Sc. N. R. 25.
(*f*) *Darley Main Colliery Co.* v. *Mitchell*, *ante*, p. 57. *Lamb* v. *Walker*, 3 Q. B. D. 389; 47 L. J., Q. B. 451.
(*g*) *Merest* v. *Harvey*, 5 Taunt. 442.
(*h*) *Merest* v. *Harvey*, 5 Taunt. 442.
(*i*) *Tullidge* v. *Wade*, 3 Wils. 18. *Huckle* v. *Money*, 2 Wils. 205. In some of the states, it is held, following the rule laid down in a New Hampshire case, that, where an action is brought for an injury which results from an act which is also punishable criminally, exemplary damages are not recoverable: *Fay* v. *Parker*, 53 N. H. 342; *Lucas* v. *Flinn*, 35 Iowa, 9; *Smith* v. *Pittsburgh, &c. R. R. Co.*, 23 Ohio St. 10. But this doctrine has no foundation in principle, and is not generally accepted: *Hoadley* v. *Watson*, 45 Vt. 239.

with a high hand, or is accompanied with a deliberate intention to injure, or with words of contumely and abuse, the jury are authorized in giving, and may be told to give, vindictive

82 damages (*k*). Thus, where, in an action against a colonel of militia for ordering the plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave 150*l.* damages, and a new trial was moved for on the ground that the man appeared to have been moderately punished, and not much hurt, and that the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment (*l*).

Wherever injury has been done to the fair fame, reputation, or character of the plaintiff, juries are generally invited to give, and are justified in giving, such a sum as marks their sense of the maliciousness or recklessness of the wrong-doer in offering the insult and injury, their belief in the groundlessness of the charge, and their desire to vindicate the character of the plaintiff (*m*). Thus, in all actions of libel and slander, where the object of the plaintiff is to clear himself from aspersions that have been cast upon him, the jury are in the habit of giving large damages, with a view of vindicating the plaintiff's character from the aspersions cast upon it. And in an action for oral slander, where the cause of action rests upon special damage alleged and proved, the jury, in assessing their damages, are not limited to the amount of special damage proved, but may give their verdict for general damages, which would in their judgment be the natural and probable result of it. They must, however, exclude from their consideration damages resulting from the repetition of the slander by third parties who had no authority from the defendant to repeat it (*n*).

Remedy by action—Mitigation of damages.—Circumstances which fall short of a complete justification, and do not amount to a defence to the action, may be given in evidence in mitigation of damages, as establishing a less aggravated case against the defendant (*o*). Thus, in an action for an assault and battery, the circumstances which led to the assault are admissible in evidence in reduction of the damages (*p*).

In an action for assaulting the plaintiff and seizing his goods it may be shown in mitigation of damages that the defendant was

(*k*) *Thomas* v. *Harris*, 27 L. J., Ex. 353. Willes, J., *Bell* v. *Midland Rail. Co.*, 10 C. B., N. S. 307; 30 L. J., C. P. 281. *Embden* v. *Myers*, 6 H. & N. 54; 30 L. J., Ex. 71.

(*l*) *Benson* v. *Frederick*, 3 Burr. 1847.

(*m*) *Doe* v. *Filliter*, 13 M. & W. 51.

(*n*) *Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J., Ex. 125. *Evans* v. *Harries*, 1 H. & N. 251; 26 L. J., Ex. 31. *Allsop* v. *Allsop*, 5 H. & N. 534; 29 L. J., Ex. 315.

(*o*) Tindal, C. J., *Perkins* v. *Vaughan*, 4 M. & G. 989; 7 Sc. N. R. 886. *Speck* v. *Phillips*, 5 M. & W. 281; 7 Dowl. 470.

(*p*) *Linford* v. *Lake*, 3 H. & N. 276; 27 L. J., Ex. 334.

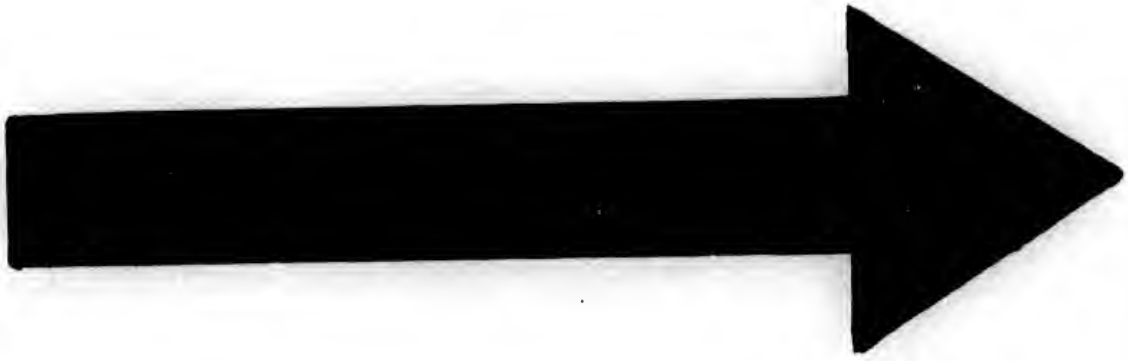
a custom-house officer, and that the plaintiff was going away from a vessel with goods liable to duty, without paying the duty, **83** whereupon the defendant detained him and took possession of his goods (*q*). Where the defendant gave the plaintiff in charge for stealing fat, and it appeared that there was no legal evidence of any felony, but the defendant *bonâ fide* believed that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, Best, C. J., allowed the grounds of suspicion to be given in evidence in mitigation of damages (*r*).

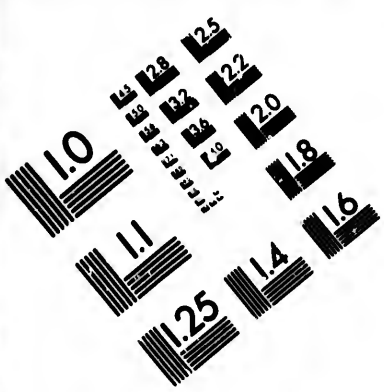
In an action for libel or slander, where the plaintiff claims damages on the ground of the disparagement of his character, general evidence of the plaintiff's bad character prior to the publication of the libel is admissible in evidence, in reduction of the damages (*s*).

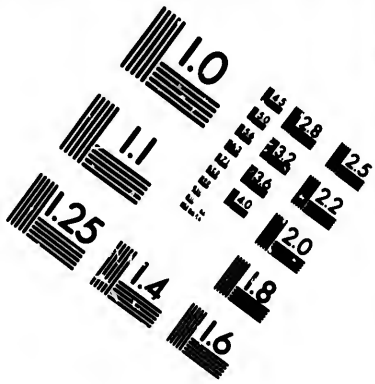
Where the defendant wrote a novel, and the plaintiff in reviewing it went beyond the bounds of fair criticism and libelled the defendant and his family, and the defendant thrashed the plaintiff, who brought an action for the assault, it was held that the libel might be given in evidence in mitigation of damages, although it was the subject of another action by the defendant against the plaintiff; but the jury were told that, as the defendant had chosen his remedy for the libel by his action for damages, he could not fairly be allowed to take much advantage of it in mitigation of damages in the action for the assault (*t*).

Where the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited in Pall Mall for money, where crowds went to see it, and the defendant went and hacked the picture in pieces, and the plaintiff claimed the full value of the picture and compensation for the loss of the exhibition, the defendant was permitted to show in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister, and the exhibition of it a public nuisance. "If," observes Lord Ellenborough, "this picture was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition; and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts" (*u*).

(*q*) Ld. Denman, C. J., *De Goudouin* v. *Lewis*, 10 Ad. & E. 120.
(*r*) *Chinn* v. *Morris*, 2 C. & P. 364.
(*s*) Keilw. 203 b. *Dennis* v. *Pawling*, Vin. Abr., EVIDENCE (1 b), pl. 16.
(*t*) *Fraser* v. *Berkeley*, 7 C. & P. 625.
(*u*) *Du Bost* v. *Beresford*, 2 Campb. 511.







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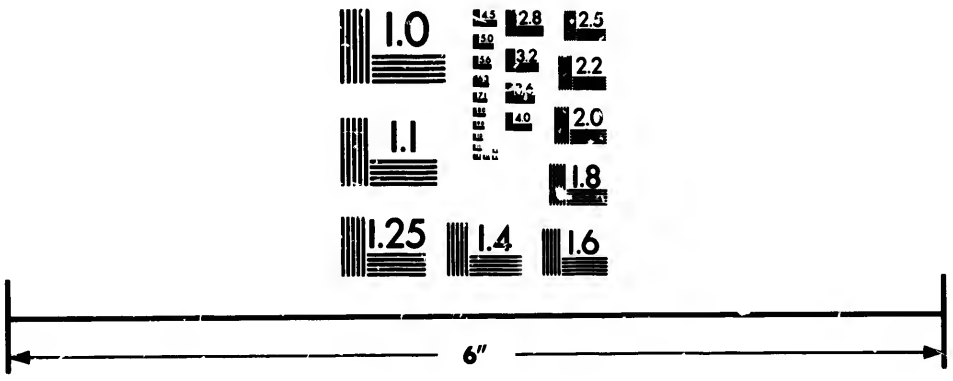

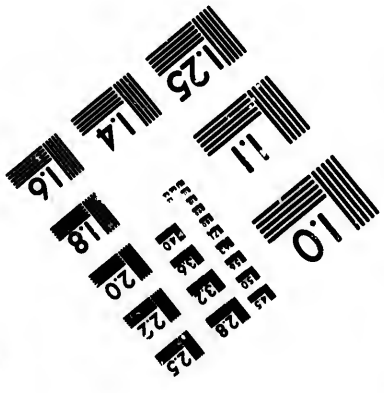

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In actions for damages for seizing goods under irregular or void process, it is no ground for mitigation of damages that a 84 regular judgment had been recovered against the plaintiff. Parties are not to extort even what is justly due by the improper execution of a warrant; and, wherever goods are seized under process in a place to which the process does not run, the full value of the goods and all provable damage are recoverable (*x*).

Remedy by action—Damages when the plaintiff is insured against loss, or has received full indemnity under a contract of insurance.—The recovery by the plaintiff of full compensation for the loss or damage his property has sustained under a contract with insurers, cannot be given in evidence in reduction of damages in an action against the wrong-doer who has done the mischief. The plaintiff's contract with the underwriters or insurers is *res inter alios acta*, of which the defendant cannot avail himself. If it were not so, the wrong-doer would take the benefit of a policy of insurance without paying the premium (*y*). Thus, in an action for an injury done to the plaintiff's vessel from negligence in running it down at sea, the fact of the plaintiff's having received from the underwriters the amount of the loss was held to be no answer to the plaintiff's claim for damages (*z*). So, in an action for injuries caused by the defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages (*a*). A plaintiff, however, who has received a full indemnity for his loss under a contract of insurance, and has afterwards recovered compensation in an action for damages against the wrong-doer, is not entitled to a double satisfaction; but, as soon as he has received from the underwriter or insurer the amount for which he has insured, he becomes a trustee for the latter in respect of any compensation paid or payable by the wrong-doer, and is bound to hand over to the insurer whatever money he receives from the wrong-doer over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. The insurer, moreover, who has paid the loss, is entitled to sue in the name of the insured, for the purpose of recovering from the wrong-doer full compensation for the injury (*b*). Thus, where certain insurers had paid the amount of the loss occasioned by the demolition of a house by rioters, it was held that they might maintain an action in the name of the assured against the hundred, under the statute, to recover compensation for the injury (*c*). But the

(*x*) *Sowell* v. *Champion*, 6 Ad. & E. 407. *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102.

(*y*) *Yates* v. *Whyte*, 4 Bing. N. C. 289; 5 Sc. 640.

(*z*) *Yates* v. *Whyte*, 4 Bing. N. C. 272; 5 Sc. 640.

(*a*) *Bradburn* v. *Great Western Rail. Co.*, L. R., 10 Ex. 1; 44 L. J., Ex. 9.

(*b*) *Randal* v. *Cockran*, 1 Ves. sen. 97.

(*c*) *Mason* v. *Sainsbury*, 3 Doug. 64. *Clark* v. *Blything*, 2 B. & C. 254; 3 D. & R. 489.

85 right of the insurer is merely to make such claim for damages as the insured could have made; and, when the latter cannot assert a claim for damages against the wrong-doer, neither can the insurer do so (*d*).

Remedy by action—Double and treble damages.—Various statutes give double and treble damages against persons who violate their provisions (*e*). In these cases, it should be ascertained at the trial whether the amount of damage assessed by the jury is the actual damage sustained, or the statutory damage of double or treble the actual damage; for, if the jury assess the damages generally at a certain sum, and there is nothing to show that the jury have found only the single value, the court is bound to conclude that the jury have taken into their consideration and have assessed all the damages that the plaintiff is entitled to recover. But, if the jury find the actual or single damage expressly, then the plaintiff may come into court to have the judgment entered up for double or treble value according to the statute (*f*).

Remedy by action—Excessive damages.—"I should be sorry to say," observes Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury" (*g*). "I always have felt that it is extremely difficult to interfere, and say when damages are too large. You may take twenty juries, and every one of them will differ from 2,000*l.* down to 200*l.* Nevertheless it is now well acknowledged in all the courts of Westminster Hall, that if the damages are clearly too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct" (*h*).

(*d*) *Simpson* v. *Thompson*, L. R., 3 App. Cas. 279. *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; 50 L. J., Q. B. 329.

(*e*) Such are the statutes prohibiting and punishing a forcible entry (8 Hen. 6, c. 9; Dyer, 214 a); or the improper impounding of a distress (1 & 2 Ph. & M. c. 12, s. 1); or the rescuing a distress (2 W. & M., Sess. 1, c. 5, s. 4); or the selling a distress when no rent is owing (*ib.* s. 5).

(*f*) *Baldwyn* v. *Girries*, Godb. 245. *Sandford* v. *Clarke*, 2 Chitt. 352. *Buckle* v. *Bewes*, 4 B. & C. 154. *Baker* v. *Brown*, 2 M. & W. 199. When the jury have by their verdict found only the single damage, the application to the court to increase the damages to the statutory amount should, it seems, be made within four days of the return of the jury process. *Masters* v. *Farris*, 1 C. B. 716.

(*g*) *Gilbert* v. *Bartenshaw*, Cowp. 230; Lofft, 771. *Britton* v. *South Wales Rail. Co.*, 27 L. J., Ex. 355. The instances in which our courts have set aside verdicts upon the ground that they were excessive are numerous, but the principle upon which they act is that stated in the text: see Wood's Railway Law, p. 1266, vol. 2.

(*h*) *Hewlett* v. *Cruchley*, 5 Taunt. 281. *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396; 32 L. J., Q. B. 377.

"I think further," observes Ashhurst, J., "that before the
86 court can set a verdict aside merely for excess of damages, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the court have some medium to direct them by which they are enabled to correct any mistake of the jury. But, where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the court have no line to go by; and, therefore, it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages" (*i*).

But, when there is any rule or guidance for the assessment of the damages, and the jury have not been properly directed on the point, or have disregarded the ruling of the judge, and have manifestly given excessive damages, the court will grant a new trial. So, where the plaintiff has himself fixed the amount of damage and received it, and the jury give him a sum altogether disproportionate to his own estimate, the court will interpose and grant a new trial, unless the plaintiff consents to reduce the damages to a reasonable amount. Thus, where an importunate beggar having refused to quit the defendant's premises, the defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn, and was brought before the defendant the following morning, when he demanded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half-a-crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and, there being no plea of accord and satisfaction on the record, recovered a verdict with damages to the amount of 100*l.*, it was held that the damages were enormous and disproportionate, on account of the limit which the plaintiff himself had put on his demand in the first instance. "It seems to me," observes Tindal, C. J., "that, if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for 100*l.* is far beyond the merits, as we cannot but see, on the evidence of the plaintiff himself, who has set the measure on his own damages" (*k*).

Wherever the facts show that the plaintiff has taken upon

(*i*) *Duberley* v. *Gunning*, 4 T. R. 656. (*k*) *Price* v. *Severn*, 7 Bing. 319.

87 himself to avenge his own wrongs, and to retaliate upon the defendant, these facts ought to be taken into consideration by the jury in reduction of damages; and, if the jury have not been directed to do this, or have disregarded the direction, and have given excessive damages, the court will grant a new trial. Where an action was brought by a servant for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow for impertinent behaviour, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered 40*l.* damages, the court granted a new trial (*l*).

Where also the plaintiff himself has been guilty of misconduct in the matter of his complaint, and does not come into court with clean hands and a fair case for damages, and the circumstance has been overlooked by the jury, and excessive and disproportionate damages have been given, the court will allow the matter to be revised by another jury (*m*). And, when a defendant against whom excessive damages have been recovered appears to have been acting in the discharge of some duty, or in the intended execution of an Act of Parliament, or in the *bonâ fide* exercise of some power or authority which he supposed that he possessed, and intended to act right, but by mistake did wrong, and the damages are manifestly out of all proportion to the injury actually sustained, the court will interfere and grant a new trial for the purpose of confining the damages within moderate and reasonable limits (*n*).

Remedy by action—Inadequate damages.—A new trial will sometimes be granted in actions *ex delicto*, where the damages are unreasonably small, as, for instance, where the smallness of the damages shows that the jury have made a compromise, and, instead of deciding the issue submitted to them of guilty or not guilty, have agreed to find for the plaintiff for nominal damages only (*o*), or that they must have omitted to take into consideration some of the elements of damage (*p*). Thus, where it was proved that by reason of the defendant's negligence in driving an omnibus the plaintiff was run over and his thigh broken, and that the doctor's bill for setting his leg and attending upon him came to 10*l.* 5*s.* 6*d.*, and the jury gave the plaintiff a verdict with a farthing damages, the court ordered a new trial (*q*). So, where in an action of slander

(*l*) *Jones* v. *Sparrow*, 5 T. R. 257.
(*m*) Buller, J., in *Duberley* v. *Gunning*, 4 T. R. 658.
(*n*) *Eliot* v. *Allen*, 1 C. B. 40.
(*o*) *Kelly* v. *Sherlock*, L. R., 1 Q. B. 697; 35 L. J., Q. B. 209.
(*p*) *Phillips* v. *L. & S. W. Rail. Co.*, 5 Q. B. D. 78; 48 L. J., Q. B. 673.
(*q*) *Armytage* v. *Haley*, 4 Q. B. 918. Where the damages given are clearly inadequate to compensate for the injury, the court will set it aside.

88 the words complained of were grossly slanderous, and calculated, if believed, to be extremely injurious to the character of the plaintiff, and there was no evidence that he had done anything to provoke or give the least ground for the slanderous imputation, the court, at the instance of the plaintiff, set aside a verdict found for him with a farthing damages, and ordered a new trial (*r*). But, where there is no standard for estimating the damages, and the court are unable to lay down any rule for the guidance of the jury, the court will not grant a new trial, although they may think the damages much too small (*s*).

Remedy by action—Orders for delivery of the specific thing detained.—In the old action of detinue, the defendant had the option of retaining possession of the chattel detained, paying to the plaintiff the sum at which the jury thought proper to assess its value (*t*). "The judgment," observes Frowike, C. J., "is, that the plaintiff shall recover the goods or their value; then shall issue a writ to the sheriff to distrain the defendant to deliver the goods, and, if he will not, then the value as it is taxed by the inquisition. And so it is in the election of the defendant to deliver to the plaintiff the goods or the value" (*u*). This option on the part of the defendant being felt to operate as a hardship upon the plaintiff in many cases, it was taken away by the Common Law Procedure Act, 1854, which enacted, s. 78, that the court or a judge should have power, if they or he should see fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution should issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and, if the chattel could not be found, and unless the court or a judge should otherwise order, the sheriff should distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the defendant should render such chattel, or, at the option of the plaintiff, that he should cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff should, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action. And now by the new orders under the Judicature Acts the above provisions are substantially re-enacted (*x*).

Remedy by action—Assessment of value.—The value of the thing detained should be assessed at the highest price it bore in the

(*r*) *Falvey* v. *Stanford*, L. R., 10 Q. B. 54; 44 L. J., Q. B. 7.
(*s*) *Strafford's case*, cited 4 T. R. 655.
(*t*) *Phillips* v. *Jones*, 15 Q. B. 867.
(*u*) Keilw. 64 b; Yelv. 71.
(*x*) Rules of the Supreme Court, Order XLVIII., rr. 1, 2.

89 market at any time during the period of its detention (*y*); and, where the value is doubtful, and the defendant might have returned it if he had thought fit, every fair presumption and inference should be made in favour of the owner of the property seeking its restitution, and against the wrong-doer who has detained it from him. But, where the value of the article lies peculiarly within the knowledge of the plaintiff, he should prove the value of it, in order to enable the jury to make a correct assessment of the damages. Thus, when he sues for the detention of letters and documents, he should prove the nature of the letters, and of what use they were to him (*z*). If he sues for the detaining of title-deeds, he should prove the value of the property to which they refer, and that the deeds are essential to the establishment of the title, and he will then be entitled to have the damages assessed at the value of the estate (*a*).

Remedy by action—Assessment of damages where the whole, or part, of the goods have been delivered up after action.—If all or any of the goods have been delivered up after suit, the plaintiff may recover damages for their detention if he has sustained any; and, for the residue not delivered up, he may have the usual writ of delivery (*b*). In an action of detinue for several goods, which were collectively valued at one sum in the declaration and by the jury, it was held that, if all the goods were not given up—if one article was withheld—the defendant was liable for the value of all; but in an action for detaining two things, the defendant may before verdict give up one, and plead as to the other (*c*). If there is a good defence to part of the goods, by reason that the defendant was always ready to deliver them, the jury must assess the value of the residue of the goods, and damages for the detention, but none as to the goods delivered up. If there was no defence as to them, then the jury must assess the value of the residue of the goods, and damages for the prior detention of those that were delivered up (*d*).

Whenever the defendant has wrongfully detained the plaintiff's chattels, or has wrongfully withheld from him the means of obtaining possession of them, he is answerable for all the loss naturally resulting in the ordinary course of things from his wrongful act (*e*). In an action for detaining railway-scrip, which had been delivered up to the plaintiff after the commencement of

(*y*) *Archer* v. *Williams*, 2 C. & K. 27. *Barrow* v. *Arnaud*, 8 Q. B. 609. *Post*, p. 90.

(*z*) *Anderson* v. *Passman*, 7 C. & P. 197.

(*a*) Roll. Abr. DETINUE, E.

(*b*) *Crossfield* v. *Such*, 8 Exch. 165, 828; 22 L. J., Ex. 65.

(*c*) Bro. Abr. TENDER, pl. 39.

(*d*) *Crossfield* v. *Such*, 8 Exch. 165, 828; 22 L. J., Ex. 65. *Pawly* v. *Holly*, 2 W. Bl. 853.

(*e*) *Barrow* v. *Arnaud*, 8 Q. B. 610.

90 the action, under a judge's order, it was held that the judge was warranted in directing the jury at the trial, that in estimating the damages they might take into consideration the difference in the value of the scrip at the time of the demand and the time of its delivery to the plaintiff under the judge's order (*f*). Where railway-scrip, shares or stock have been unlawfully detained after demand, and given up after the commencement of the action, the measure of damages is the highest sum the scrip could have been sold for during the period of its detention, deducting the value of it at the time it was received back by the plaintiff. The wrong-doer cannot get off with less than that, and may have to pay greater damages (*g*).

A defendant who has wrongfully detained the plaintiff's horse cannot make the expense of the horse's keep, while he was wrongfully detained, a ground for reduction of the damages (*h*).

Remedy by injunction—When granted.—An injunction conditional or otherwise will be granted at the discretion of the court, restraining a defendant from the commission, repetition, or continuance, of a wrongful act, and enforceable, in case of disobedience, by attachment (*i*). The object of the interference by injunction is to prevent the infringement or disturbance of a right (*j*), or for the purpose of better enforcing rights, or preventing mischief until such rights have been ascertained (*k*). An injunction may be granted to prevent the continuance of a nuisance (*l*), or to restrain the infringement of patent rights and copyright (*m*), or the wrongful sale or detention of a chattel (*n*), or the publication, to the injury of the plaintiff's trade, of matter which a jury has found to be libellous (*o*).

The acts of several persons may together constitute a nuisance which the court will restrain, although the damage occasioned by the acts of any one, if taken alone, would be inappreciable (*p*).

The granting of an injunction is to some extent discretionary, but must be exercised on settled legal principles (*pp*); and, generally speaking, it will not be granted where the injury complained of can be sufficiently compensated in damages. Thus, in the case of an obstruction to ancient lights, the court has frequently granted an inquiry as to damages in lieu of an injunction. But, where, as

(*f*) *Williams* v. *Archer*, 5 C. B. 318. *Barrow* v. *Arnaud*, 8 Q. B. 609.
(*g*) *Archer* v. *Williams*, 2 C. & K. 27.
(*h*) *Wormer* v. *Biggs*, 2 C. & K. 36.
(i) As to granting an injunction, see Judicature Act, 1873, s. 25 (8). The writ of injunction is abolished, and judgment or order substituted, Order L., r. 11.
(*j*) *Herr* v. *Union Bank*, 2 Giff. 686.
(*k*) *Saunders* v. *Smith*, 3 Myl. & Cr. 729.
(*l*) *Post*, p. 391.
(*m*) *Post*, pp. 551, 572.
(*n*) *Post*, p. 514.
(*o*) *Saxby* v. *Easterbrook*, 3 C. P. D. 339.
(*p*) *Thorpe* v. *Brumfitt*, L. R., 8 Ch. 650.
(*pp*) *North London Rail. Co.* v. *Great Northern Rail. Co.*, 11 Q. B. D. 30.

91 in the case of the pollution of water, the injury varies from day to day, and may cease or may increase at any time, and where, therefore, damages would only represent the past injury, the court will not refuse an injunction, even where the actual damage is only slight (*q*). But it is not every trifling damage for which the court will grant an injunction (*r*).

Remedy by injunction—In cases of threatened injury.—An injunction may be granted to prevent any threatened or apprehended waste or trespass, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable (*s*). The interference of the court is founded on its jurisdiction to give relief in the shape of preventive justice, in order to preserve and make more effectual a legal right, and protect property from that which, if completed, would give a right of action (*t*). If the party applying is free from blame, and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted (*u*). But a plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say that a violation of the right may be the result. If the act threatened can by any reasonable possibility be done in such a way as not to prejudice the right, it will not be restrained (*x*). Thus, an injunction will not be granted against the importation or sale of goods which may be used by the persons who purchase them improperly, if others have a right to use them; and an injunction to restrain the printing or selling of labels, either copies of, or only colourably differing from, labels used by the plaintiff to distinguish the bottles of *Eau de Cologne* manufactured by him, was dissolved, on the ground that there were or might be retail buyers of the genuine *Eau de Cologne*, who might legitimately use the labels in replacing those damaged on the bottles bought by them of the plaintiff (*y*).

(*q*) *Pennington* v. *Brinsop Hall Coal Co.*, 5 Ch. D. 769; 46 L. J., Ch. 773.

(*r*) *Cooper* v. *Crabtree*, 20 Ch. D. 589; 51 L. J., Ch. 544. See Wood on Nuisances, chap. 25, where the rules adopted by our courts are stated, and the authorities collected.

(*s*) The Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

(*t*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

(*u*) *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217, 240; 30 L. J., Ch. 706.

(*x*) *Haines* v. *Taylor*, 2 Ph. 209, 210. *Pattisson* v. *Gilford*, L. R., 18 Eq. 259; 43 L. J., Ch. 254.

(*y*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; 26 L. J., Ch. 11.

92 The court will not grant an interlocutory injunction before the hearing of the cause, unless it is necessary for the protection of property, or the prevention of some threatened injury thereto (*z*); nor will it interfere in any case to protect a dry legal right or title, merely because the legal right is infringed (*a*).

Remedy by injunction—Effect of laches and delay in applying for an injunction.—The court, in the exercise of its discretion with regard to the granting of an injunction, will be influenced by any *laches* or delay which may have taken place in the institution of the proceedings (*b*). Long delay may amount to absolute proof of acquiescence in the act complained of, and will, if unexplained, certainly throw considerable doubt on the reality of the alleged injury (*c*).

Remedy by injunction—Acquiescence precluding a plaintiff from relief.—A man who lies by while he sees another person expend his capital and bestow his labour upon any work which he claims to have a right to prevent, without giving that person any notice or attempting to interrupt him, and who thus acquiesces in proceedings inconsistent with his own claims, will in vain ask for an injunction, the effect of which would be to render all the expense useless which he voluntarily suffered to be incurred (*d*). Where there was a parol agreement for the making of a watercourse through the defendant's land, for a certain consideration to be paid to the latter, and the watercourse was made and used for some time, and the parties could not afterwards agree upon the amount to be paid for the easement, and the defendant then stopped up the watercourse, an injunction was granted to restrain him from interfering with the plaintiff's use of it, and it was referred to the master to ascertain the amount that ought to be paid for the enjoyment of the privilege (*e*). But it must be reasonably clear that the effect of what is acquiesced in will be to injure the right of the person acquiescing; for, where a man has a right to do a thing, and appears to be doing what he has a right to do, it is not to be assumed that he is going to use his right for an unlawful purpose (*f*); and, if the nature of the act is such that the defendant must have been aware that he was going to do

(*z*) *Att.-Gen.* v. *United Kingdom Electric Telegraph Co.*, 30 Beav. 287; 31 L. J., Ch. 329. But see Judicature Act, 1873, s. 25 (8), *ante*, p. 90.

(*a*) *Wandsworth Board* v. *London and South Western Rail. Co.*, 31 L. J., Ch. 855.

(*b*) *Bridson* v. *Benecke*, 12 Beav. 1. *Bovill* v. *Crate*, L. R., 1 Eq. 388.

(*c*) *Ware* v. *Regent's Canal Co.*, 3 De G. & J. 230. *Wicks* v. *Hunt*, 1 Johns. 372.

(*d*) *Parrott* v. *Palmer*, 3 Myl. & K. 640. *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515. *Cotching* v. *Bassett*, 32 Beav. 101; 32 L. J., Ch. 286. *Maxwell* v. *Hogg*, L. R., 2 Ch. 307; 36 L. J., Ch. 433.

(*e*) *Devonshire* (*Duke of*) v. *Elgin*, 14 Beav. 530; 20 L. J., Ch. 495.

(*f*) *Smith* v. *Smith*, L. R., 20 Eq. 500; 44 L. J., Ch. 630.

93 a wrong, and took his chance about being disturbed in doing it, he cannot set up the acquiescence of the plaintiff as a defence (*g*). Where what is sought to be prevented is the mere repetition of an unlawful act, lapse of time will not be a bar to the granting of the injunction. Thus, where, to an action for an injunction to restrain the defendant from representing that the business carried on by him was the same as that carried on by the plaintiff, it was objected that the plaintiff had known for between two and three years before issuing his writ the facts on which he relied, it was held that this delay was no bar to the action (*h*). So, mere delay in taking proceedings after knowledge of a piracy, is not in itself such acquiescence as will deprive the plaintiff of his right to an injunction (*i*).

(*g*) *Smith* v. *Smith*, *supra*.
(*h*) *Fullwood* v. *Fullwood*, 9 Ch. D. 176; 47 L. J., Ch. 459.
(*i*) *Hogg* v. *Scott*, L. R., 18 Eq. 444; 43 L. J., Ch. 705.

94

CHAPTER V.

OF TORT-FEASORS.

Joint tort-feasors.—Whoever wilfully assists in the doing of an unlawful act becomes answerable for all the consequences of such act; and, when several persons have been jointly concerned in the commission of a wrongful act, they may in general all be charged jointly as principals, or the plaintiff may sue any of the parties upon whom individually a separate trespass attaches (*a*).

If several co-proprietors of a stage-coach intrust the driving of the coach to one of them, all will be responsible for injuries caused by his negligent driving (*b*); and, if two omnibuses are racing, and one of them runs over a man who is crossing the road and has not time to get out of the way, the injured person has a remedy against the proprietor of either omnibus (*c*).

If several are jointly bound to perform a duty, they are liable jointly and severally for the failure or refusal to perform it; and, if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number from concurring are answerable to the party injured; that is, all those who constitute the majority, such majority committing the non-feasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it (*d*).

But, where one ship is, by the improper navigation of a second ship, compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course is liable for the damage (*e*).

Judgment recovered against one.—If two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause (*f*); and, whenever the cause of action in the two suits is identical, the recovery of judgment in the one is a bar to the other (*g*). If,

95 therefore, *A* and *B* jointly convert goods, and *A* receives the

(*a*) Ld. Kenyon, C. J., *Mitchell* v. *Tarbutt*, 5 T. R. 651. *Sutton* v. *Clarke*, 6 Taunt. 29.

(*b*) *Moreton* v. *Hardern*, 4 B. & C. 223.

(*c*) Cresswell, J., in *Thorogood* v. *Bryan*, 8 C. B. 121.

(*d*) *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & F. 251, 289, 305.

(*e*) *The Sisters*, 1 P. D. 117; 45 L. J., Adm. 39.

(*f*) *King* v. *Hoare*, 13 M. & W. 504, 500. *Brinsmead* v. *Harrison*, L. R., 7 C. P. 547; 41 L. J., C. P. 19.

(*g*) *Ante*, p. 54. A discharge of one, two or more tort-feasors, or a judgment against one, discharges all, unless the statute otherwise specially provides; and if one pays the whole of a judgment against several, he cannot compel the others to contribute: *Campbell* v. *Phelps*, 1 Pick. (Mass.) 65; *Peek* v. *Ellis*, 2 John. (N.Y.) Ch. 131; *Thweat* v. *Jones*, 1 Rand. (Va.) 328; *Duprey* v. *Johnson*, 1 Bibb. (Ky.) 562; *Wilford* v. *Grant*, Kirby (Conn.), 116.

proceeds, you cannot, after a judgment against *B* in trover, which is unsatisfied, have an action against *A*, either for the conversion, or for money had and received, to recover the value of the goods (*h*).

Where compensation in damages has been claimed for a trespass committed by several persons, and full compensation in damages has been received from one of the co-trespassers, the court will interfere summarily to prevent the plaintiff from seeking the same compensation a second time from another co-trespasser; but, where the injury done is an injury to character from the publication of a libel, the court will not interfere in a summary way to prevent the continuance of proceedings against the publisher of the libel, on the ground that damages have been recovered by the plaintiff from another publisher of the same libel, as the nature and extent of the injury in each particular case depend upon the extent of the circulation of the libel (*i*).

Damages, where there are several co-trespassers.—Where several persons have associated themselves together in the pursuit of a common object, and they all trespass upon the plaintiff's land in following out the common design, each is answerable for the whole of the damage done by all. Thus, where, in an action for a trespass by the defendant, with horses, &c., upon the plaintiff's land, it appeared that the defendant was the huntsman of the Berkeley hounds, and that he followed the hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, and destroyed the fences, and injured the crops, Lord Ellenborough held that the defendant was answerable for the whole of the damage, and directed the jury not to estimate the damage according to the mischief which the defendant had individually occasioned by his trespass, but according to the aggregate amount of mischief done by him, and his co-trespassers, and the hounds (*k*). Whenever two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act. The true criterion of damage in such cases is the whole injury which the plaintiff has sustained from the joint act of all. Where, therefore, two persons have a joint purpose, and thereby make themselves joint-trespassers, and the one beats violently, and the other a little, the real injury is the aggregate of the injury received from both, and each is responsible for all the damage; but the malignant motive of one party cannot be made a ground of

(*h*) *Buckland* v. *Johnson*, 15 C. B. 161; 23 L. J., C. P. 204. *Brown* v. *Wootton*, Cro. Jac. 73.

(*i*) *Martin* v. *Kennedy*, 2 B. & P. 69.

(*k*) *Hume* v. *Oldacre*, 1 Stark. 352; *Hamilton* v. *Hunt*, 14 Ill. 472; *Bishop* v. *Ely*, 9 John. (N.Y.) 294; *Prince* v. *Flynn*, 2 Litt. (Ky.) 240; *Ellis* v. *Howard*, 17 Vt. 330; *Waterbury* v. *Westervelt*, 9 N.Y. 598; *De Brahl* v. *Parker*, 2 Brev. (S.C.) 406.

96 aggravation of damage against the other, who was altogether free from any improper motive (*l*).

Contribution between joint tort-feasors.—No contribution can be claimed as between joint wrong-doers. If, therefore, a plaintiff who has recovered judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damages from the other (*m*).

Principal and agent—Liability of the principal—Express authority.—The principal is liable to third persons for the tortious acts of his agent, where he has expressly authorized or subsequently ratified such acts: for every one who procures the violation of a right to be done by another is as responsible as if he did the act himself. Thus, in violations of a right to property, whether real or personal, or to personal security, he who procures the wrong to be done is a joint wrong-doer, and may be sued either alone or jointly with the agent for the wrong done (*n*). So, if one person incites another to commit perjury, or forgery, or a nuisance, or to bring a false charge or accusation, and the accused party is acquitted of the charge, the instigator of the wrongful act is responsible for all its injurious consequences (*o*). Thus, where the mistress of a wine-shop brought an action against the defendant for procuring a soldier and others to come into her house with a man dressed in woman's clothes, and there conduct themselves with indecency, and collect a crowd, and raise a cry of "bawdy house," by reason whereof the mob threw stones and broke the plaintiff's windows, and damaged and destroyed her furniture, it was held that the defendant was responsible for all the damage sustained by the plaintiff, although he did not himself appear upon the scene, or join in the cry (*p*).

Moreover, he who procures or authorizes an act to be done by another, is responsible for all that the other necessarily does in the execution of his authority. Thus, every person who directs the doing of an act which cannot be done at all without inflicting an injury on a third person, is personally responsible to such third person (*q*); for, when the mischief is the natural and necessary result of the doing of the act ordered to be done, and not the result of some collateral or negligent act not ordered, the maxim *respondeat superior* applies (*r*). If, therefore, an assault

(*l*) *Clark* v. *Newsam*, 1 Exch. 140. *Brown* v. *Allen*, 4 Esp. 158. *Eliot* v. *Allen*, 1 C. B. 18.

(*m*) *Merryweather* v. *Nixan*, 8 T. R. 186. *Farebrother* v. *Ansley*, 1 Campb. 344. The rule is the same in this country, and there is no contribution between wrong-doers unless a remedy is given by statute.

(*n*) Erle, J., *Lumley* v. *Gye*, 2 El. & Bl. 216; 22 L. J., Q. B. 463.

(*o*) Com. Dig. Action upon the Case, A. *Coxe* v. *Smith*, 1 Lev. 119. *Fitzjohn* v. *Mackinder*, 9 C. B., N. S. 516; 30 L. J., C. P. 257.

(*p*) *Plunket* v. *Gilmore*, Fortescue, 211.

(*q*) *Wilson* v. *Peto*, 6 Moore, 49. *Witte* v. *Hague*, 2 D. & R. 33.

(*r*) *Hole* v. *Sittingbourne, &c. Rail. Co.*, 6 H. & N. 488; 30 L. J., Ex. 81.

97 or imprisonment of the plaintiff is the necessary or probable consequence of orders given by the defendant, he will be responsible in damages for such assault and imprisonment, although he did not directly order it, or contemplate the possibility of its occurrence (*s*). So, where a master ordered his servant to lay some rubbish near his neighbour's wall, but so that it might not touch the wall, and the servant used ordinary care in executing the orders of his master, but some of the rubbish nevertheless ran against the wall, it was held that the master was liable in trespass (*t*).

Principal and agent—Liability of the principal—Subsequent ratification.—"He that receiveth a trespasser, and agrees to a trespass after it is done, is no trespasser," observes Lord Coke, "unless the trespass was done to his use or for his benefit; and then his agreement subsequent amounteth to a precedent commandment; for in that case *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" (*u*). But, to make the subsequent ratification equivalent to a precedent commandment, the act of trespass must have been committed in the name, and avowedly on behalf and for the benefit, of the party subsequently ratifying it. If the trespass was not done for his use or benefit, or he is not in a situation to have originally commanded the act, then his subsequent assent does not make him a trespasser (*x*). "It is a known and well-established rule of law," observes Tindal, C. J., "that an 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 principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or advantage, to the same extent, and with all the consequences which follow from the same act if done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Hen. 4, fo. 35, where it was held that, if a bailiff took a heriot claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time: but, if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time" (*y*).

But, to make a man a trespasser by relation, from having ratified and adopted an act of trespass done in his name and for his benefit, it must be shown that the act was ratified and adopted

(*s*) *Glynn* v. *Houston*, 2 M. & G. 337; 2 Sc. N. R. 564.

(*t*) *Gregory* v. *Piper*, 9 B. & C. 591; 4 M. & R. 500.

(*u*) 4 Inst. 317. Dallas, C. J., *Hull* v. *Pickersgill*, 1 B. & B. 282.

(*x*) *Wilson* v. *Barker*, 4 B. & Ad. 616; 1 N. & M. 409. *Nicoll* v. *Glennie*, 1 M. & S. 592.

(*y*) *Wilson* v. *Tumman*, 6 M. & G. 242; 6 Sc. N. R. 907. *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513.

98 by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction, right or wrong. Promises to make inquiries, expressions of disapprobation of the conduct of the agent, accompanied by offers of compromise and overtures to purchase peace by returning the property taken or paying the value of it, are of themselves no evidence of the ratification of the wrongful act (*z*).

One of several partners cannot drag the firm or his co-partners into a trespass by signing a warrant or authority for the doing a wrongful act in the name of the firm of which he is a member; for one partner has no authority to bind the partnership to the commission of a wrongful act without the previous consent or subsequent concurrence of all the partners (*a*). If the act is done by the one partner for the benefit of the firm, and the firm afterwards take advantage of the act, and adopt the transaction, they may then become responsible for it.

Principal and agent—Liability of the agent.—The doctrine that the receipt of the agent is the receipt of the principal does not extend to the case of a wrongdoer, so that, if an agent obtains money in the name of his principal by extortion, as, for example, if he detains goods which he has no right to detain, and compels the owner to pay him money as the price of their restitution, he cannot shelter himself from responsibility on the ground that he is an agent. "A payment to *A*, expressly as the agent of *B*, for the purpose of redeeming goods wrongfully detained by *B*, and a receipt by *A* expressly for *B*, will still give a right of action against *A*" (*b*). So, also, an action can be maintained against a solicitor who wrongfully exacts money on behalf of his client, as the price of the liberation of deeds or securities unjustly and illegally detained by him on behalf of such client (*b*); or who extorts more than the principal and interest due on a mortgage deed, and the costs, under the threat of the exercise of a power of sale (*c*); or against a parish clerk who demands and receives on behalf of the rector a greater sum for searches in the parish register than he is entitled to charge (*d*); or a vestry clerk who wrongfully receives and detains, by direction of the vestry, burial fees which

99 belong to the rector (*e*); or a steward of a manor who exacts

(*z*) *Roe* v. *Birkenhead, &c. Rail. Co.*, 7 Exch. 36.

(*a*) *Petrie* v. *Lamont*, Car. & M. 96. See *Ex parte Adamson*, 8 Ch. D. 820; but see *Ex parte Salting*, 25 Ch. D. 148.

(*b*) *Smith* v. *Sleap*, 12 M. & W. 588. *Wakefield* v. *Newbon*, 6 Q. B. 276. *Ashmole* v. *Wainwright*, 2 Q. B. 827. *Oates* v. *Hudson*, 6 Exch. 346.

(*c*) *Close* v. *Phipps*, 7 M. & G. 586; 8 Sc. N. R. 381. *Fraser* v. *Pendlebury*, 31 L. J., C. P. 1.

(*d*) *Steele* v. *Williams*, 8 Exch. 625.

(*e*) *Spry* v. *Emperor*, 6 M. & W. 639.

exorbitant fees from tenants on their admittance (*f*). Nor can the agent discharge himself from liability even by paying the money over to his principal (*g*). Thus, where a bailiff illegally compelled the plaintiff, under a threat of distraining his goods, to pay him a sum of money, it was held that the fact of the bailiff's having, before the commencement of the action, paid over the entire sum to the sheriff, who had paid it into the exchequer, constituted no defence to the action (*h*). So, if a man acts as an agent in collecting the assets of a deceased person, and knows at the time that his employer is not the legal personal representative, he is himself responsible for the money he has received, although he may have duly accounted with his principal, and paid it over to him (*i*).

Master and servant—Liability of the master.—The master is liable to third persons for the torts, negligences, and other malfeasances or misfeasances, and omissions of duty, of his servant in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of, such misconduct; or even if he forbade the acts, or disapproved of them (*k*). But, although the master is thus liable for the torts and negligences of his servant, yet we are to understand the doctrine with its just limitation, that the tort or negligence occurs in the course of the employment; for the master is not liable for the torts or negligences of his servant in any matter beyond the scope of the employment, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use and benefit (*l*).

The employer is responsible for the act of his servant, whether the work is done by a domestic servant or day-labourer, or by a person who works by the job or piece, and contracts to do the work for a specific sum (*n*); provided always, that the workman is an ordinary labourer, personally engaged in the execution of the work, acting under the control of the master, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work (*o*).

(*f*) *Traherne* v. *Gardner*, 5 El. & Bl. 942.

(*g*) *Townson* v. *Wilson*, 1 Camp. 397. *Clark* v. *Johnson*, 3 Bing. 426. *Miller* v. *Avis*, 1 Selw. N. P. 90 n. *Oates* v. *Hudson*, 6 Exch. 348.

(*h*) *Snowden* v. *Davis*, 1 Taunt. 359. *Lovell* v. *Simpson*, 3 Esp. 153.

(*i*) *Sharland* v. *Mildon*, 5 Hare, 469; 10 Jur. 771. The doctrines stated in this and the previous sub-division are fully recognized in our courts.

(*k*) Story on Agency, s. 452.

(*l*) *Ib.*, s. 456. *McGowan & Co.* v. *Dyer*, L. R., 8 Q. B. 141. *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J., P. C. 31. *Coleman* v. *Riches*, 16 C. B. 104; 24 L. J., C. P. 125. *Udell* v. *Atherton*, 7 H. & N. 181; 30 L. J., Ex. 338. See Wood's Master and Servant, pp. 575—592.

(*n*) *Birkett* v. *Whitehaven Junction Rail. Co.*, 4 H. & N. 730; 28 L. J., Ex. 348.

(*o*) *Sadler* v. *Henlock*, 4 El. & Bl. 578; 24 L. J., Q. B. 138.

100 Thus, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship; and, if any damage happens through their default, it is the same as if it happened through the immediate default of the owner himself. So, the same principle prevails, if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself, or by a person specially deputed by him; if any damage happens through their default, the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So, in the case of a mine, if the owner employs a steward or manager to superintend the working of the mine, and to hire under-workmen, and he pays them on behalf of the owner, these under-workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer (*p*). If the landlord of a house, under a contract with his tenant to whom he has demised the house, employs workmen to repair the house, the landlord is responsible for a nuisance in the house occasioned by the negligence of his own workmen, although the repairs are done at the instance and for the benefit of the tenant, and are, when executed, to be paid for by him (*q*).

In an action on the case brought against a master and his servant, the plaintiff set forth that the defendants brought a coach with two ungovernable horses into Lincoln's Inn Fields, where people were always going to and fro upon their business, and there, "*improvide et absque debitâ consideratione ineptitudinis loci*," drove them to make them tractable and fit for a coach, and that the horses, being unmanageable, ran upon and injured the plaintiff; and it was urged that, the master being absent, the action was not maintainable against him, that no knowledge of the horses being unruly, nor any negligence was alleged; but judgment was given for the plaintiff (*r*).

If the person for whom the work is done selects the servant who is to do it, that will not relieve the master of such servant from liability for his negligence (*s*). But, when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with

(*p*) *Laugher* v. *Pointer*, 5 B. & C. 554.
(*q*) *Leslie* v. *Pounds*, 4 Taunt. 648.
(*r*) *Michael* v. *Alestree*, 2 Lev. 173.
(*s*) *Holmes* v. *Onion*, 2 C. B., N. S. 790; 26 L. J., C. P. 263.

101 as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him (*t*).

The master is not relieved from his responsibility for the wrongful act of his servant while doing his master's work, merely because an Act of Parliament has limited and controlled the choice of the master in the selection of his servants, and has compelled him to choose from a particular class of skilled or educated persons, supposed to be peculiarly fitted for the performance of the duties intrusted to them to discharge (*u*).

Master and servant—Liabilities of owners of carriages let to hire who select and send their own coachmen.—If carriage and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage and horses, the latter is responsible for all injuries resulting from the negligent and careless driving of the vehicle, although the carriage and horses may be in the possession and under the control of the hirer (*x*). But, if the latter drives himself, or appoints the coachman and furnishes the horses, the owner of the carriage cannot, of course, be made responsible for the negligence or want of skill of the coachman (*y*). Two ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses and a driver by the day or drive. They gave the driver a gratuity for each day's drive, and provided him with a livery-hat and coat, which were kept in their house; and, after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with the carriage, and inflicted an injury upon the plaintiff. It was held that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master (*z*). So, where an urban authority were supplied with a horse for a watering-cart and a driver, to whom they gave directions as to the streets to be watered, they were not held liable for the negligence of the driver (*a*). But, if any directions are given by the hirer of the horses to the driver or postilion to break through a line of carriages, or to do any unusual, improper, or aggressive act, or if he interferes so as to take the actual management of the horses into his own hands, he is responsible for any damage done by the driver whilst carrying out the directions given (*b*). "It is undoubtedly true," observes Parke, B., "that

(*t*) *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; 46 L. J., C. P. 283. *Murray* v. *Currie*, L. R., 6 C. P. 24; 40 L. J., C. P. 26. *Post*, p. 104.

(*u*) *Martin* v. *Temperley*, 4 Q. B. 298.

(*x*) *Laugher* v. *Pointer*, 5 B. & C. 572; 8 D. & R. 556. *Smith* v. *Lawrence*, 2 M. & Ry. 2. *Sammell* v. *Wright*, 5 Esp. 262. *Dean* v. *Branthwaite*, 5 Esp. 36.

(*y*) *Croft* v. *Alison*, 4 B. & Ald. 590. *Halt* v. *Pickard*, 3 Campb. 187.

(*z*) *Quarman* v. *Burnett*, 6 M. & W. 499. *Laugher* v. *Pointer*, 5 B. & C. 547; 8 D. & R. 556.

(*a*) *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890; 54 L. J., Q. B. 345.

(*b*) *M'Laughlin* v. *Pryor*, 4 M. & G. 48; 4 Sc. N. R. 665.

102 there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of" (*c*). A cab-driver, employed on the usual terms of paying so much a day for his cab and keeping the rest himself, is, as between the cab-proprietor and the public, by virtue of the Acts relating to the subject, the servant of the proprietor, who is therefore liable for the cab-driver's negligence while acting within the scope of the purposes for which the cab is intrusted to him (*d*). But where the cab-driver hires the cab only, and he himself provides a horse, he is not the servant of the proprietor of the cab so as to make the latter liable for his negligence (*e*).

Master and servant—Liabilities of borrowers of carriages for the negligence of their drivers.—A person who has borrowed a horse and chaise for his own use and enjoyment, and who rides about in it, driven by a friend, whom he allows to drive, is responsible for the negligence of the driver (*f*).

Master and servant—Liabilities of shipowners, &c.—The register of a ship is *primâ facie* evidence that the person registered as the owner is the master of the persons in charge of the ship, and, consequently, answerable for their negligence. Thus, where the plaintiff, who was lawfully passing over a ship lying in dock, was injured by the negligence of a person left in charge of the ship, the production of the ship's register was held to be *primâ facie* evidence that the ship-keeper was the servant of the person appearing on the register as the owner, and, therefore, that such owner was responsible (*g*).

Where a sloop was navigated under a verbal agreement between *A*, "the managing owner," registered according to the Merchant Shipping Act, 1875, and *B*, the captain, by which, on condition that *A* should have one-third of the net profits, accounts of which were to be rendered to him by *B* from time to time, *B* was at liberty to go to any port, and take and refuse any cargo he chose, and was also to hire and pay the crew, and supply the stores, *A* having no control over the vessel, it was held that the agreement did not amount to a demise of the vessel, and that, whatever might be the precise relationship thereby created between *A* and

(*c*) *Quarman* v. *Burnett*, 6 M. & W. 499.

(*d*) *Powles* v. *Hider*, 6 El. & Bl. 207; 25 L. J., Q. B. 331. *Venables* v. *Smith*, 2 Q. B. D. 279; 46 L. J., Q. B. 470.

(*e*) *King* v. *Spurr*, 8 Q. B. D. 104; 51 L. J., Q. B. 105.

(*f*) *Wheatley* v. *Patrick*, 2 M. & W 650.

(*g*) *Hibbs* v. *Ross*, L. R., 1 Q. B. 534; 35 L. J., Q. B. 193.

103 *B inter se*, *A* was responsible to the public for the negligence of *B* (*h*).

Where the lessee of a ferry hired of the defendants a steamer, with a crew, for the day, to carry his passengers, it was held that the defendants were liable for injuries caused to the passengers by the negligence of the crew, who were the servants of the defendants, although the passengers contracted with the lessee of the ferry for conveyance in the steamboat, and paid their fares to such lessee (*i*).

Master and servant — Contractors and sub-contractors. — The liability of any one other than the person actually doing the act from whence the injury results, proceeds on the maxim *qui facit per alium facit per se*. The master has the selection of the servant employed; and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule nor the rule itself can apply to a case, where the person sought to be charged does not stand in the character of employer and master to the person by whose negligent act the injury has been occasioned (*k*).

Although, therefore, a person has ordered or directed a particular thing to be done, yet, if he does not employ his own servants and workmen to do it, but intrusts the execution of the work to a person who exercises an independent employment, and has the immediate dominion and control over the workmen engaged in the work, he is not responsible for injuries done to third persons from the negligent execution of the work (*l*), unless these injuries are such as in the natural course of things may be expected to arise from the work ordered to be done, if proper precautions are not taken to prevent them (*m*). Thus, where a butcher employed a licensed drover in the way of his ordinary calling to drive a bullock from Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's show-room, where it broke several marble chimney-pieces, it was held that the butcher was not answerable for the damage (*n*). So, where a company, empowered by Act of Parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the

104 contractor's workmen for incompetence, and the workmen, in

(*h*) *Steel* v. *Lester*, 3 C. P. D. 121; 47 L. J., C. P. 43.

(*i*) *Dalyell* v. *Tyrer*, El. Bl. & El. 899; 28 L. J., Q. B. 52.

(*k*) *Reedie* v. *London and North Western Rail. Co.*, 4 Exch. 255.

(*l*) *Cuthbertson* v. *Parsons*, 12 C. B. 304.

(*m*) *Post*, p. 106.

(*n*) *Milligan* v. *Wedge*, 12 Ad. & E. 737.

constructing a bridge over a highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, it was held, in an action against the company by the administratrix of the deceased, that they were not liable (*o*). It is immaterial that the defendant lends some of his own men to the contractor, if they are acting substantially as the contractor's servants at the time of the injury (*p*). But, where the defendants, who were occupiers of a bonded warehouse in Liverpool, employed a master-porter for the purpose of removing some barrels of flour from their warehouse and lowering them into a cart, and the master-porter used his own tackle, and brought and paid his own men, and, through the negligence of the men or the insufficiency of the tackle, one of the barrels slipped from the tackle whilst it was being lowered into the cart, and fell upon the plaintiff and injured him, it was held that the defendants were responsible for the injury (*q*). Here the work, it has been observed, was in effect done by the defendants themselves at their own warehouse, the workmen, though engaged by the master-porter, being under the control of the defendants, and acting substantially as their servants (*r*); and it is upon this ground alone, it seems, that the above case can be supported (*s*).

Where work which if properly conducted can occasion no risk of injury to others, is placed in the hands of a builder or contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it, exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the person responsible for injuries to strangers from the negligent execution of the work (*t*); and, if the work is done under the immediate control and superintendence of a sub-contractor, then the latter is the party responsible for any wrong done by the workmen he employs in the execution of the work. It must not be understood, however, that a contractor cannot become liable for the negligence of his sub-contractor. If the contractor personally interferes and gives directions to the sub-contractor, or to the workmen employed by him, he will be responsible for the orders given; but he cannot be charged simply on the ground of his filling the character of contractor (*u*).

(*o*) *Reedie* v. *London and North Western Rail. Co.*, 4 Exch. 244.

(*p*) *Murray* v. *Currie*, L. R., 6 C. P. 24; 40 L. J., C. P. 26.

(*q*) *Randleson* v. *Murray*, 8 Ad. & E. 109.

(*r*) Denman, C. J., *Milligan* v. *Wedge*, 12 Ad. & E. 741. *West Riding Rail. Co.* v. *Wakefield Board of Health*, 5 B. & S. 478; 33 L. J., M. C. 174.

(*s*) *Murphy* v. *Caralli*, 3 H. & C. 462; 34 L. J., Ex. 14.

(*t*) *Steel* v. *South Eastern Rail. Co.*, 16 C. B. 550.

(*u*) *Overton* v. *Freeman*, 11 C. B. 873; 21 L. J., C. P. 52. *Blake* v. *Thirst*, 2 H. & C. 20; 32 L. J., Ex. 189. The doctrine stated in this sub-division is adopted in this country, and an employer who commits the whole charge of a certain work to a contractor, reserving to himself no control over it, is not responsible for injuries inflicted by him in the prosecution of the work. See Wood's Master and Servant, p. 614.

105 Where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and to prepare and fix the necessary gas-fittings, and the builder made a sub-contract with a gas-fitter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion, which injured the butler of the club and his wife, it was held that the gas-fitter, and not the builder, was liable for the negligence (*x*).

If the execution of repairs to a dwelling-house, or the construction of a drain, is entrusted to a builder or contractor, who exercises an independent employment, and selects his own servants and workmen, and has the immediate control and superintendence of the work, the owner of the house, who employs the contractor, is not responsible for the creation of nuisances in the public thoroughfare by the negligence of the contractor's servants, if he was ignorant of their unlawful proceedings, and had no knowledge of the probable consequences of their acts (*y*).

If any excavations or constructions of any kind are authorized to be made over or across a public thoroughfare, by private individuals or a public company, or by commissioners, and the works are lawful in themselves, and can be done without injury to individuals, and without creating any nuisance, and the persons directing the works to be executed employ a contractor to do the work, who selects the workmen, and has the entire conduct and management of the work, the persons so employing the contractor, and authorizing the execution of the works, are not themselves responsible for nuisances or injuries arising from the incompetence of the contractor, or for the negligent execution of the works by him, his servants, or agents, or for damage from things done by the contractor or his workmen, which were never authorized or ordered to be done by the company or commissioners (*z*).

Where commissioners, appointed under an Act of Parliament for the improvement of the navigation of a canal, agreed with a contractor for the performance of certain works for draining and carrying off the surplus waters of the canal, and the contractor, in the exercise of the powers conferred on the commissioners by the Legislature, constructed a drain through the land of the plaintiff for the purpose of carrying off the waste water, and the plaintiff's land was flooded in consequence of the defective and negligent construction of the drain, it was held that the con-

(*x*) *Rapson* v. *Cubitt*, 9 M. & W. 710.
(*y*) *Peachey* v. *Rowland*, 13 C. B. 185.
(*z*) *Gray* v. *Pullen*, 5 B. & S. 970, 981; 34 L. J., Q. B. 265. *Knight* v. *Fox*, 5 Exch. 725; 20 L. J., Ex. 9. *Peachey* v. *Rowland*, 13 C. B. 182; 22 L. J., C. P. 81, qualifying *Bush* v. *Steinman*, 1 B. & P. 404.

106 tractor, and not the commissioners, was responsible for the nuisance, as the contractor was not the servant of the company, but occupied an independent position, having the selection and entire control of the workmen and the sole management of the works (*a*). In this case the defective drain, causing the overflow of the water and creating the nuisance, was on the plaintiff's own land. Had the nuisance arisen upon the land of the defendants, they would have been responsible for it.

A man who orders a work to be executed, lawful in itself, but from which, in the natural course of things, injurious consequences to others must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to exercise reasonable skill and care in the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. Thus, where *A* and *B* were the respective owners of two adjoining houses, *A* being entitled to the support for his house of *B*'s soil, and *B* employed a contractor to pull down his house and excavate the foundations, and *A*'s house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient, it was held that *B* was liable, and that it would have been no defence if he had expressly stipulated with the contractor that he should do all that was necessary to support the plaintiff's house (*b*).

Where the defendants have employed a contractor to do an act which is unlawful in itself, or which cannot be done without creating a nuisance, then the act done by the contractor is in substance their act, and they as well as he are responsible for the consequences which naturally result from it (*c*).

After the contract has been properly completed, and the works handed over to the commissioners or persons who have employed the contractor, the liability of the contractor ceases; and, for any subsequent injury caused by the natural result of the work the contractor has completed, the commissioners and not the contractor will be responsible: as where the defendant, under a contract with the Metropolitan Board of Works, opened a highway for the purpose of constructing a sewer thereunder, and, after finishing the sewer, properly filled in and made good the road,

(*a*) *Allen* v. *Hayward*, 7 Q. B. 960; 15 L. J., Q. B. 99.

(*b*) *Bower* v. *Peate*, 1 Q. B. D. 321; 45 L. J., Q. B. 446. *Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J., Q. B. 689. *Hughes* v. *Percival*, 8 App. Cas. 443; 52 L. J., Q. B. 719. See Wood's Master and Servant, pp. 592—631.

(*c*) *Ellis* v. *Sheffield Gas Co.*, 2 El. & Bl. 757; 23 L. J., Q. B. 42. *Hole* v. *Sittingbourne Rail. Co.*, 6 H. & N. 500; 30 L. J., Ex. 81. *Blake* v. *Thirst*, 2 H. & C. 20; 32 L. J., Ex. 188. *Brownlow* v. *Metropolitan Board of Works*, 16 C. B., N. S. 546; 33 L. J., C. P. 233.

107 which, however, subsequently subsided, which is the natural result of such opening of the road and loosening of the materials of which it is composed, and the plaintiff's horse stumbled in one of the holes so caused and was injured (*d*).

Master and servant—Scope of the employment.—A master is responsible for the wrongful act of his servant, even if it is wilful, or reckless, or malicious, provided the act is done by the servant within the scope of his employment, and in furtherance of his master's business, or for the master's benefit (*e*); but, if the servant, at the time he does the wrong, is not acting in the execution of the master's business and within the scope of his employment as his servant, but is carrying into effect some exclusive object of his own, the master will not be answerable for his act. Thus it is said, "if I command my servant to distrain, and he ride on the distress, he shall be punished, and not I" (*f*). So, "if my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished (*g*); and, if my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts" (*h*). So, if a servant, authorized merely to distrain cattle *damage feasant*, drives cattle from the highway into his master's close, and there distrains them, the master will not be responsible for the wrongful act (*i*). And, where the defendant employed a carpenter to make a signboard, and obtained permission for him to make it in the plaintiff's shed, and the carpenter in lighting his pipe negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant; for the act of the carpenter in lighting his pipe was not connected with the employment on which he was engaged by the defendant (*k*). And where a broker, in the execution of a warrant obtained by a company, committed an assault, it was held that the company were not liable (*l*).

What is or is not within the course of the servant's employ-

(*d*) *Hyams* v. *Webster*, L. R., 4 Q. B. 138; 38 L. J., Q. B. 21. *Bartlett* v. *Baker*, 3 H. & C. 153; 34 L. J., Ex. 8.

(*e*) *Huzzey* v. *Field*, 2 Cr. M. & R. 432, 440.

(*f*) Noy's Maxims, ch. 44.

(*g*) Bro. Abr. TRESPASS, pl. 435.

(*h*) 2 Roll. Abr. 553.

(*i*) *Lyons* v. *Martin*, 8 Ad. & E. 512. It is doubtful whether the doctrine stated in the last paragraph would now be adopted, the tendency of our courts being to hold the master liable for all injuries inflicted by him in the prosecution of the business with which he is entrusted, even though they result from acts not contemplated by the master, or in disobedience of his positive orders. The question is one of fact for the jury, whether the act was done in the course of his employment, and in furtherance thereof. Wood's Master and Servant, pp. 524—662.

(*k*) *Williams* v. *Jones*, 3 H. & C. 602; 33 L. J., Ex. 297.

(*l*) *Richards* v. *West Middlesex Waterworks Co.*, 15 Q. B. D. 660.

ment, or the course of his authority, is, within certain limits, a question of fact; and the decisions of the courts on the subject are not altogether consistent, or easily to be reconciled (*m*).

108 Where a partially intoxicated passenger in an omnibus refused to get out and pay his fare when the omnibus arrived at its destination, and the conductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that there was evidence for the jury of the wrongful act having been done by the servant in the course of his employment about his master's business, and the omnibus proprietor was made responsible for the injury (*n*). And, where a stevedore employed to ship iron rails, had a foreman, whose duty it was (assisted by labourers) to carry the rails from the quay to the ship *after* the carman had brought them to the quay and unloaded them there, and, the carman not unloading the rails to the foreman's satisfaction, the latter got into the cart, and threw out some of them so negligently that one fell upon and injured the plaintiff, who was passing by, it was held that there was evidence for the jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts (*o*). So, where the servant was authorized by a railway company to arrest persons supposed to be guilty of committing offences for which the company had power to arrest, and the servant made a mistake, and arrested a person whom he supposed to be, but who in fact was not, guilty of such an offence, it was held that the company were liable (*p*). But, where the servant was authorized by a railway company to arrest in certain cases in which the company had power to arrest, and the servant arrested the plaintiff in a case in which the company had no power to arrest, it was held that there could be no implication of authority from the company to the servant to arrest in cases where the company itself had no power to arrest (*q*). And, where a local board of health, being in occupation of a sewage farm, had given the servant plenary powers for the management of such farm in the most beneficial manner, and, with the view of rendering a

(*m*) See *Lucas* v. *Mason*, L. R., 10 Ex. 251; 44 L. J., Ex. 145, a decision not easily reconciled with *Seymour* v. *Greenwood*, 7 H. & N. 355; 30 L. J., Ex. 327.

(*n*) *Seymour* v. *Greenwood*, 7 H. & N. 355; 30 L. J., Ex. 327, qualifying *M'Manus* v. *Cricket*, 1 East, 107. *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, L. R., 7 C. P. 415; 8 *ib.* 148; 42 L. J., C. P. 78. *Shea* v. *Sixth Avenue R. R. Co.*, 62 N. Y. 180; *Holmes* v. *Wakefield*, 12 Allen (Mass.), 580; *Ramsden* v. *Boston, &c. R. R. Co.*, 104 Mass. 117; *Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116; *Rounds* v. *Del. & L. R. R. Co.*; *Lovett* v. *Salem, &c. R. R. Co.*; 9 Allen (Mass.), 557; *Garretson* v. *Duenckel*, 50 Mo. 104; *Hamilton* v. *Third Avenue R. R. Co.*, 53 N. Y. 25; *Minton* v. *Pacific R. R. Co.*, 41 Mo. 503.

(*o*) *Burns* v. *Poulsom*, L. R., 8 C. P. 563; 42 L. J., C. P. 302.

(*p*) *Moore* v. *Metropolitan Rail. Co.*, L. R., 8 Q. B. 36; 42 L. J., Q. B. 23.

(*q*) *Poulton* v. *London and South Western Rail. Co.*, L. R., 2 Q. B. 534; 36 L. J., Q. B. 294.

ditch which ran between the farm and the land of the plaintiff more capable of carrying off the drainage of the farm, the servant went upon the plaintiff's land and pared away his side of the ditch, it was held that the act so done was not within the scope of the servant's employment, and consequently that the local board were not liable (*r*).

109 Wherever the master intrusts a horse, or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of the master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. Where the master was riding along a public highway with a mounted groom behind him, and the master having suddenly quickened his pace, the groom spurred his horse to keep up with him, whereupon the horse struck out with his hind legs and kicked a waggoner who was walking in the road at the head of his team, it was held that the master was responsible for the injury (*s*).

In all cases of negligent and improvident driving by a servant employed to drive, the master will be responsible if the servant was driving about the master's business, or using the master's horses and carriage for the master's benefit; and the master cannot exonerate himself from liability by showing that the servant was acting in disobedience of his orders. Where, therefore, an omnibus company gave written instructions to their drivers "to drive at a steady pace, and not on any account to race with or obstruct other omnibuses," and a driver disobeyed these instructions, and wilfully drew across the road to obstruct another omnibus, and ran against it and upset it, it was held that the instructions given by the omnibus company to their servants could not exonerate the company from responsibility for the careless, wilful, or malicious acts of such servants while carrying passengers for the benefit of the company (*t*). So, where the carter of a contractor, in defiance of his master's orders, left his cart standing in the street while he went away for dinner, and the horse ran away and injured the plaintiff's railings, it was held that the contractor was responsible (*u*).

(*r*) *Bolingbroke (Lord)* v. *Swindon Local Board*, L. R., 9 C. P. 575; 43 L. J., C. P. 575. *Sed quære.*

(*s*) *North* v. *Smith*, 10 C. B., N. S. 572.

(*t*) *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526; 32 L. J., Ex. 34. *Betts* v. *De Vitre*, L. R., 3 Ch. 441; 37 L. J., Ch. 326. *Shea* v. *Sixth Avenue R. R. Co.*, *ante*; *Hewitt* v. *Swift*, 3 Allen (Mass.), 420; *Bryant* v. *Rich*, 106 Mass. 180; *Shirley* v. *Billings*, 8 Bush. (Ky.) 147; *Goddard* v. *Grand Trunk R. R. Co.*, 57 Me. 202; *Duggins* v. *Watson*, 15 Ark. 118; *Higgins* v. *Watervliet T. Co.*, 46 N. Y. 23; *Jackson* v. *Second Avenue R. R. Co.*, 47 N. Y. 9.

(*u*) *Whatman* v. *Pearson*, L. R., 3 C. P. 422.

It is not necessary to prove any express request or order by the master to the servant to use the master's horse or carriage. If, at the time of the injury, the servant appears to have been driving his master's carriage in the ordinary course of his employment, the master will be *primâ facie* responsible (*x*).

But, if my servant, without my knowledge wrongfully takes my carriage or my horse, for his own purposes, and drives against another person's carriage, I shall not be responsible for the

110 injury; for, when the servant takes the master's carriage or horse, and uses it under such circumstances, he gains a special property for the time being in the chattel, and makes it for the time, and for the particular wrongful purpose, his own (*y*). Where the defendant's coachman was driving the defendant's carriage through a narrow street which was blocked up by a luggage-van containing goods of the plaintiff, which were being unladen and taken into the plaintiff's house, and behind the van stood the plaintiff's gig, and the defendant's coachman (there not being room for the carriage to pass) got off his box and laid hold of the van-horse's head and moved the van, and caused a large packing-case to tumble on the shafts of the gig, and break them, it was held that the defendant was not liable for the injury, the servant at the time not being in the execution of his master's orders, or doing his master's work (*z*). So, where the defendant's carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out the defendant's horse and cart, and on the way home, after he had collected some empty casks of his master's, negligently ran against the plaintiff's cab and damaged it, it was held that he was not acting within the scope of his employment at the time of the accident (*a*).

Where a porter of a railway company so negligently managed a truck containing luggage, that a portmanteau fell from it and injured the plaintiff, it was held that the railway company were responsible, although the plaintiff had neither arrived nor was going by the defendants' line, and was merely passing along a platform used in common by three railway companies (*b*).

If the master of a ship, who has received no instructions from his owners as to performing salvage services, agrees to tow a disabled ship into port, he is acting within the scope of his general

(*x*) *Patten* v. *Rea*, 2 C. B., N. S. 613; 26 L. J., C. P. 237.

(*y*) *M'Manus* v. *Cricket*, 1 East, 106; 2 Roll. Abr. 553. *Sleath* v. *Wilson*, 9 C. & P. 607; qualified by *Seymour* v. *Greenwood*, 7 H. & N. 355; 30 L. J., Ex. 327. *Joel* v. *Morison*, 6 C. & P. 503. *Mitchell* v. *Crassweller*, 13 C. B. 237. *Storey* v. *Ashton*, L. R., 4 Q. B. 476; 38 L. J., Q. B. 223.

(*z*) *Lamb* v. *Palk*, 9 C. & P. 631. *Sed quære.*

(*a*) *Rayner* v. *Mitchell*, 2 C. P. D. 357. *Phelan* v. *Stiles*, 43 Conn. 426; *Adams* v. *Cost*, 62 Md. 264.

(*b*) *Tebbutt* v. *Bristol and Exeter Rail. Co.*, L. R., 6 Q. B. 73; 40 L. J., Q. B. 78.

authority as master, and his owners are responsible for his negligence in towing the disabled ship whereby she is damaged (*c*).

Master and servant—Liability of master in the case of fellow-servants.—Where both the person injured and the person inflicting the injury are fellow-servants in the same employment, the master was generally exempt from liability (*d*), before the passing of the Employers' Liability Act.

Master and servant—Employers' Liability Act.—Since the

111 passing of that Act (*e*) the legal result of the plaintiff being a *workman* (within the cases contemplated by the statute) is not that he has "impliedly contracted to bear the risks of the employment" (*f*), which was the former theory, and he is now (if within the statute) entitled to bring his action of tort against the master. The first and second sections of the Act describe or limit the classes of cases which are to come within the Act. They are as follows:—

"1. Where, after the commencement of this Act, personal injury is caused to a workman—

"(1.) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with 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 intrusted 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 bye-laws of the employer, or in obedience to particular instructions given 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 signal, points, locomotive engine, or train upon a railway;

(*c*) *The Thetis*, L. R., 2 A. & E. 365; 38 L. J., Adm. 42.

(*d*) Addison on Contracts, 8th ed. p. 445. This is the rule in this country in all the States, except where by statute the master is made liable for the negligence of a co-servant. See Wood's Master and Servant, Chap. XVI.

(*e*) 43 & 44 Vict. c. 42. A workman may contract himself out of the Act. *Griffiths* v. *Lord Dudley*, *infra*.

(*f*) *Per* Cave, J., *Griffiths* v. *Lord Dudley*, 9 Q. B. D. 357, 366; 51 L. J., Q. B. 543.

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

"2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases: that is to say—

"(1.) Under sub-sect. one of sect. one, 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 in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition;

"(2.) Under sub-sect. four of sect. one, unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned; provided that where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's principal secretaries of state, or by the Board of Trade, or any other department of the government, under or by virtue of an Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective bye-law;

"(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer, or such superior, already knew of the said defect or negligence."

With respect to these sections it may be observed that the Act only applies to "workmen," as defined by the Employers and Workmen Act, 1875, s. 10, and to railway servants (*g*), so that clerks, shopmen, timekeepers, &c., appear to be excluded (*h*). Seamen are not within the statute (*i*), nor are workmen in the service of the Crown as they are not mentioned (*k*).

(*g*) Sect. 8.

(*h*) A person hired for the purpose of assisting a firm in carrying out mechanical ideas is not a mechanic or workman under the Employers and Workmen Act, 1875. *Jackson* v. *Hill & Co.*, 13 Q. B. D. 618. Also an omnibus conductor is not a workman. *Morgan* v. *General Omnibus Co.*, 12 Q. B. D. 201; 13 Q. B. D. 832; 53 L. J., Q. B. 352.

(*i*) See 43 & 44 Vict. c. 16, s. 11.

(*k*) Maxwell on Statutes, p. 112. Workmen includes workwomen (13 & 14 Vict. c. 21, s. 4), and apprentices of a limited class are probably included (see ss. 5, 6, and 12 of 38 & 39 Vict. c. 90).

The meaning of the word "defect" in the above sections has received many illustrations (*l*). Under the law, as it stood before the Act, the master could (besides denial of negligence and assertion of contributory negligence), set up (1) common employment, and (2) that servant has undertaken the risk; but now these two defences are taken away in cases under the statute, and there is substituted by sub-sect. 3 another defence, viz.: that the servant knew of the defect and the master did not (*m*).

113 The meaning of the words "person who has any superintendence entrusted to him" is explained by sect. 8 to mean "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour" (*n*).

The meaning of the words "to whose orders the workman at the time of the injury was bound to conform" has also given rise to some litigation (*o*).

The words "train" (*p*), "charge and control" (*q*), "railway" (*r*), have also received an interpretation by the Courts.

By sect. 3 of the Act, "The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury."

By sect. 4, "An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case 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."

(*l*) *Heske* v. *Samuelson & Co.*, 12 Q. B. D. 30; 53 L. J., Q. B. 45; approved of in *Cripps* v. *Judge*, 13 Q. B. D. 30; 53 L. J., Q. B. 583. *McGiffen* v. *Palmer's Ship Co.*, 10 Q. B. D. 5; 52 L. J., Q. B. 25. *Paley* v. *Garnett*, 16 Q. B. D. 52. *Thomas* v. *Quartermaine*, 17 Q. B. D. 414; 55 L. J., Q. B. 439. The word "works" in s. 1 means works already completed. *Howe* v. *Fineh*, 17 Q. B. D. 187.

(*m*) *Weblin* v. *Ballard*, 17 Q. B. D. 122; 55 L. J., Q. B. 395. See, however, *Thomas* v. *Quartermaine*, *supra*.

(*n*) As to an omnibus conductor, see *ante*, note (*h*), and *Shaffers* v. *General Steam Navigation Co.*, 10 Q. B. D. 356; 52 L. J., Q. B. 260; where a man guiding the beam of a crane was held to be engaged in manual labour and not superintending. But *contra*, where a man handed a plank to another. *Osborn* v. *Jackson*, 11 Q. B. D. 619.

(*o*) *Laming* v. *Webb*, L. T. Feb. 4, 1882, p. 247. *Bunker* v. *Midland Rail. Co.*, 47 L. T. 476. *Millward* v. *Midland Rail. Co.*, 14 Q. B. D. 68; 54 L. J., Q. B. 202.

(*p*) *Cox* v. *Great Western Rail. Co.*, 9 Q. B. D. 107.

(*q*) *Gibbs* v. *Great Western Rail. Co.*, 12 Q. B. D. 208.

(*r*) *Doughty* v. *Firbank*, 10 Q. B. D. 358; 52 L. J., Q. B. 480. *Cox* v. *Great Western Rail. Co.*, *supra*.

The notice under s. 4 must be in writing, for this section must be read with sect. 7, *post*, p. 114 (*s*), and the notice must be in accordance with sect. 7, and must not in general, it should seem, be made by reference to some other document, and, at all events, not by mere reference to words (*t*). The notice need not describe the injury with particularity, and therefore the words "for injury to his leg" are sufficient (*u*). So, a notice that the plaintiff "was injured in consequence of your negligence in leaving a certain hoist unprotected, whereby, &c.," was held sufficiently to state the "cause of injury" within the section, though, as the jury found,

114 the negligence consisted in allowing the plaintiff to go alone on the hoist, and not in leaving it unprotected (*x*).

By sect. 5, "There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or persons shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action."

By sect. 6, provision is made for the trial of all actions under the statute in the county court (*y*).

By sect. 7, "Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

"The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(*s*) *Moyle* v. *Jenkins*, 8 Q. B. D. 116; 51 L. J., Q. B. 112. *Keen* v. *Millwall Dock Co.*, 8 Q. B. D. 482; 51 L. J., Q. B. 277.

(*t*) *Keen* v. *Millwall Dock Co.*, *supra*.

(*u*) *Stone* v. *Hyde*, 9 Q. B. D. 76; 51 L. J., Q. B. 450.

(*x*) *Clarkson* v. *Musgrave*, 9 Q. B. D. 386; 51 L. J., Q. B. 525.

(*y*) As to removing actions from a county court to a superior court, see 9 & 10 Vict. c. 95, s. 90; 19 & 20 Vict. c. 108, ss. 38, 39 (which latter section does not apply to the Employers' Liability Act. *The Queen* v. *Judge of the City of London Court*, 15 Q. B. D. 905; 54 L. J., Q. B. 330), and 28 & 29 Vict. c. 99, s. 39. See Pitt-Lewis, County Court Practice, p. 171 *et seq.* Actions may also be removed by certiorari; but see *Munday* v. *Thames Ironworks Co.*, 10 Q. B. D. 59; 52 L. J., Ch. 380.

"The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to p. 'hat the notice was properly addressed and registered.

"Where the employer is a body of persons, corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the **115** office, or, if there be more than one office, any one of the offices of such body.

"A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action, arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

A notice left at the place of business after business hours, not in the letter box, but in a box used by the foreman, is not properly served (*z*).

The "defect or inaccuracy" mentioned in the section must be such as to prejudice or mislead the defendant, and an omission of the date of the injury was held to be such a defect or inaccuracy (*a*).

By sect. 8, "For the purposes of this Act, unless the context otherwise requires—

"The expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour:

"The expression 'employer' includes a body of persons corporate or incorporate:

"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

Master and servant—Liability of master in the case of volunteers.—If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and gets injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater

(*z*) *Adams* v. *Nightingale*, L. T. April 15, 1882, p. 424, Grove, J. and Huddleston, B.

(*a*) *Carter* v. *Drysdale*, 12 Q. B. D. 91.

duties on the employer, than would have existed if he had been a hired servant (*b*). But, if he is assisting the defendant's servants with the defendant's assent for a purpose in which he and the defendant have a common interest, as, for instance, for the purpose of expediting the delivery of his own goods, he is not a mere volunteer, and is entitled to recover if he is injured by the negligence of the defendant's servants (*c*).

116 *Master and servant—Liability of the servant.*—The person who actually inflicts the injury through his own negligence, is, of course, always responsible for the injurious consequences of his default. "Those," observes Domat, "who construct works, or who do any other thing from whence may ensue damage to others, will be answerable for that damage, if they have not taken the necessary precautions to prevent it. Thus, masons, carpenters, and others, who carry materials up their scaffolds, and those who, from the top of a tree, cut down the branches thereof, must give timely warning to all persons likely to be endangered by their proceedings, and will be answerable in damages if they neglect so to do" (*d*). Both the master who commands the doing, and the servant who does, an act of trespass, may be made responsible as principals, and sued jointly for damages (*e*). A servant keeping the key of a room, knowing that a man is imprisoned therein, is a trespasser (*f*). The servant is equally liable with the master in respect of his own personal participation in a wrongful act, and cannot discharge himself from liability on the ground that he acted under unavoidable ignorance and in obedience to his master's orders; nor can he justify under any authority from his master, when his master had no authority in the matter (*g*). A servant may be liable for a conversion to which he is a party, though he is acting in obedience to the commands of his master, and under authority from him (*h*); and a servant who is required by statute to obey the lawful orders of his master, as the surveyor of a highway board is required to obey those of the board (*i*), is, nevertheless, personally responsible, if in obeying their orders he commits a trespass or other unlawful act (*j*).

(*b*) *Degg* v. *Midland Rail. Co.*, 1 H. & N. 773; 26 L. J., Ex. 173. *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L. J., Q. B. 30. See Wood's Master and Servant, p. 909.

(*c*) *Wright* v. *London and North-Western Rail. Co.*, 1 Q. B. D. 252; 45 L. J., Q. B. 570. In such a case the plaintiff occupies a position analogous to that of a person who has been licensed by the occupier to come on the premises of the latter for the joint interest of both.

(*d*) Domat, liv. 2, tit. 8, s. 4.

(*e*) *Bates* v. *Pilling*, 6 B. & C. 38.

(*f*) Bro. Abr. TRESPASS, pl. 133, 256, 265.

(*g*) Alderson, B., *Hutchinson* v. *York and Newcastle Rail. Co.*, 5 Exch. 350. *Stephens* v. *Elwall*, 4 M. & S. 261. *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J., Ex. 224.

(*h*) *Perkins* v. *Smith*, 1 Wils. 328. *Davies* v. *Vernon*, 6 Q. B. 443.

(*i*) 25 & 26 Vict. c. 61, s. 16.

(*j*) *Mill* v. *Hawker*, L. R., 10 Ex. 92; 44 L. J., Ex. 49.

A servant who merely hires labourers for the performance of the master's work, is not answerable for the negligence of such fellow-servants, or for injuries inflicted by them in the course of their employment. Thus a gardener or a steward, who employs labourers under him to do his master's work, is not answerable for the defaults or improper conduct of such labourers causing damage to a third person. In such cases the action must either be brought against the hand committing the injury, or against
117 the owner for whom the act was done (*k*), or against both the one and the other jointly (*l*). But a clerk who superintends the erection of a building by which ancient lights are darkened, and who alone directs the workmen, is liable, as well as the contractors who appointed him to superintend the progress of the building (*m*).

If the injured person sues either the master or the servant and obtains judgment, he cannot sue the other (*n*); and, where a cabman, who had been injured by the negligent driving of an omnibus, accepted a sum which was awarded to him by a magistrate under the 6 & 7 Vict. c. 86, s. 28, as compensation from the driver, it was held that he could not sue the master (*o*).

Corporations.—A corporation, by accepting a grant of land from the Crown upon certain conditions as to the repair of sea-walls and defences, may render themselves liable to an action of tort at the suit of any party sustaining any private and peculiar damage from the non-repair of such sea-walls, &c. (*p*). A corporation may also be made responsible in an action for a trespass in breaking and entering a close, and for seizing goods; for every corporate body is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation, without any order or authority under its common seal (*q*). A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress; and the jury may infer, in the matter of a wrongful distress or seizure of goods, that the actual wrong-doer was the agent of the corporation, from the fact of their having received the proceeds of the seizure (*r*).

An action for a wrong lies against a corporation, where the thing done is within the purpose of the corporation, and has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. Therefore, when an

(*k*) *Stone* v. *Cartwright*, 6 T. R. 411.
(*l*) *Wilson* v. *Peto*, 6 Mooro, 49.
(*m*) *Wilson* v. *Peto*, 6 Moore, 47.
(*n*) See *ante*, p. 54.
(*o*) *Wright* v. *London General Omnibus Co.*, 2 Q. B. D. 271; 46 L. J., Q. B. 429.
(*p*) *Mayor of Lyme Regis* v. *Henley*, 1 Bing. N. C. 240; 2 Cl. & F. 331.
(*q*) *Maund* v. *Monmouth Rail. Co.*, 4 M. & G. 452; 5 Sc. N. R. 457.
(*r*) *Smith* v. *Birmingham Gas Co.*, 1 Ad. & E. 526.

action was brought against the London General Omnibus Company for interfering with the rights of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that, as the company were incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration of the cause of action were acts connected with the driving of their vehicles along the public highway, and were, therefore, within the purpose of their
118 incorporation, an action for damages was maintainable against them. "We think it extremely important," observes Erle, J., "where such companies admit that they have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompence which the law may award" (*s*).

A corporation may become liable in damages for the improper and careless construction and management of dangerous premises and dangerous machinery (*t*); or for an assault and battery, or false imprisonment, committed by its servants in the exercise of its orders, or in the discharge of their duty, without proof of any authority under seal from the corporation (*u*). Where a railway company are carrying on business, there are certain things which are necessary to be done for the carrying on of the business and the protection of the company, and there are things which, if done at all, must be done at once; and, therefore, the company must have some person on the spot to do these things, and clothed with authority to decide, as the exigency arises, what shall be done. If such person, intending to exercise his authority, makes a mistake, and does an act which cannot be justified, the company are responsible, because he was their agent (*x*). Where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority is *primâ facie* evidence that he had authority; and the presumption that he had authority must be rebutted by the company (*y*). Where a railway passenger was

(*s*) *Green* v. *London General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*t*) *Cowley* v. *Mayor of Sunderland*, 6 H. & N. 565; 30 L. J., Ex. 127.

(*u*) *Eastern Counties Rail. Co.* v. *Broom*, 6 Exch. 314. *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148.

(*x*) *Giles* v. *Taff Vale Rail. Co.*, 2 El. & Bl. 822. *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148. *Moore* v. *Metropolitan Rail. Co.*, L. R., 8 Q. B. 36; 42 L. J., Q. B. 23. *Bailey* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, L. R., 7 C. P. 415; 8 C. P. 148; 42 L. J., C. P. 78.

(*y*) *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148.

taken into custody by a railway servant by command of a superintendent, for travelling on the railway without having paid his fare, with intent to avoid payment thereof (*z*), and the charge fell to the ground, and an action was brought against the company for an unlawful imprisonment, it was held that they were liable in damages; for it must be presumed that a superintendent of traffic or of police, and all officers in authority, upon the line, or at the station, had power on behalf of the company to determine whether

119 the servant of the company should, or should not, arrest persons for criminal frauds upon the company (*a*). But it is otherwise, if the corporation cannot legally authorize the act to be done. Where, therefore, a station-master arrested a person travelling by a railway in charge of a horse for not paying for the carriage of the horse on demand, and there was no power in the railway company by law to arrest a person for such non-payment, but only to detain the goods, it was held that no authority could be implied to the station-master, and that the railway company were not responsible (*b*). There is an implied authority in a servant to do all those things that are necessary for the protection of the property entrusted to him, or for fulfilling a duty which he has to perform; but there is no authority in a servant having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. Thus, if a foreman porter in temporary charge of a station, or a ticket clerk, arrests a servant of the company, or a stranger, on a charge of stealing the company's goods, or robbing the till, the arrest not being for the purpose of protecting the company's property by preventing a felony, or for recovering it back; but only for the purpose of punishing the offender for what has already been done, as they have no implied authority so to arrest, the company are not responsible for it (*c*). So, where one of the defendant's servants, a constable, *after* the conclusion of a scuffle in a station yard, wrongfully gave the plaintiff into custody, and all that the constable was authorized by the regulations of the company to do, was to interfere in any fight or affray occurring at any of the stations, for the purpose of stopping it, it was held that the company were not responsible (*d*). On the other hand, where the plaintiff, who

(*z*) See the 8 Vict. c. 20, ss. 103, 104. *Post*, p. 158.

(*a*) *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148, qualifying and explaining *Roe* v. *Birkenhead and Lancashire Rail. Co.*, 7 Exch. 41.

(*b*) *Poulton* v. *London and South-Western Rail. Co.*, L. R., 2 Q. B. 534; 36 L. J., Q. B. 294.

(*c*) *Edwards* v. *London and North Western Rail. Co.*, L. R., 5 C. P. 445; 39 L. J., C. P. 241. *Allen* v. *London and South Western Rail. Co.*, L. R., 6 Q. B. 65; 40 L. J., Q. B. 55.

(*d*) *Walker* v. *South Eastern Rail. Co.*, L. R. 5 C. P. 640; 39 L. J., C. P. 346.

refused to show his ticket, was removed from the station with unnecessary violence by order of the inspector, the company were held responsible (*e*). An imprisonment of a person liable to a railway company for not having paid his fare is an act for the benefit of the company, which may be ratified by the company (*f*).

Where a corporation have employed a solicitor to conduct legal proceedings, the corporation are not necessarily liable for the

120 unlawful acts of which the solicitor may have been guilty in the conduct of the proceedings (*g*); nor is his appearance to conduct a prosecution necessarily evidence as against the company that they ratified the assault complained of (*h*).

A corporation aggregate may be made responsible for the negligence and unskilfulness of their servants in the execution of the ordinary work and business of the corporation, without any proof that the work was ordered under the common seal (*i*).

It appears to be doubtful whether an action for a malicious prosecution is maintainable against a corporation aggregate (*k*); but it has been held that such an action will lie against a company (*l*); and, also that an action of libel may be maintained against a corporation for the publication of libellous intelligence through the medium of their servants, acting in the course of their ordinary employment in the management of an electric telegraph (*m*). But the prosecution of offenders is not within the ordinary routine of banking, and, therefore, not within the ordinary scope of a bank manager's authority (*n*). If it is essential to the conversion of property by a corporation that the act of conversion should have been authorized by them under their common seal, a jury may, from proof that the conversion was committed by the servants and agents of the corporation in

(*e*) *Walker* v. *South Eastern Rail. Co.*, *supra*.

(*f*) *Eastern Counties Rail. Co.* v. *Broom*, 6 Exch. 327. *Goff* v. *Great Northern Rail. Co.*, *supra*.

(*g*) *Eggington* v. *Mayor of Lichfield*, 5 El. & Bl. 112.

(*h*) *Walker* v. *South Eastern Rail. Co.*, L. R., 5 C. P. 643; 39 L. J., C. P. 346.

(*i*) *Scott* v. *Mayor of Manchester*, 2 H. & N. 204; 26 L. J., Ex. 406.

(*k*) *Stevens* v. *Midland Counties Rail. Co.*, 10 Exch. 352. And see per Lord Bramwell in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247.

(*l*) *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287; 50 L. J., Q. B. 281.

(*m*) *Whitfield* v. *South Eastern Rail. Co.*, El. Bl. & El. 121; 27 L. J., Q. B. 229.

(*n*) *Bank of New South Wales* v. *Owston*, L. R., 4 App. Cas. 270; 48 L. J., P. C. 25. The doctrine of *ultra vires* does not apply to torts committed by the agents of a corporation within the scope of the powers attempted to be conferred upon them: *New York, &c., R. R. Co.* v. *Schuyler*, 34 N. Y. 30; *Bissell* v. *Michigan, &c., R. R. Co.*, 22 N. Y. 258; *Booth* v. *Farmers' &c., Bank*, 50 N. Y. 396; *Frankfort Bank* v. *Johnson*, 24 Me. 490. Corporations have been held liable for various species of wrongs committed by their agents, as assault and battery, *Owsley* v. *Montgomery R. R. Co.*, 37 Ala. 560; *Philadelphia, &c., R. R. Co.* v. *Derby*, 14 How. (U. S.) 468; *Hamilton* v. *Third Av. R. R. Co.*, 53 N. Y. 25: trespass, *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *Lee* v. *Sandy Hill*, 40 N. Y. 442: trover, *Brown* v. *South Kennebec Agl. Soc.*, 47 Me. 275: libel, *Philadelphia, &c., R. R. Co.* v. *Gingley*, 21 How. (U. S.) 202: nuisance, *Delaware Canal Co.* v. *Com.*, 60 Penn. St. 367: malicious prosecution, &c., *Vance* v. *Erie R. R. Co.*, 32 N. J. L. 334.

the exercise of their ordinary employment and service, presume that the act was done under the common seal (*o*). And, in the case of corporations called into existence for trading purposes, and carrying on trade through the medium of their servants and agents, the corporation may be made responsible for a conversion of property by such servants and agents acting in the ordinary course of their employment in the business of the corporation (*p*). If the wrongful act was not done by the servant or agent of the corporation in the exercise of his ordinary employment, or in the discharge of his ordinary duties as servant of the corporation it must be shown that the corporation has ratified and adopted the act. Where the plaintiff set forth that he was entitled to certain "carmarked shares" in a railway company, that these shares had been wrongfully declared forfeited, that the forfeiture had been confirmed at a general meeting of the share-

121 holders of the company, and the shares directed to be sold, it was held that there was a good cause of action against the company. So, where the directors had been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, whereby the plaintiff was deprived of the ordinary privileges of a shareholder, and of any profits that might have arisen upon the shares, it was held that the company were responsible for the wrongful act of the directors (*q*).

But, where the directors have acted beyond the scope of their authority, the company are not responsible for their acts, but the directors themselves are the parties to be made personally responsible in damages (*r*). Where a corporate body is guilty of an act of misfeasance or non-feasance, an action may be brought against the individual members who procured the act to be done. Thus, where a mandamus had gone to a corporation, and a false return had been made, it was held that an action lay against an individual member who had procured the false return (*s*).

Foreign corporations.—A foreign corporation, if it carries on business here, may be sued on a cause of action arising in this country, although it is not incorporated according to English law (*t*).

(*o*) *Yarborough* v. *Bank of England*, 16 East, 6.

(*p*) *Giles* v. *Taff Vale Rail. Co.*, 2 El. & Bl. 831.

(*q*) *Catchpole* v. *Ambergate, &c., Rail. Co.*, 1 El. & Bl. 120.

(*r*) *Davidson* v. *Tulloch*, 3 Macq. 783.

(*s*) Lord Holt, *R.* v. *Mayor of Ripon*, 1 Lord Raym. 564. A corporation is liable the same as a natural person for all torts committed by its officers or agents in the prosecution of its business: *Philadelphia & Reading R. R. Co.* v. *Derby*, 14 How. (U. S.) 468; *Hale* v. *Union, &c., Ins. Co.*, 32 N. H. 295; *Alabama & Tenn. R. R. Co.* v. *Kidd*, 29 Ala. 221; *Noyes* v. *Rutland & Burlington R. R. Co.*, 27 Vt. 110; *Lowell* v. *Boston, &c., R. R. Co.*, 23 Pick. (Mass.) 24; *Edwards* v. *Union Bank*, 1 Fla. 136; *Booth* v. *Farmers' Bank*, 50 N. Y. 396; *Philadelphia, &c., R. R. Co.* v. *Gingley*, 21 How. (U. S.) 209; *Goodspeed* v. *East Haddam Bank*, 22 Conn. 630; *Bissell* v. *Michigan, &c., R. R. Co.*, 22 N. Y. 258; *Frankfort Bank* v. *Johnson*, 24 Me. 490.

(*t*) *Newby* v. *Colt's Patent Fire-Arms Co.*, L. R., 7 Q. B. 293; 41 L. J., Q. B.

Infants.—A plea of infancy constitutes no defence to an action of tort. Thus, an infant is responsible for an assault or false imprisonment, for libel and slander, for seduction, and for trespass; and an infant in the actual occupation of land is responsible for nuisances and injuries to his neighbour, arising from the negligent use and management of the property. A man who has made a contract with an infant cannot convert anything that arises out of that contract into a tort, and seek to enforce the contract through the medium of an action of tort. Therefore, where a lad hired a mare, and injured it by immoderate riding, it was held that a plea of infancy was an answer to the action, the action being founded on contract (*u*). But where a horse is hired for one purpose and is used for another, or is let out to be used by one person, and he allows it to be used by another, there is a tort independent of contract. And, therefore, where an infant hired a horse on the terms that it was to be ridden on the road and not over fences in the fields, and the infant having got possession of the horse lent it to a friend, who took it off the high road, and in endeavouring to jump the animal over a hedge transfixed it on a

122 stake and killed it, it was held that the infant was responsible in damages for the value of the horse (*x*).

An infant is not liable for the conversion of goods, if the cause of action is grounded on matter of contract with the infant (*y*). But, if an infant gets goods into his hands by fraud and false pretences, or under colour of a pretended contract, and then refuses to deliver up the goods on the demand of the party who has been defrauded of the possession of them, he cannot, if the goods were in his hands or under his control at the time they were demanded back, set up his minority as a defence to an action grounded on such demand and refusal (*z*).

Where an action for money had and received was brought against an infant to recover money which the infant had embezzled, Lord Kenyon said that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu;* and though the action was in form an action of the latter description, yet it was *ex delicto* in point of substance; that if an action of trover had been brought for any part of the property embezzled, or an action grounded on the fraud, infancy would have been no defence; and that, as the object of the action was precisely the same, his opinion was that the same rule of law

148. Service of the writ upon the head officer of the English branch is sufficient. *Ibid.*

(*u*) *Jennings* v. *Rundall*, 8 T. R. 335.

(*x*) *Burnard* v. *Haggis*, 14 C. B., N. S. 45; 32 L. J., C. P. 189.

(*y*) *Manby* v. *Scott*, 1 Sid. 129.

(*z*) *Mills* v. *Graham*, 1 B. & P., N. R. 145. *Clarke* v. *Cobley*, 2 Cox, 173.

should apply (*a*). It would seem that an infant cannot be made a bankrupt, but there is some doubt upon the point (*b*).

Married women.—The husband was at common law (and as to his position since the Married Women's Property Act, 1882, see *infra*), answerable for all the wife's torts and trespasses during coverture; but the action must have been against them both jointly; for, if she alone were sued, it might be a means of making the husband liable without giving him an opportunity of defending himself (*c*).

The husband must have been sued jointly with the wife for an assault or libel committed by the wife, or for the destruction or conversion of property by the wife, or for any act of trespass committed by her during the coverture (*d*). He continued answerable in damages to all persons who had been injured by the wrongful act of the wife so long as the relation of husband and wife continued, though they were living apart (*e*), unless they were separated under a decree of judicial separation, 20 & 21 Vict. c. 85, s. 26, or the wife had obtained a protecting order under sect. 21, in which

123 case the husband was not liable for the wife's tortious acts. If the marriage was dissolved, the husband could not be sued jointly with the wife for a tort committed during the coverture (*f*).

Where a married woman signed and delivered a distress-warrant to a bailiff, and directed him to distrain the goods of a tenant, under the impression that she had a right to distrain when she had no such right, and the bailiff, having been sued and compelled to pay damages for the illegal distress, brought an action of tort for deceit against the wife and her husband, it was held that the action was not maintainable, as it was not founded upon an alleged assertion of the wife that she had a right to distrain, and there could be no retainer of the plaintiff to distrain given by the wife, nor any contract by her to indemnify him (*g*).

By the Married Women's Property Act, 1882 (*h*), a married woman is capable of being sued in tort in all respects as if she

(*a*) *Bristow* v. *Eastman*, 1 Esp. 172.

(*b*) *Ex parte Jones*, 18 Ch. D. 109; where it is doubted whether he could not be made a bankrupt where he has expressly represented himself as of full age. *R.* v. *Wilson*, 5 Q. B. D. 28, where the debts were not for necessaries.

(*c*) Bac. Abr. BARON AND FEME, L. The relation of husband and wife, and their rights and liabilities, have been so essentially changed by statute in many of the States, that the practitioner will be obliged to consult the statute to ascertain how far the common law relative to this relation has been changed, and no general rule can be given.

(*d*) *Catterall* v. *Kenyon*, 3 Q. B. 315. *Keyworth* v. *Hill*, 3 B. & Ald. 686. *Draper* v. *Fulkes*, Yelv. 165.

(*e*) *Head* v. *Briscoe*, 5 C. P. 484.

(*f*) *Capel* v. *Powell*, 17 C. B., N. S. 743; 34 L. J., C. P. 168.

(*g*) *Rawlings* v. *Bell*, 1 C. B. 959. See *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 430; 23 L. J., Ex. 164. *Wright* v. *Leonard*, 11 C. B., N. S. 258; 30 L. J., C. P. 365.

(*h*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2. The section is apparently retrospective; see *Weldon* v. *Winslow*, and *Weldon* v. *De Bathe*, *ante*, p. 62.

were a *feme sole*, and her husband need not be joined with her as defendant, or be made a party to any action or legal proceeding taken against her, and any damages or costs recovered against her in any such action or proceedings shall be payable out of her separate property. But this section has been held not to relieve the husband from his liability to be sued in respect of his wife's torts committed after marriage (*i*).

A married woman carrying on a trade separately from her husband is subject to the bankruptcy laws just as if she were a *feme sole* (*k*).

After the death of the wife, or the dissolution of the marriage, the husband is discharged from all responsibility for her tortious acts, unless he himself participated therein, or authorized or instigated them, in which case he will be responsible, like any other principal who has committed a tortious act through the medium of an agent. After the death of the husband, the wife may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them, or whether they were committed by her at the instigation or under the influence of her husband (*l*); and the same rule of law prevails where the husband has abjured the realm, or has been transported, and is thereby *civiliter mortuus* (*m*).

124 In every case of a judicial separation, or divorce *a vinculo matrimonii*, or protecting order, the wife so separated, divorced or protected, is considered a *feme sole* for the purpose of being sued for wrongs and injuries done by her; and her husband is not liable for any wrongful act or omission by her (*n*).

A wife could not, prior to the Act of 1882, after being divorced from her husband, sue him for an assault committed upon her during the coverture, since the inability to sue during the coverture did not arise from the necessity of joining her husband with her as co-plaintiff, but from the rule that husband and wife are one person in law (*o*).

But by sect. 12 of the Act it was provided that every woman whether married before or after the Act should have in her own name against all persons including her husband the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, but except as aforesaid no husband or wife should be entitled to sue the other for a tort. The effect of this section appears to be to enable

(*i*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177.
(*k*) 45 & 46 Vict. c. 75, s. 1, sub-s. 5.
(*l*) *Vine* v. *Saunders*, 4 Bing. N. C. 103. As to damages in the latter case, see per Bosanquet, J., *S. C.*
(*m*) Bac. Abr. BARON AND FEME, M.
(*n*) 20 & 21 Vict. c. 85, ss. 21, 26. *Capel* v. *Powell*, 17 C. B., N. S. 743; 34 L. J., C. P. 168.
(*o*) *Phillips* v. *Barnet*, 1 Q. B. D. 436; 45 L. J., Q. B. 277.

a wife to sue her husband for torts affecting her separate property (*p*) even while they are living together, but it is doubtful whether he has any similar rights against her (*q*).

Lunatics (*r*).—At law a lunatic is in general liable for a tort. An action of trespass may be brought against a lunatic notwithstanding he is incapable of design; for wherever one person receives an injury from the voluntary act of another this is a trespass, although there were no design to injure (*s*). If a lunatic hurt a man he shall be liable in trespass (*t*).

So a lunatic innkeeper was held not to be excused from his responsibility to take care of his guest's goods (*u*). It was said in the course of the argument in one case (*v*), that a lunatic is liable to an action for false representation, to which Kelly, C. B., added "and also for a libel," but no authority was cited. In the American Courts it has been held that lunatics are liable for torts in general (*x*), but not for those torts where intention is a necessary element of

125 the tort (such as defamation or malicious prosecution) (*y*), and it has been stated that where vindictive damages might be given against a sane person, the measure of damages against a lunatic would be merely the injury suffered by the plaintiff (*z*).

Public officers.—In a subsequent part of this work (*a*), the duties of public officers, and the mode of compelling the performance of their duties by mandamus, are fully explained. In the same chapter, also, will be found stated the law as it affects magistrates acting without jurisdiction.

By the 11 & 12 Vict. c. 44, s. 3, where a discretionary power is given to magistrates no action can be brought against them by reason of the manner in which they have exercised such discretion; but they must have jurisdiction and be acting judicially (*b*), and if

(*p*) See *Weldon* v. *De Bathe*, 14 Q. B. D. 339. *Reg.* v. *Lord Mayor of London*, 16 Q. B. D. 772.

(*q*) See per Willes, J., *Butler* v. *Butler*, 14 Q. B. D. 835. *S. C.*, 16 Q. B. D. 374.

(*r*) The rules under the Judicature Acts relating to the mode of service of writ, mode of suing, service of judgment, &c. are Ord. IX. r. 5; Ord. XVI. rr. 16, 21, 44; where the lunatic does not appear to the writ, Ord. XIII. r. 1; admissions on pleadings, Ord. XIX. r. 13; being party to special case, Ord. XXXIV. r. 4.

(*s*) Bac. Abr. TRESPASS, G. 1. This is the rule in this country, and lunatics are liable for torts committed by them the same as a natural person.

(*t*) *Weaver* v. *Ward*, Hob. 134.

(*u*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*v*) *Mordaunt* v. *Mordaunt*, 39 L. J., P. & M. 67.

(*x*) *Morain* v. *Devlin*, 132 Mass. 87, liable for defective condition of his real estate, and the American cases cited *infra*.

(*y*) *Bryant* v. *Jackson*, 6 Humph. 199. *Yates* v. *Reed*, 4 Blackf. 463. In *Dickenson* v. *Barber*, 9 Mass. 225, the Court would give no opinion, but said if the derangement was great there would be no damage, but if slight there might be, and the jury must judge.

(*z*) *Krom* v. *Schoomaker*, 3 Barbour, 647. *Ward* v. *Conatser*, 4 Baxter (Tenn.) 64. See note to *Borradaile* v. *Hunter*, 5 M. & G. 670.

(*a*) Ch. XI.

(*b*) *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 378. *Newbould* v. *Coltman*, 6 Exch. 201; 20 L. J., M. C. 149.

the party is shown to have been guilty of the offence he can only recover nominal damages (*c*).

Where there is neither judicial power nor discretion, but the law orders a person to do a thing, he is liable in damages if he neglects to perform his duty (*d*), and so is a ministerial officer who neglects his duty (*e*), and he is liable even where he is acting according to the directions of the Court, if the Court is absolutely without jurisdiction (*f*).

The duties and consequent liabilities of a high sheriff and his officers are also treated of at length in Chapter XI.; it may be sufficient here to mention that the high sheriff may be responsible for the acts of the under-sheriff; but not of the bailiff, except for what is done in the execution of the warrant properly issued to him (*g*). He is, however, liable for acts done by the bailiff beyond the authority given, where the bailiff is acting under colour of the warrant (*h*).

The duties and responsibilities of officers of the county courts are set forth in Chapter XI.

Constables and their assistants are exempted from liability to

126 actions for acts done by them in obedience to warrants of justices (*i*), but they must not abuse their authority (*k*).

Gaolers are responsible in damages if the warrant under which the prisoner is brought to them is altogether void, or if the wrong man has been brought to the prison (*l*).

Governors of colonies are answerable for abuse of their authority (*m*), and they are responsible for acts which are wholly beyond the authority confided in them, although they assume to do them in their character as governor (*n*).

Military and naval officers are responsible for acts done in obedience to commands which are manifestly illegal (*o*), but not

(*c*) 11 & 12 Vict. c. 44, s. 13.

(*d*) *Ferguson* v. *Kinnoul* (*Earl of*), 9 Cl. & F. 251. *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 278.

(*e*) *Brayser* v. *Maclean*, L. R., 6 P. C. 398; 44 L. J., P. C. 79. *Douglas* v. *Yallop*, 2 Burr. 722. *Robinson* v. *Gell*, 12 C. B. 191.

(*f*) *Dews* v. *Riley*, 11 C. B. 434; 20 L. J., C. P. 264. *Andrews* v. *Marris*, 1 Q. B. 3. *Watson* v. *Bodell*, 14 M. & W. 57.

(*g*) *Crowder* v. *Long*, 8 B. & C. 605. *Drake* v. *Sykes*, 7 T. R. 116. *Gibbins* v. *Phillips*, 7 B. & C. 535, note. *Smith* v. *Pritchard*, 8 C. B. 588. *Woods* v. *Finnis*, 7 Exch. 372.

(*h*) *Smart* v. *Hutton*, 8 A. & E. 568, note. As to special bailiff, see *Ford* v. *Lecke*, 6 Ad. & E. 699. *Alderson* v. *Davenport*, 13 M. & W. 42.

(*i*) 24 Geo. 2, c. 44, s. 6; 7 Jac. 1, c. 5; 21 Jac. 1, c. 12; 1 & 2 Will. 4, c. 41, s. 19; 2 & 3 Vict. c. 93, s. 8, *post*, p. 716.

(*k*) *Wright* v. *Court*, 4 B. & C. 596. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134. *Crozier* v. *Cundey*, 6 B. & C. 232.

(*l*) *Aaron* v. *Alexander*, 3 Camp. 34. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134.

(*m*) *Sutherland* v. *Murray*, cited in *Johnstone* v. *Sutton*, 1 T. R. 493, at p. 538. *Hill* v. *Bigge*, 3 Moo. P. C. 465.

(*n*) *Musgrave* v. *Pulido*, 5 App. Cas. 102.

(*o*) *Buron* v. *Denman*, 2 Exch. 167. *Warden* v. *Bailey*, 5 Taunt. 67. *Echols* v. *Staunton*, 3 W. Va. 574. *Lively* v. *Balland*, 2 W. Va. 574.

for acts which are done by authority, whether precedent or by way of ratification (*p*). A Court of law will not take cognizance of disputes about military discipline between military men (*q*).

Revenue officers may justify the detention of goods for a reasonable time for examination (*r*).

Public officers employed in the public business of the country are not responsible for the negligence or misconduct of those who act under them. Thus, a Queen's officer on board ship is not responsible for the negligent acts of his subordinate officers (*s*). Public officers are only liable for their own personal negligence or misconduct (*t*).

Public commissioners, boards of health, &c., are liable for torts so long as they are acting in the execution of their statutory powers and *bonâ fide* (*u*), but they must not be negligent (*x*). Most statutes, under which public bodies act, exempt the officers of the body from personal liability though the body itself is liable for wilful neglect or default (*y*).

Rioters.—By the 49 & 50 Vict. c. 38, s. 2—(1) where a house, shop, or building in any police district has been injured or destroyed,

127 or the property therein has been injured, stolen, or destroyed by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction; but in fixing the amount of such compensation regard shall be had to the conduct of the said person, whether as respects the precautions taken by him, or as respects his being a party or accessory to such riotous or tumultuous assembly, or as regards any provocation offered to the persons assembled, or otherwise. (2) Where any person having sustained such loss as aforesaid has received, by way of insurance or otherwise, any sum to recoup him, in whole or in part, for such loss, the compensation otherwise payable to him under this Act shall, if exceeding such sum, be reduced by the amount thereof, and in

(*p*) *Buron* v. *Denman*, 2 Exch. 167. *Bradley* v. *Arthur*, 4 B. & C. 305.

(*q*) *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806; L. R., 7 H. L. 744; 45 L. J., Q. B. 8. *Johnstone* v. *Sutton*, 1 T. R. 544.

(*r*) *Jacobsohn* v. *Blake*, 6 M. & G. 919; 8 & 9 Vict. c. 87, s. 116.

(*s*) *Nicholson* v. *Mouncey*, 15 East, 384. The Trinity House are not servants of the Crown. *Gilbert* v. *Trinity House*, 17 Q. B. D. 795. It is a good defence to an action of trespass against an officer of the navy to show that he did the act in obedience to an order from the president and secretary of the navy. *Durand* v. *Hollins*, 4 Blatchf. (U. S.) 451; *Ruan* v. *Perry*, 3 Caines (N. Y.), 120.

(*t*) *Lane* v. *Cotton*, 1 Ld. Raym. 646; 1 Salk. 17. *Whitfield* v. *Despencer*, Cowper, 754. See per Blackburn, J., *Mersey Docks* v. *Gibbs*, L. R., 1 H. L. 93, at p. 111.

(*u*) *Sutton* v. *Clarke*, 6 Taunt. 29. *Herring* v. *Met. Board*, 19 C. B., N. S. 510; 34 L. J., M. C. 224.

(*x*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305. *Leader* v. *Moxon*, 2 W. Bl. 924. *Mersey Docks* v. *Gibbs*, *supra*. *Foreman* v. *Mayor of Canterbury*, L. R., 6 Q. B. 214; 40 L. J., Q. B. 138.

(*y*) See *post*, ch. 11, "Liability of Public Officers."

any other case shall not be paid to him, and the payer of such sum shall be entitled to compensation under this Act, in respect of the sum so paid, in like manner as if he had sustained the said loss, and any policy of insurance given by such payer shall continue in force as if he had made no such payment, and where such person was recouped as aforesaid otherwise than by payment of a sum, this enactment shall apply as if the value of such recoupment were a sum paid.

Claims for compensation are to be made to the police authority of the district, who are to inquire into the truth thereof, and fix such compensation as appears to them to be just (*z*). A Secretary of State may make regulations as to claims (*a*). Where a party aggrieved fails to obtain compensation he may bring an action, but if, in such action, he fails to recover compensation or an amount exceeding that fixed by the police authority, he will have to pay the costs as between solicitor and client (*b*). If the amount claimed does not exceed 100*l.* the action must be brought in the county court (*c*). Sect. 5 provides for the mode of raising the compensation money. Sect. 6 extends the Act to damage to wrecks and machinery, &c., and sect. 7 to churches and public institutions, &c. In an action against the hundred, under the repealed statute 7 & 8 Geo. 4, c. 31, to recover compensation for the felonious demolition of a house, building, or erection, the same strictness of proof was required as on the trial of an indictment for the felony (*d*), and the plaintiff must have shown either that there was an actual demolition or destruction, or that there was a commencement of demolition or destruction with intent to demolish or destroy. Breaking the windows of a house and damaging the walls by throwing stones, where there was no

128 intent to proceed further, were held not sufficient to give a title to compensation (*e*).

Crowds—Liability of person collecting.—It is an old principle of law, that, if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. Therefore, where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected *near* the spot, trod down the grass of the neighbouring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the

(*z*) Sect. 3, sub-sect (1).
(*a*) *Ib.* sub-sect. (2).
(*b*) Sect. 4, sub-sect. (1).
(*c*) *Ib.* sub-sect. (2).
(*d*) *Barwell* v. *Winterstoke*, 14 Q. B. 708.
(*e*) *Drake* v. *Footitt*, 7 Q. B. D. 201; 45 L. T. 42.

defendant was guilty of a nuisance (*d*). So, where the defendant descended in a balloon into the plaintiff's garden, and a number of persons rushed into the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant, who had set the balloon in motion and caused the mischief, was responsible for the injury (*e*). But the keeping of a large school is not, at all events necessarily, a nuisance (*f*).

Animals—Injuries by cattle and domestic animals.—If a man's cattle, sheep, or poultry, or any animals in which the law gives him a valuable property, trespass upon another's close, the owner of the animals is responsible for the trespass and consequential damage, unless he can show that his neighbour was bound to fence, and had failed so to do (*g*). Thus, where the defendant's horse injured the plaintiff's mare by biting and kicking her through an iron fence belonging to the defendant which separated the defendant's land from the plaintiff's, it was held that there was a trespass for which the defendant was liable apart from any question of negligence (*h*). It matters not whether the animals are at the time in the owner's immediate care or charge, or under the care of his servants, or in the custody of a stranger. In this last case, the stranger may be sued as well as the owner for the trespass (*i*). But, if my servant, without my knowledge, takes my beasts and puts them in another's land, my servant is the trespasser, and not I; for, by his wilful dealing with the beasts without any authority from me, he gains a special property in them for the time, and for this purpose they become his beasts (*k*). But, if a wife so deals with her husband's cattle, the husband himself is the trespasser; for the wife can gain no special

129 property in them as against the husband (*l*). A commoner who puts his beasts on a common which is not inclosed is bound at his peril to see that his beasts do not stray from the common and trespass upon another man's land (*m*). Where an animal is a trespasser, it is immaterial that an injury done by it is due to the animal's vice. The owner in such a case is liable for all the damage it may do, whether the damage is such as may reasonably be expected from the nature of the animal or is due to

(*d*) *R.* v. *Moore*, 3 B. & Ad. 188. *Walker* v. *Brewster*, L. R., 5 Eq. 25; 37 L. J., Ch. 33.

(*e*) *Guille* v. *Swan*, 19 Johns. (U. S. R.) 381.

(*f*) *Harrison* v. *Good*, L. R., 11 Eq. 338; 40 L. J., Ch. 294.

(*g*) *Sagrill* v. *Milward*, 21 Hen. 6, p. 33, pl. 20. *Lee* v. *Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212.

(*h*) *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10; 44 L. J., C. P. 24.

(*i*) 2 Roll. Abr. 546, pl. 20. *Dawtry* v. *Huggins*, Clayt. 32, pl. 56.

(*k*) 2 Roll. Abr. TRESPASS, 553, pl. 25.

(*l*) 2 Roll. Abr. TRESPASS, 553, pl. 2. *Sed query*, since the Married Women's Property Act.

(*m*) 20 Ed. 4, fo. 10 b., cited in *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 32.

mischievous propensities of which the owner is ignorant (*n*). But where an ox was being driven down the street of a country town and entered the plaintiff's shop, no negligence being shown on the part of the persons in charge of the ox, the owner of the ox was held not liable for damage done by it (*o*).

Animals—Trespasses from defect of fences.—Where the plaintiff himself has contributed to the injury of which he complains, he has no ground for seeking compensation in damages (*p*). If, therefore, a man is bound by contract or prescription to repair a fence between my land and his, and he neglects to repair, and by reason thereof my beasts get on to his land, this is a good answer to an action of trespass brought by him (*q*). Where some pigs escaped through a fence on to a railway, and, getting on the line, upset a trolly on which was a platelayer in the service of the company, and injured him, it was held that, as the company were bound to maintain the fence, the platelayer was identified with them, and could not recover against the owner of the pigs (*r*).

Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbour (*s*), but one proprietor may acquire a right or title, by grant or prescription, to have the boundary-fence between his close and that of the adjoining proprietor maintained and repaired at the expense of the adjoining proprietor (*t*). "Every man must use his own land so as thereby not to hurt another; and as, of common right, one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user. If, therefore, a vendor sells a piece of pasture lying open to another piece of pasture of which he is possessed, the vendee **130** is bound to keep his cattle from running into the vendor's piece" (*u*). If a landowner, who has land abutting upon a highway, neglects to fence the land from the highway, so that cattle stray from the high road and injure his crops, he cannot immediately distrain the beasts *damage feasant*, or treat the owner of the beasts as a trespasser, but must either drive them out himself, or allow a reasonable time to the drovers in charge of them to get them out of the land (*x*). But, if the beasts are not lawfully using the highway, if they have strayed away from the owner or

(*n*) *Lee* v. *Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212. *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10; 44 L. J., C. P. 24.

(*o*) *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J., Q. B. 61.

(*p*) *Ante*, pp. 23, 24.

(*q*) 2 Roll. Abr. TRESPASS, 565, pl. 3, citing 19 Hen. 6, 34; 39 Ed. 3, 3 b.

(*r*) *Child* v. *Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100.

(*s*) Bayley, J., *Boyle* v. *Tamlyn*, 6 B. & C. 337; 9 D. & R. 437; Dyer, 372 b.

(*t*) *Post*, pp. 296, 331.

(*u*) *Tenant* v. *Goldwin*, 6 Mod. 314.

(*x*) *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298.

his servants, and are trespassing upon the public thoroughfare, and pass from thence on to the adjoining uninclosed land, this is a trespass for which the owner of the beasts is responsible (*y*); and, whenever one landowner is bound to maintain and repair a fence for the benefit of the adjoining landowner, and cattle escape out of the land of the latter, and trespass upon the land of the person who ought to have kept up the fence, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If it is a close, the owner of the cattle must show an interest or a right to put them there. If it is a way, he must show that he was lawfully using the way (*z*).

Where the owner of a horse negligently allowed his horse to stray on the high road, it was held that the owner would be responsible for all such damage as in the ordinary sequence of events might be expected to occur therefrom, such as the horse's walking into a neighbouring pasture, and consuming the grass there, or wandering into a corn-field and trampling down the corn, but not for a kick to a child in the road, unless it could be shown that the horse was naturally of a vicious disposition, and wont to kick, and that the owner knew of it at the time he allowed the horse to stray into the highway (*a*). Where cattle afflicted with a contagious disorder trespassed upon an adjoining pasture and infected other cattle there with the disease, it was held that the owner of the trespassing beasts was responsible for the damage arising from the spread of the disorder, as well as for the injury to the grass and herbage (*b*). But the mere fact of the defendant's scabby sheep getting amongst the plaintiff's healthy flock, and infecting them with the disorder, establishes no cause of action, unless it is proved that the defendant knew them to be infected, and neglected to take proper and reasonable

131 precautions to prevent them from getting mixed with healthy flocks (*c*).

Animals—Injuries by intruding dogs.—A man is not, by the common law, considered to have the same valuable property in a dog as in cattle and sheep; and it has been held that, if a man's dog goes into his neighbour's garden, and spoils and injures his crops, no action will lie (*d*), unless the dog is of a peculiarly mischievous disposition, so as to be unfit to be at large, and this is

(*y*) 2 Roll. Abr. 565, pl. 7. *Dovaston* v. *Payne*, 2 H. Bl. 528.
(*z*) *Dovaston* v. *Payne*, *supra*. *Anon.*, 3 Wils. 126.
(*a*) *Cox* v. *Burbidge*, 13 C. B., N. S. 430; 32 L. J., C. P. 89.
(*b*) *Anderson* v. *Buckton*, 1 Str. 192.
(*c*) *Cooke* v. *Waring*, 2 H. & C. 332; 32 L. J., Ex. 262.
(*d*) Holt, C. J., *Mason* v. *Keeling*, 12 Mod. 336; 1 Ld. Raym. 608. *Broun* v. *Giles*, 1 C. & P. 118.

known to the master (*e*). If the master accompanies the dog, and is himself a trespasser, the damage done by the dog is consequential upon the trespass by the master (*f*).

If the owner of a dog allowed the dog to stray away and trespass on his neighbour's land, and the dog worried and killed the neighbour's sheep, the owner of the dog was not responsible at common law for the damage done, as the worrying and killing of sheep were, it was said, not in accordance with the ordinary instinct of the animal, and would not in the ordinary sequence of events be expected to result from a dog being allowed to stray away from his master's premises; but, if the dog had previously worried sheep with the knowledge of the owner, the law threw upon the latter the duty of keeping the animal on his own premises, and not suffering him to go at large (*g*). Now, however, by the 28 & 29 Vict. c. 60, it is enacted that the owner of every dog shall be liable in damages for injury done to any cattle (*h*) or sheep by his dog; and it shall not be necessary to show a previous mischievous propensity in such dog, or the owner's knowledge of such propensity, or that the injury was attributable to neglect on the part of the owner.

The occupier of any house or premises where any dog was kept or permitted to live or remain at the time of the injury, is to be deemed to be the owner of the dog, unless he can prove that he was not the owner, and that the dog was so kept or permitted to live or remain without his sanction or knowledge. Where there are more occupiers than one, the occupier of that part of the house or premises where the dog was kept is to be deemed to be the owner (*i*).

132 *Animals feræ naturæ—Destruction of crops by rabbits and pigeons.*—If a man encourages the growth of wild rabbits upon his land, and forms "coney burrows" there, and the rabbits stray from his land to the land of his neighbour, this is no trespass for which the breeder of the rabbits is responsible; for, when they have left his land, they are not then *his* rabbits doing damage. Being animals *feræ naturæ*, he has no more property in them after they have left his soil than in the birds of the air, which may breed in one man's land and devour the crops of another (*k*). The only remedy, therefore, for a person whose crops are eaten by wild

(*e*) *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 32.

(*f*) *Beckwith* v. *Shordike*, 4 Burr. 2093.

(*g*) *Anon.*, Dyer, pl. 162. Vin. Abr. *Actions*, H. pl. 3. *Baker* v. *Webberley*, Het. 171. *Jenkins* v. *Turner*, Ld. Raym. 109. *Card* v. *Case*, 5 C. B. 622. *Fleming* v. *Orr*, 2 Macq. H. L. 14. As to dogs known to have a mischievous propensity for pursuing and destroying game, see *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 31.

(*h*) The word "cattle" includes horses, *Wright* v. *Pearson*, L. R., 4 Q. B. 582; 38 L. J., Q. B. 312.

(*i*) Sect. 2.

(*k*) *Boulston's case*, 5 Co. 104a; Cro. Eliz. 547.

rabbits is the capture and destruction of the rabbits. Commoners may destroy rabbits which come upon the common from the adjoining land, not being the lord's land (*l*); but they have no remedy against those who breed them (*m*). The same law prevails with regard to pigeons: "if they come upon my land, I may kill them;" but I have no remedy against any one for breeding them (*n*). But an action is maintainable by a tenant, to whom land has been let, the right of shooting being reserved, against the persons entitled to the right of shooting, for so overstocking the land with game as to cause damage to the tenant's crops (*o*).

Animals—Injuries from the keeping of ferocious animals.—Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is, *primâ facie*, liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous disposition (*p*). But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night, provided the barking of the dog does not disturb the rest of the neighbours and create a nuisance; and, therefore, where the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and was let loose at night, and the defendant's foreman incautiously went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to an action for damages (*q*). But a man has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the day-time may be injured by it. So with respect to a foot-path, though it be a private one, a man has no

133 right to put a dog with such a length of chain, and so near the path, that he could bite a person going along it (*r*).

There is a difference between beasts that are *feræ naturæ*, as lions and tigers, which a man must always keep chained up at his peril, and beasts that are *mansuetæ naturæ*, and break through the ordinary tameness of their nature, such as oxen and horses. In the latter case, an action lies only if the owner, whether an individual or corporation, has had notice of the mischievous nature of

(*l*) *Cooper* v. *Marshall*, 1 Burr. 226.
(*m*) *Hinsley* v. *Wilkinson*, Cro. Car. 387.
(*n*) *Dewell* v. *Sanders*, Cro. Jac. 490. Bayley, J., *Hannam* v. *Mockett*, 2 B. & C. 939.
(*o*) *Farrer* v. *Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385.
(*p*) *May* v. *Burdett*, 9 Q. B. 110.
(*q*) *Brock* v. *Copeland*, 1 Esp. 203.
(*r*) Tindal, C. J., *Sarch* v. *Blackburn*, 4 C. & P. 300; M. & M. 505. *Curtis* v. *Mills*, 5 C. & P. 489.

the beast (*s*). In the former case, an action lies without such notice (*t*).

But, when an animal *mansuetæ naturæ* has broken through the ordinary tameness of its nature and become fierce, and is known by the owner to be so, there is no distinction between the case of the keeping of such an animal and the keeping of one which is *feræ naturæ* (*u*). If a dog has once bitten a man without provocation, or under circumstances which would not excite any dog of good temper to bite, and the owner has notice of it, it is his duty to chain up or muzzle the dog; and, if he lets him go about, or lie at the door unmuzzled, and another person is bitten under similar circumstances, the owner of the dog will be responsible for the injury (*x*). It is not material whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he keeps the dog; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support the action. As soon as a dog is known to be mischievous, it is the duty of the person whose premises the dog frequents, to send him away, or cause him to be destroyed (*y*). The same rule of law prevails with regard to a bull which is known to have run at a man, and to be therefore dangerous (*z*).

The putting up a notice to beware of the dog will not exempt the owner of the dog from liability to a person injured, if it appears that the latter could not read, or did not in fact read, the notice. If the plaintiff was lawfully in a way leading to the house, and was, in point of fact, ignorant of the notice, and of the danger from the dog at the time he was bitten by it, he will be entitled to compensation in damages (*a*).

134 *Animals ferocious—The scienter.*—It is sufficient to prove, generally, that the animal was of a ferocious nature, and given to bite, and that the defendant knew it (*b*); and, if this is proved, it is not necessary to prove that anybody before the plaintiff had in fact been bitten (*c*). If it can be shown that a dog has been guilty, to the knowledge of the owner, of a single act of ferocity, that is suf-

(*s*) *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L. J., Q. B. 310.

(*t*) *R.* v. *Huggins*, 2 Ld. Raym. 1583. *Jenkins* v. *Turner*, 1 *ib.* 110. *Mason* v. *Keeling*, 1 *ib.* 608. *Cox* v. *Burbidge*, 13 C. B., N. S. 440; 32 L. J., C. P. 89.

(*u*) *Jackson* v. *Smithson*, 15 M. & W. 563; 15 L. J., Ex. 311.

(*x*) *Charlwood* v. *Greig*, 3 C. & K. 48.

(*y*) *McKone* v. *Wood*, 5 C. & P. 2. See *Smith* v. *Great Eastern Rail. Co.*, L. R., 2 C. P. 4; 36 L. J., C. P. 22. By the 34 & 35 Vict. c. 56, "The Dogs Act, 1871," stray dogs may be detained by the police, and dangerous dogs destroyed by order of justices.

(*z*) *Blackman* v. *Simmons*, 3 C. & P. 138. *Clark* v. *Armstrong*, 24 Sc. Sess. Cas. 1315.

(*a*) *Sarch* v. *Blackburn*, M. & M. 507; 4 C. & P. 300. As to the doctrine of the American Courts relative to liability for injuries by animals, see Wood on Nuisances, Chap. XXIV.

(*b*) *Hartley* v. *Halliwell*, 2 Stark. 212. See Wood on Nuisances, Chap. XXIV., pp. 875—882.

(*c*) *Worth* v. *Gilling*, L. R., 2 C. P. 1.

ficient to impose upon the owner the duty of watching and securing the animal, and will render the master responsible in damages if the dog is guilty of another ferocious act (*d*). Where a dog was proved to be of a savage disposition, and the defendant had warned a person to beware of the dog, lest he should be bitten, it was held that this was evidence for a jury of the defendant's knowledge of the nature of the beast (*e*). And, where the wife of the defendant, who occasionally assisted him in his business as a milkman, had a complaint made to her of the savage nature of a dog kept on the premises, for the purpose of communicating it to her husband, this was held evidence of the husband's knowledge (*f*). It has been held also that, if the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master; for all dogs may be mischievous, and, therefore, a man who keeps a dog is bound, either to have it under his own observation and inspection, or to appoint some one under whose observation and inspection it may be (*g*).

Proof of an offer on the part of the defendant to make compensation to the plaintiff is some, but very slight, evidence against the defendant, as the offer may have been made purely from charitable and praiseworthy motives, and not as admitting any consciousness of wrong or of legal liability in the matter (*h*); and it has been held that such an offer is no evidence at all of the *scienter* (*i*).

Where the defendant's bull, which was being driven along the public streets, ran at a man with a red handkerchief round his neck and gored him, and the defendant, after the accident, was heard to say that the red handkerchief caused the mischief, as a bull would run at anything red, it was held that this was some evidence to go to a jury to show that the defendant knew that his bull was a dangerous animal. "As the circumstance of persons carrying red handkerchiefs is not uncommon," observes Pollock,

135 C. B., "and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing, as he did, the knowledge that, if it met a person with a red garment, it was likely to run at and injure him" (*k*).

(*d*) *Fleming* v. *Orr*, 2 Macq. H. L. 25.
(*e*) *Judge* v. *Cox*, 1 Stark. 285.
(*f*) *Gladman* v. *Johnson*, 36 L. J., C. P. 153. *Applebee* v. *Percy*, L. R., 9 C. P. 647; 43 L. J., C. P. 365.
(*g*) *Baldwin* v. *Casella*, L. R., 7 Ex. 325; 41 L. J., Ex. 167.
(*h*) *Thomas* v. *Morgan*, 2 C. M. & R. 502.
(*i*) *Beck* v. *Dyson*, 4 Campb. 198, per Lord Ellenborough, C. J.
(*k*) *Hudson* v. *Roberts*, 6 Exch. 699; 20 L. J., Ex. 299. The following laws respecting the keeping of ferocious animals, extracted from the Roman law, are not undeserving of attention. "If an ox has a trick of pushing with his horns, and wounds any one, or causes any other

If, by common report, a dog has been bitten by a mad dog, "it becomes the duty of the owner of the dog so reputed to have been bitten to be very circumspect" in the keeping of it. Whether the dog said to be mad was mad or not may be mere matter of suspicion, and yet it is not enough for a defendant to say, "I did use a certain precaution." He ought to put it out of the animal's power to do further mischief (*l*).

In actions for injuries from keeping ferocious animals, the plaintiff is entitled to recover substantial damages in respect of any bodily anguish he has endured, together with the expenses of surgical attendance, and all such expenses as have been reasonably and necessarily incurred by him in consequence of the injury. If, in consequence of a bit[illegible] a ferocious dog, knowingly kept and harboured by the defendant, the plaintiff has been obliged, under medical advice, to undergo a surgical operation to guard against hydrophobia, this will be a ground for increasing the damages.

Torts committed in foreign countries.—Actions may be maintained in this country for wrongs committed in a foreign country, if all that is sought is reparation in damages, or satisfaction to be made by process against the person of the wrong-doer or against his effects within the jurisdiction of the Court (*m*). Thus,

136 when Captain Gambier pulled down some sutlers' houses in Nova Scotia, who supplied spirits to his sailors, and afterwards inadvertently brought one of the sutlers home in his own ship, and the sutler, as soon as he landed, brought an action against the captain, it was held that the action was maintainable (*n*). So it was held that trespass for false imprisonment lay in England by a native Minorquin against a Governor of Minorca for such injury committed by him in Minorca (*o*).

damage, the master who has neglected to shut up the ox, or to give such warning that people might avoid it, shall be answerable for the harm he does. Those who have horses or mules which kick or bite, must either warn people of their being vicious, or take care to have them well watched, otherwise they will be made liable for the damage they may do. If a dog, who has a trick of biting, is not tied up, or if he gets loose for want of being well looked after, and wounds any one, the master of the dog will be liable to make good the damage. But, if a dog or other creature bites or does any damage only because he has been provoked, he who has given occasion to the injury that has happened shall be accountable for it; and, if he is the person who has sustained the injury, he is alone to blame. If the beast which has done the damage has been exasperated and stirred up by another beast, the master of the latter beast shall be accountable for the damage. Those who have wild beasts—such as lions, tigers, bears, and others of the like kind—ought to keep them so that they can do no harm; and they are answerable for all damage that arises from their not being safely and securely kept." Domat, liv. 2, tit. 8, s. 2.

(*l*) Ld. Kenyon, *Jones* v. *Perry*, 1 Esp. 483.

(*m*) *Scott* v. *Lord Seymour*, 1 H. & C. 219; 31 L. J., Ex. 457. *Dobree* v. *Napier*, 2 Bing. N. C. 797. *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1. *Phillips* v. *Eyre*, L. R., 6 Q. B. 1; 38 L. J., Q. B. 113.

(*n*) Per Ld. Mansfield, *Mostyn* v. *Fabrigas*, Cowp. 180.

(*o*) *Mostyn* v. *Fabrigas*, Cowp. 161. *Rafael* v. *Verelst*, 2 W. Bl. 983, 1055. The law is the same in America, *Smith* v. *Bull*, 17 Wendell, 323.

No action can be maintained in the courts of this country on account of an injury, either to the person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. In the case of *The Halley* (*p*), there was a collision with a ship in foreign waters. By the law of the foreign country the ship was liable, and the owners were liable as the owners of the ship; but by the law of England the ship and owners would not be liable, because there was a pilot on board, who was taken compulsorily on board, and who was navigating the ship, and the negligent act was his act. Under these circumstances it was held that, notwithstanding the ship and the owners were liable, according to the law of the country where the act was committed, yet, inasmuch as they were not liable by the law of England, no action could be maintained against them. So, where an action was brought for a wrong to the person committed in a foreign country, it was decided that, as the liability of the defendant had been taken away by the law of the country where the act was committed, no action could be brought in this country (*q*); and, where an action was brought for a wrongful act to real property in a foreign country, it was held that the same rule applied (*r*).

But it is no answer to an action for an assault committed abroad, that, by the law of the foreign country, no action for private damages for such a tort can be maintained until after the defendant has been convicted in a public prosecution for the offence, and that the prosecution is still pending; for that is only a matter of procedure which must be governed by the *lex fori* (*s*).

Ambassadors.—Foreign sovereigns and their accredited ambassadors resident in this country are not amenable to the jurisdiction
137 of our civil tribunals. They cannot be lawfully served with process in any civil proceeding; nor can their goods be taken in execution (*t*). But proceedings *in rem* may be instituted against a foreign sovereign or an ambassador, if the *res* is not connected with the *jus coronæ* of the sovereign or the discharge of the functions of the ambassador (*u*).

(*p*) L. R., 2 P. C. 193; 37 L. J., Adm. 1.
(*q*) *Phillips* v. *Eyre*, L. R., 6 Q. B. 1; 38 L. J., Q. B. 113.
(*r*) *The M. Moxham*, 1 P. D. 107; 46 L. J., Adm. 17.
(*s*) *Scott* v. *Lord Seymour*, 1 H. & C. 219; 31 L. J., Ex. 457.
(*t*) *Magdalena Steam Navigation Co.* v. *Martin*, 2 El. & El. 94; 28 L. J., Q. B. 310. See 7 Ann. c. 12. Sections 1 and 2, applying to the Russian Ambassador, are repealed by Statute Law Revision Act, 1867.
(*u*) *The Charkieh*, L. R., 4 A. & E. 59; 42 L. J., Adm. 17.

CHAPTER VI.

INJURIES TO THE PERSON.

Rights of personal security and liberty consist, as we have seen (*a*), in the right which everyone has to the enjoyment of life, limbs, and bodily health, and to move his body from place to place at his pleasure, so far as he can do so consistently with his legal obligations. The ordinary modes by which rights of personal security and liberty are infringed are by assault, battery, and false imprisonment.

Infringement of rights of personal security—Assault.—Every laying of hands on the person of another, and every blow or push, constitute an assault and trespass, in respect of which an action for damages is maintainable, unless the act can be justified or excused. Every attempt, also, to offer with force and violence to do hurt to another, constitutes an assault, such as striking at a person with or without a weapon; holding up a fist in a threatening attitude sufficiently near to be able to strike; presenting a gun or pistol, whether loaded or unloaded, in a hostile and threatening manner, within gun-shot or pistol-shot range, and near enough to create terror and alarm; riding after a man with a whip threatening to beat him; shaking a whip in a man's face; advancing with hand uplifted in a threatening manner with intent to strike, although the person is stopped before he gets near enough to carry the intention into effect (*b*); and any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect (*c*). But, as regards threatening gestures, if the parties at the time the gestures are used are so far distant from each other that immediate contact is impossible, there is no assault (*d*).

Words accompanying a threatening gesture may deprive that gesture of the character of an assault. Thus, where a man laid his hand on his sword in a threatening manner, but accompanied

(*a*) *Ante*, p. 3.

(*b*) Bac. Abr. ASSAULT. *Martin* v. *Shopper*, 3 C. & P. 373. *Stephens* v. *Myers*, 4 C. & P. 350. *R.* v. *St. George*, 9 C. & P. 493.

(*c*) *Read* v. *Coker*, 13 C. B. 860.

(*d*) Pollock, C. B., *Cobbett* v. *Grey*, 4 Exch. 744.

139 the gesture with the words, "If it were not assize-time, I would not take such language from you," it was held that the words showed that the party did not *then* intend to use his sword, and that there was no assault (*e*); and Lord Abinger is reported to have held that, if a man presents an unloaded pistol at another, and at the same time says that he does not intend to shoot him, this is no assault (*f*). The mere touching of a person, without force or violence, for the purpose of drawing his attention to some matter or another, is not an assault, unless it is done in a hostile or insulting manner (*g*); nor is it an assault to push gently against the person of another in endeavouring to make a way through a crowd; but, if it is done in a rude and violent manner, or there is any struggling or pushing calculated to do harm, there will be both an assault and a battery (*h*).

Personal security—Assault and battery.—A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner (*i*). If a man is violently jostled out of the way, or spat upon (*k*), or has water, stones, or dirt rudely thrown upon him (*l*), or has his hat insolently knocked off, or his hair forcibly cut (*m*), or his horse has been struck so that it ran away and threw him to the ground (*n*), the person guilty of the violence is liable to an action for an assault and battery. "But every laying on of hands is not a battery. The party's intention must be considered; for people will sometimes, by way of joke or in friendship, clap a man on the back; and it would be ridiculous to say that every such case constitutes a battery" (*o*). A touch given by a constable's staff in order to engage the attention of a person is not a battery (*p*).

Personal security—Mayhem and wounding.—When the assault has been carried to the extent of maiming or crippling, or of wounding, a person, it of course becomes of a much more serious character than a common assault, and the person injured will recover heavy damages, unless the maiming or wounding can be justified or excused in the manner presently mentioned. The old word "mayme" or "mayhem," derived from the French word *mayhemer* or *mehaigner*, was used to signify any hurt done to a man's body, whereby he was rendered less able in fighting either to defend himself or annoy his adversary; such as the cutting off,

(*e*) *Tuberville* v. *Savage*, 1 Mod. 3.
(*f*) *Blake* v. *Barnard*, 9 C. & P. 628.
(*g*) *Coward* v. *Baddeley*, 4 H. & N. 481; 28 L. J., Ex. 261.
(*h*) *Cole* v. *Turner*, 6 Mod. 149.
(*i*) *Rawlings* v. *Till*, 3 M. & W. 28.
(*k*) *Reg.* v. *Cotesworth*, 6 Mod. 172.
(*l*) *Pursell* v. *Horn*, 8 Ad. & E. 604; 4 N. & P. 564.
(*m*) *Forde* v. *Skinner*, 4 C. & P. 239.
(*n*) *Dodwell* v. *Burford*, 1 Mod. 24; 1 Sid. 433.
(*o*) Ld. Hardwicke, *Williams* v. *Jones*, Hard. 301.
(*p*) *Wiffin* v. *Kincard*, 2 B. & P. N. R. 472. *Coward* v. *Baddeley*, 4 H. & N. 481; 28 L. J., Ex. 261.

140 disabling, or weakening, a hand or finger, striking out an eye or foretooth, breaking a bone, or injuring the head, or wounding a sinew, &c. (*q*).

Personal security—Assault without consent.—An assault must be an act done against the will of the person assaulted; and, therefore, it cannot be said that a person has been assaulted by his own permission, for where there is consent, there is no assault. Thus, if two persons agree to play at cricket together, and the one strikes the other with the ball in the course of the game, this is not an assault; for "it is a contradiction in terms to say that the defendant assaulted the plaintiff by the leave and licence or permission of the latter" (*r*).

Personal security—Assault without design.—An assault may be committed without any design or intention to commit an assault; for, if the person of one man is violently struck by another, this is an assault; and it is no answer to say that it was done unintentionally, as, for instance, in endeavouring to strike some one else (*s*). So, if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he is seated, the person thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault (*t*). If the damage done is the immediate result of force exercised by the defendant, in a place where the probable and natural result of misdirected force would be to cause injury to others, the defendant will be responsible for the damage done, though it happen accidentally or by misfortune, unless the force was used strictly in self-defence (*u*).

Personal security—Justification—Assault and battery in self-defence.—If the assault is in self-defence, and it can be shown that the plaintiff was the aggressor, and assaulted the defendant in the first instance, the action will be answered. But the defendant must show an assault by the plaintiff commensurate with the assault charged upon the defendant; for, if the assault proved to have been committed by the plaintiff is trifling, and altogether disproportioned to the assault committed by the defendant, and forms no excusable or justifiable cause for it, the plaintiff will be entitled to a verdict (*x*). Where the defendant proved that the plaintiff got off his horse, and held up his stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation,

(*q*) Bac. Abr. MAIHEM. Beames's Glanv. p. 350. Bract. lib. 3, tr. 2.
(*r*) *Christopherson* v. *Bare*, 11 Q. B. 477.
(*s*) *James* v. *Campbell*, 5 C. & P. 372.
(*t*) *Hopper* v. *Reeve*, 7 Taunt. 698.
(*u*) *Ante*, p. 17.
(*x*) *Dean* v. *Taylor*, 11 Exch. 68. *Cockcroft* v. *Smith*, 2 Salk. 641; 11 Mod. 43. Littledale, J., *Reeve* v. *Taylor*, 4 N. & M. 470.

141 justifiable (*y*). So, if one man strikes another, and the person struck, in the heat of anger, and on the impulse of the moment, returns the blow with a stick or bludgeon, the battery is excusable (*z*); but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary for his defence he commits an assault and battery (*a*). If a man strikes another, who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, the second assault cannot be justified (*b*).

When a person has been assaulted in such a way as to endanger his life, he is, of course, justified in maiming and wounding the attacking party; and, if he has been violently assaulted, or assaulted in such a way as to put him in bodily fear, the mayhem or wounding, if inflicted in self-defence, is held excusable. "A man cannot justify a maim for every assault, as, if *A* strike *B*, *B* cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger" (*c*). "If *A* strike *B*, and *B* strike again, and they close immediately, and in the scuffle *B* maims *A*, this mayhem is excusable; but if, upon a little blow given by *A* to *B*, *B* gives him a blow that maims him, this mayhem is not excusable" (*d*). "Cockcroft, in a scuffle, ran his finger towards Smith's eye, who bit a joint off from the plaintiff's finger: the question was, whether this was a proper defence for the defendant to justify in an action of mayhem; and Holt, C. J., said that a man ought not, in the case of a small assault, to give a violent or unsuitable return, but in such a case plead what is necessary for a man's defence, and not who struck first; for hitting a man a little blow with a little stick on the shoulder is not a reason for him to draw a sword, and cut and hew the other" (*e*).

Personal security—Justification—Assault in defence of the possession of a house, or close, or of property.—An assault and battery may be justified in defence of the possession of a house, or a close, or a vestry-room, or pulpit (*f*), or in defence of the possession of goods and chattels by the person entitled to the possession and use of them (*g*). If one man enters the house of another with force and violence, the owner of the house may justify turning him out,

(*y*) *Dale* v. *Wood*, 7 Moore, 33. *Penn* v. *Ward*, 2 C. M. & R. 338.

(*z*) *Blunt* v. *Beaumont*, 2 Cr. M. & R. 412. *Oakes* v. *Wood*, 3 M. & W. 150.

(*a*) Coleridge, J., *Reg.* v. *Driscoll*, Car. & M. 214.

(*b*) Holt, C. J., *Cockcroft* v. *Smith*, 11 Mod. 43; 2 Salk. 641.

(*c*) Per Cur., *Cook* v. *Beal*, 1 Ld. Raym. 177; 3 Salk. 115.

(*d*) *Cockcroft* v. *Smith*, 2 Salk. 642.

(*e*) *Cockcraft* v. *Smith*, 11 Mod. 43.

(*f*) *Jackson* v. *Courtenay*, 8 El. & Bl. 8; 27 L. J., Q. B. 37. Bro. Abr. TRESPASS, pl. 128.

(*g*) *Roberts* v. *Tayler*, 1 C. B. 117; 14 L. J., C. P. 87.

142 without a previous request to depart (*h*); but if he enters quietly, he must be requested to retire before hands can be lawfully laid upon him to turn him out (*i*). If he will not depart after having been requested so to do, the owner may use as much force as is necessary; and, if the intruder resists the attempts of the owner of the house to turn him out, he is guilty of an assault upon the latter; and, if a policeman standing by sees the resistance and witnesses the assault, he is justified in taking the intruder into custody. A policeman may also, with the authority and at the request of the master of the house, himself proceed to turn out the intruder; but he is not bound to do so unless he pleases, as it is no part of a policeman's duty to do so (*k*). If a shopkeeper puts goods into his shop window, ticketed at a certain price, he is not bound to sell them at the price marked; and, if a customer insists upon having the goods, and refuses to leave the shop after having been requested so to do by the shopkeeper or his servants, he may be turned out (*l*). If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out, though the disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him, using no more violence than is necessary to turn him out. If the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord (*m*). The same rule prevails with regard to a forcible seizure of goods and chattels. If one comes forcibly and takes away my goods, I may oppose him without any more ado; for there is no time to make a request (*n*). The owner of goods which are wrongfully in the possession of another may justify an assault involving no unnecessary violence, in order to repossess himself of his property (*o*). When the defendant justifies in defence of his possession of realty or personalty, he must prove the fact of his possession at the time he committed the assault, and that the assault was of a defensive, and not of an offensive, character (*p*). Bare possession without title is sufficient against any person having no better title (*q*).

If a tenant who holds over after the expiration of his lease is *de facto* in possession of the house; if he is sitting in his

(*h*) *Weaver* v. *Bush*, 8 T. R. 78. *Tullay* v. *Reed*, 1 C. & P. 6.

(*i*) *Polkinhorn* v. *Wright*, 8 Q. B. 197; 15 L. J., Q. B. 70.

(*k*) *Wheeler* v. *Whiting*, 9 C. & P. 265.

(*l*) *Timothy* v. *Simpson*, 6 C. & P. 500.

(*m*) *Howell* v. *Jackson*, 6 C. & P. 725. *Webster* v. *Watts*, 11 Q. B. 311; 17 L. J., Q. B. 73.

(*n*) *Green* v. *Goddard*, 2 Salk. 641; Owen, 150.

(*o*) *Blades* v. *Higgs*, 10 C. B., N. S. 713; 12 C. B., N. S. 501; 34 L. J., C. P. 286. But it has been held in Ireland that he cannot justify an imprisonment for the same purpose. *Harvey* v. *Maine*, Ir. Rep., 5 C. L. 417.

(*p*) *Dean* v. *Hogg*, 10 Bing. 349.

(*q*) *Chatteris* v. *Cooper*, 4 Taunt. 547. *Brett* v. *Mullarkey*, Ir. Rep., 7 C. L. 120.

143 drawing-room, or sleeping in his bed, and the landlord walks in at the front door, the latter cannot be said to be in possession of the house, any more than a visitor who comes to make a morning call; and, if he lays hands on the tenant and turns him out, he cannot truly say that this was done in defence of his (the landlord's) possession of the house, such possession not having been gained until *after* the exercise of the act of force constituting the assault. But, if the tenant, or any other person who has originally lawfully come into possession, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter, and take and keep possession. The previous possessor is then lawfully dispossessed; and, if he re-enters, he commits a trespass, and may be turned out of the house or off the land (*r*).

To justify a battery, the defendant must show that there was an unlawful resistance on the part of the plaintiff to the lawful acts of the defendant. If the plaintiff complains of repeated blows, of his having been knocked down and wounded, or of his having had his leg broken, it is no answer to say that the plaintiff intruded himself into the defendant's dwelling-house, and made a disturbance, and would not go out, and therefore the defendant knocked him down, or cut his head open with a truncheon, or broke his leg, as no man is justified in resorting to such severe measures to expel an intruder, unless resistance has been offered; in which case it must be shown that the force used was no more than was reasonably necessary to overcome such resistance (*s*).

In an action of trespass it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground, and the defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden, and went up the ladder in order to nail a board to the house of the plaintiff; that the defendant forbad the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, doing as little damage as possible to the plaintiff, and on demurrer to the plea it was held that the overturning and throwing down of the ladder, however gently, with the plaintiff upon it, were unjustifiable, and the plea bad (*t*).

Personal security—Spring-guns.—In *Bird* v. *Holbrook* (*u*) the **144** defendant being the owner of a garden, which was at some distance from his dwelling-house, and which was subject to depreda-

(*r*) *Browne* v. *Dawson*, 12 Ad. & E. 629. *Taylor* v. *Cole*, 3 T. R. 295. *Taunton* v. *Costar*, 7 T. R. 431. *Butcher* v. *Butcher*, 7 B. & C. 402; 1 M. & R. 220.

(*s*) *Gregory* v. *Hill*, 8 T. R. 299. *Oakes* v. *Wood*, 2 M. & W. 791.

(*t*) *Collins* v. *Renison*, Say. 138.

(*u*) 4 Bing. 628.

tions, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, got over the wall in order to catch a pea-fowl, the property of a neighbour, which had escaped into the garden, and, his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held that the defendant was liable. In *Ilott* v. *Wilkes* (*x*)—the well-known case as to spring-guns—it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Bayley, J., and Holroyd, J., appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be obtained, and dangerous to the lives of persons who might be innocently trespassing. In *Jordin* v. *Crump* (*y*), the use of dog-spears was held not illegal; but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different.

By the 24 & 25 Vict. c. 100, s. 31 (re-enacting the 7 & 8 Geo. 4, c. 18), it is provided that whoever shall place or cause to be placed, or shall knowingly and wilfully continue, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, shall be guilty of a misdemeanour; but the setting of any gun or trap, such as is usually set with intent to destroy vermin, is not to be thereby rendered illegal; nor the setting of a spring-gun, man-trap, or other engine in a dwelling-house, for the protection thereof in the night-time (*z*).

Personal security—Justification—Defence of neighbours and friends.—If the assault complained of was committed by the defendant in the necessary and proper defence of a third party from the unlawful violence of the plaintiff, it is justifiable under a plea to the effect that the plaintiff first assaulted *A*, being the child or relative, wife, husband, servant, apprentice, neighbour, or friend of the defendant,

145 and was continuing to do so, whereupon the defendant laid his

(*x*) 3 B. & Ald. 304.

(*y*) 8 M. & W. 782. The doctrines stated in the previous portion of this chapter are recognized and adopted in all the States, and it is unnecessary to cite supporting authorities.

(*z*) *Deane* v. *Clayton*, 7 Taunt. 489. See Wood on Nuisances (p. 147), also *State* v. *Moore* (31 Conn. 479), where the doctrine is advanced that a person may lawfully set spring-guns, &c. in certain ways, for the protection of his dwelling.

hands on the plaintiff to defend the said *A* against the plaintiff, and to prevent him from further assaulting the said *A* (*a*).

Personal security—Justification—Moderate correction by parents, schoolmasters, masters of ships, &c.—To an action for an assault and battery, it is a good defence to plead that the person assaulted was the son of the plaintiff, and was an infant within the age of twenty-one years, still domiciled under the paternal roof, and under the care and control of the plaintiff, that he behaved saucily and contumaciously to the plaintiff, and refused to obey his lawful commands, whereupon the plaintiff moderately and in a reasonable manner chastised him (*b*); or that the plaintiff was the apprentice of the defendant, and conducted himself improperly and saucily, wherefore the defendant moderately chastised him (*c*); or that the defendant was the head master of a school or college, of which the plaintiff was a pupil, that the plaintiff was a member of a society or combination of pupils for purposes subversive of the discipline of the school, wherefore, &c. (*d*); or that the defendant at the time of the assault was the captain of a merchant vessel trading to China, and the plaintiff was a mariner on board the vessel, serving under the orders of the defendant, and that the plaintiff conducted himself in a mutinous and disorderly manner, and refused to obey the lawful and necessary commands of the defendant, whereupon the defendant caused the plaintiff to be moderately and properly corrected and flogged (*e*); or that the plaintiff was a passenger by the ship of which the defendant was captain, and that by reason of the plaintiff's conduct it became necessary for the preservation of the discipline, or for the safety, of the ship, to imprison him (*f*).

Personal security—Justification—Assaults in preservation of the public peace.—Any person who witnesses an affray may, during the continuance of the affray, and for the purpose of putting a stop to it, lay hands on the affrayers (*g*). If he comes up in the midst of the affray, and forcibly interferes as a peacemaker for the purpose of separating the combatants and preventing further violence, he is not guilty of a trespass, unless he uses more violence than is reasonably necessary for the purpose (*h*).

Personal security—Assault—Hearing and dismissal by magistrates.—By the 24 & 25 Vict. c. 100, s. 42 (which is for the most

(*a*) *Leward* v. *Baseley*, 1 Ld. Raym. 62; 1 Salk. 407; 3 Salk. 46.

(*b*) *Winterburn* v. *Brooks*, 2 C. & K. 16.

(*c*) *Penn* v. *Ward*, 2 C. M. & R. 338.

(*d*) *Fitzgerald* v. *Northcote*, 4 F. & F. 656. As to the powers of a schoolmaster generally, see *Ibid.* in notes, p. 663.

(*e*) *Lamb* v. *Burnett*, 1 Cr. & J. 295.

(*f*) *Aldworth* v. *Stewart*, 4 F. & F. 957.

(*g*) *Noden* v. *Johnson*, 16 Q. B. 218.

(*h*) *Timothy* v. *Simpson*, 6 C. & P. 500. The doctrine stated in the two previous sub-divisions and in this, is recognized by our Courts. In reference to punishment inflicted by teachers upon apprentices, &c., it is proper to say, however, that it must in all cases be moderate and reasonable, and if excessive liability attaches therefor.

146 part a re-enactment of the 9 Geo. 4, c. 31, s. 27), it is enacted that, where any person shall unlawfully assault or beat any other person, two justices, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence: and (s. 44), if the justices upon the hearing of any such case of assault and battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit punishment, and shall dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And, if any person (s. 45) against whom such complaint shall have been preferred by or on behalf of the party aggrieved shall have obtained such certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or suffered the imprisonment awarded, such party shall be released from all further proceedings, civil or criminal, for the same cause. If a certificate under this statute is relied upon as a defence, it must be shown to have been granted on one of the grounds specified in the Act (*i*). If the magistrate merely orders the accused to enter into recognizances to keep the peace and pay the recognizance fee, that will be no bar to an action (*k*). If the magistrate takes cognizance of the complaint and decides it to be frivolous, he is bound forthwith to grant a certificate that he has so decided. The granting or withholding the certificate by the magistrate is not discretionary. The defendant is entitled to it *de jure;* and whether the complainant was present or absent at the time of the grant of such certificate is wholly immaterial (*l*). When the complaint has been once duly made before justices it cannot be withdrawn and further proceedings upon it discontinued by arrangement between the parties, if the justices think fit to oppose such an arrangement (*m*).

(*i*) *Skuse* v. *Davis*, 10 Ad. & E. 639. The certificate of the fact of the dismissal, signed by two justices, will be *primâ facie* evidence of the dismissal of the complaint, without proof of the genuineness of the signatures of the magistrates who have signed it (8 & 9 Vict. c. 113, s. 1). If the defendant relies upon a conviction under the same statute, the record of the conviction, or an examined copy of it, must be produced. *Hartley* v. *Hindmarsh*, L. R., 1 C. P. 553; 35 L. J., M. C. 255.

(*k*) *Hartley* v. *Hindmarsh*, L. R., 1 C. P. 553; 35 L. J., M. C. 255. Under the 9 Geo. 4, c. 31, s. 27, if the plaintiff, after the defendant had been summoned before justices, and had appeared and pleaded "Not guilty," withdrew his complaint without offering any evidence, and the charge was dismissed, or if he gave notice that he did not mean to attend the hearing, and the defendant attended and claimed to have the information dismissed, the defendant was entitled to a certificate in the terms of the statute, which was a bar to any subsequent action for the same assault (*Tunnicliffe* v. *Tedd*, 5 C. B. 553. *Vaughton* v. *Bradshaw*, 9 C. B., N. S. 115; 30 L. J., C. P. 93); but this has been altered by the above statute, which requires the hearing to be on the merits, in order to entitle the defendant to the certificate.

(*l*) *Hancock* v. *Somes*, 1 El. & El. 795; 28 L. J., M. C. 196.

(*m*) *Reg.* v. *Hawkins*, 2 N. R. 62.

147 The word "forthwith" in sect. 44 of the statute, does not mean that the certificate is to be granted forthwith upon the dismissal of the complaint by the magistrate, but forthwith upon the application of the party entitled to the certificate. It is not the duty of the magistrate to grant the certificate, not being asked for it; but, when the magistrate is asked for it, he cannot refuse it; it is a record merely of what he has judicially decided, and is demandable *ex debito justitiæ*. If, therefore, justices refuse to grant the certificate on application made to them, the Court will compel them to do it (*n*).

Infringement of rights of liberty—False imprisonment—Arrest under legal process.—False imprisonment is a trespass committed by one man against the person of another, by unlawfully arresting him, and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it is in a common prison, or a private house, or in the stocks, or by forcibly detaining any one in the public streets. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time.

Actual contact is not necessary to constitute an imprisonment. Any restraint put upon the freedom of another by show of authority or force, is sufficient to constitute an imprisonment: so that, if a person is restrained, even without the presence of a constable, from leaving a room, or going out of a house, this infringement of his personal liberty will constitute an imprisonment (*o*). If a bailiff who has a process against any one says to him, "You are my prisoner, I have a writ against you," upon which the person addressed submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process (*p*). If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force is used: for the party addressed feels that he has no option, no more power of going in any but the one direction prescribed to him, than if the constable or bailiff had actual hold of him; and it is that entire restraint of the will which constitutes the imprisonment (*q*). "If you

(*n*) *Costar* v. *Hetherington*, 1 El. & El. 802; 28 L. J., M. C. 198, overruling *Reg.* v. *Robinson*, 12 Ad. & E. 672.

(*o*) *Warner* v. *Riddiford*, 4 C. B., N. S. 206. In *McNay* v. *Stratton*, 9 Ill. App. 215, the defendant went to the plaintiff's house, and found the latter in his corn crib. He, the defendant, drew his revolver and demanded that the plaintiff should answer certain questions. The plaintiff attempted to leave the crib, when the defendant fired at, and wounded him, and kept him in the crib for over an hour. It was held that the plaintiff was liable for false imprisonment.

(*p*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; 5 Sc. 580.

(*q*) Williams, J., *Bird* v. *Jones*, 7 Q. B. 743; 2 Inst. 589; Bull. N. P. 62.

put your hand upon a man, or tell him he must go with you, and he goes, supposing you have the right and the power to compel him, that is an arrest" (*r*). But a partial restraint of the will of a person is not sufficient to constitute an imprisonment. Thus, where a part of a public footway on a bridge was taken and appropriated for seats to view a regatta, and separated for that purpose from the adjoining carriage-road by a temporary fence, and the plaintiff insisted upon a right of way across the part so appropriated, and climbed over the fence, but was stopped by two policemen, who prevented him from proceeding onwards, but at the same time told him he might go back if he pleased, which the plaintiff refused to do, and remained where he was for half-an-hour, it was held that this was no imprisonment (*s*).

Every unlawful detainer of a prisoner after he has gained a right to be discharged is a fresh imprisonment (*t*).

Every private, unofficial person, not acting in a judicial capacity, or in the authorized execution of legal process, is responsible in damages for a wrongful imprisonment ordered, directed, or authorized by him. If a person merely lays a complaint before a magistrate in a matter over which the magistrate has a general jurisdiction, and the magistrate grants a warrant, upon which the person charged is arrested, the party laying the complaint is not responsible for an assault and false imprisonment, although the particular case may be one in which the magistrate has no authority to act (*u*); but, if he officiously interferes and gives orders or directions to police constables for the imprisonment of the plaintiff, he will be responsible in damages, if he is unable to excuse or justify the act (*x*). If a private person intervenes between the magistrate and the constable, and busies himself in executing the justice's warrant, and the proceedings should be set aside, he may render himself responsible in damages for the consequences of his interference (*y*). Where, the defendant having accused the plaintiff of embezzlement, both parties agreed to go before a magistrate to settle the matter, and the defendant, addressing the magistrate, said he came to prefer a charge of embezzlement against the plaintiff, whereupon the plaintiff was ordered to go into the dock, and was detained in custody until the charge had been heard and dismissed, it was held that the defendant was not responsible for the imprisonment, which was an act done by the magistrate in the exercise of his authority (*z*). Where the defendant out of spite and ill-will, and for the purpose of getting the plaintiff out of the way,

(*r*) Tindal, C. J., *Wood* v. *Lane*, 6 C. & P. 774.
(*s*) *Bird* v. *Jones*, 7 Q. B. 742.
(*t*) *Withers* v. *Henley*, Cro. Jac. 379.
(*u*) *Carratt* v. *Morley*, 1 Q. B. 28.
(*x*) *Cohen* v. *Morgan*, 6 D. & R. 8. *Barber* v. *Rollinson*, 1 Cr. & M. 330. *West* v. *Smallwood*, 3 M. & W. 418.
(*y*) *Painter* v. *Liverpool Gas Co.*, 3 Ad. & E. 444.
(*z*) *Brown* v. *Chapman*, 6 C. B. 376. *Barber* v. *Rollinson*, 1 Cr. & M. 330.

went to the place of rendezvous for the impress service near the
149 Tower, and gave information there which caused the plaintiff to be seized by the press-gang and carried on board the tender, where he was detained until it was discovered that the information was false, and that he had never been in a ship before, it was held that the defendant was liable to an action for false imprisonment. "If a person," observes Lord Ellenborough, "causes another to be impressed, he does it at his own peril, and is liable in damages if that person proves not to have been subject to the impress service. If the defendant in this case had said that she believed the plaintiff had been a sailor, and was liable to be impressed, leaving it to the officer of the press-gang to make the necessary inquiries, and to act as he should think most advisable, she would not then have been amenable to this action; but she took upon herself positively to aver that the plaintiff was compellable to serve in a king's ship, and caused him to be seized, and she must answer for the consequences" (*a*). Here the person giving the information was the sole moving cause of the arrest, and herself trumped up a false story for the very purpose of wrongfully depriving the plaintiff of his liberty. There is a wide distinction, therefore, between this case and the case of a man who gives *bonâ fide* information, or makes a *bonâ fide* charge against another to a police constable, leaving the constable to make inquiry into the circumstances, and act as he may think fit in the matter.

Where a felony had been committed in the house of the defendant, and the latter sent for the police and complained of the robbery, and stated various circumstances of suspicion which had come to his knowledge, and the policeman made inquiry into those circumstances, and on his own authority arrested the plaintiff and took him to a police-station, and at the same time requested the defendant to come to the station and sign the charge-sheet, which he did, charging the plaintiff with the felony, it was held that these facts did not render the defendant responsible for a trespass, as charging a person with an offence was a different thing from giving him into custody. "The arrest and detention of the plaintiff," observes Pollock, C. B., "were the acts of the police-officer; and the defendant did nothing more than he was, under the circumstances, bound to do, viz., sign the charge-sheet. He might have been liable if he had acted *malâ fide*, but not otherwise. We ought to take care that people are not put in peril for making a complaint when a crime has been committed. If a charge is made *malâ fide*, there are ample means of redress" (*b*). But where the justice refused to detain the person charged unless the defendant
150 would sign the charge-sheet, and the defendant did sign it, it

(*a*) *Flewster* v. *Royle*, 1 Campb. 188. 28 L. J., Ex. 242. *Brown* v. *Chapman*, (*b*) *Grinham* v. *Willey*, 4 H. & N. 499; 6 C. B. 374.

was held that he was responsible for the imprisonment (*c*). It is not necessary to show that the defendant gave any personal orders or directions to the police touching the arrest, in order to establish a *primâ facie* case against the defendant. If it is shown that the defendant made a charge against the plaintiff, and the surrounding circumstances, and the conduct and acts of the defendant or his servants, raise a fair and reasonable presumption that the wrongful act was ordered or directed to be done by the defendant, there is enough to call upon him to answer the charge and rebut the presumption; and, if no evidence is offered by him for that purpose, the jury are justified in finding him guilty (*d*). If the defendant charges the plaintiff with a felony in the presence of a policeman, and stands by and sees the plaintiff taken into custody, and is silent, this is evidence of the defendant's having authorized or directed the policeman to act in the matter (*e*). And, if the defendant gives the plaintiff in charge (*f*), or directs the policeman to take him into custody, he will be answerable in damages for the imprisonment if he cannot establish a justification (*g*); and the signing of a charge-sheet by the defendant is *primâ facie* evidence against him that he ordered and directed the arrest (*h*).

All persons aiding and assisting in the unlawful confinement of another are responsible in damages for the trespass, although they had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful at the time they had a hand in it (*i*).

If a person has been arrested and imprisoned under the authority of legal process which has been set aside as irregular, both the solicitor who sued out the process, and the client who set the solicitor in motion, are responsible in damages in an action for an assault and false imprisonment; for, as the client gives to the solicitor the right to represent him in the conduct of a cause, he is responsible for whatever the solicitor does within the scope of his authority. The writ is a justification to the officer of the Court who acted under it, and had no option but to obey it; but it is no protection, after it has been set aside, to the solicitor (*k*) who sued it out, or to the client who set the solicitor in motion (*l*). But a

(*c*) *Austin* v. *Dowling*, L. R., 5 C. P. 534. See *Harris* v. *Dignum*, *infra*.

(*d*) *Glynn* v. *Houston*, 2 M. & G. 337; 2 Sc. N. R. 554.

(*e*) *Warner* v. *Riddiford*, 4 C. B., N. S. 200.

(*f*) *Hopkins* v. *Crowe*, 4 Ad. & E. 774. *Wheeler* v. *Whiting*, 9 C. & P. 262.

(*g*) *Warner* v. *Riddiford*, 4 C. B., N. S. 200. Ashhurst, J., in *Morgan* v. *Hughes*, 2 T. R. 231. *Stonehouse* v. *Elliott*, 6 *ib.* 315.

(*h*) *Harris* v. *Dignum*, 39 L. J., Ex. 23. See *Austin* v. *Dowling*, *supra*.

(*i*) *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 137. A magistrate who issues a warrant, void on its face, as showing that the larceny was barred by the Statute of Limitations, is liable for false imprisonment: *Vaughn* v. *Congdon*, 56 Vt. 111. But an attorney who causes a person to be imprisoned upon an erroneous process—it not being void—is not liable: *Fischer* v. *Laughim*, 13 Abb. (N. Y.) N. C. 10.

(*k*) *Parsons* v. *Lloyd*, 2 W. Bl. 844.

(*l*) *Barker* v. *Braham*, 2 W. Bl. 865. *Collett* v. *Foster*, 2 H. & N. 361.

151 person causing process to be issued is not responsible for anything that is done under it, where the process is afterwards set aside, not for irregularity, but for error. In the one case a man acts irregularly and improperly without the sanction of any Court; and he, therefore, takes the consequences of his own unauthorized act. But, where he relies upon the judgment of a competent Court, he is protected (*m*). He is also protected, where the judgment, being a valid and regular judgment, is set aside as a matter of favour to the judgment debtor (*n*).

Rights of liberty—Arrest of the wrong person.—If the wrong person is arrested by mistake, all persons causing the arrest are liable for the injury (*o*), unless the party complaining has brought the injury upon himself by his own misstatements and misrepresentations. If there was a lawful ground for arresting *A*, and *B* represents himself to be *A*, and is arrested in consequence of that representation, he has obviously no valid ground for complaining of the imprisonment which naturally resulted from his own act. But, after he has given notice that he is not the person he represented himself to be, he cannot lawfully be detained for any greater length of time than may be reasonably necessary to ascertain which of the several statements he has made is in accordance with the truth (*p*).

Rights of liberty—Arrest in execution of warrants of justices.—Constables making an arrest in execution of a warrant of justices ought to have their warrant with them, ready to be produced in case it should be required. Not having it, they are not justified in making an arrest, unless the arrest is made for felony, or suspicion of felony (*q*).

Rights of liberty—Arrest without warrant on suspicion of felony.—"If treason or felony be done," observes Lord Coke, "and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion; and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus*" (*r*). There is this distinction between an arrest for felony by a private individual and a constable. In order to justify the private individual in causing the imprisonment, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has

(*m*) *Williams* v. *Smith*, 14 C. B., N. S. 596. *Cooper* v. *Harding*, 7 Q. B. 928. *Philips* v. *Biron*, 1 Str. 509.

(*n*) *Smith* v. *Sydney*, L. R., 5 Q. B. 203.

(*o*) *Davies* v. *Jenkins*, 11 M. & W. 754; *Hays* v. *Creary*, 60 Tex. 445.

(*p*) *Dunston* v. *Paterson*, 2 C. B., N. S. 495; 26 L. J., C. P. 267.

(*q*) *Galliard* v. *Laxton*, 2 B. & S. 363; 31 L. J., M. C. 123. *Codd* v. *Cabe*, 1 Ex. D. 352; 45 L. J., Ex. 101.

(*r*) 2 Inst. 52. *Davis* v. *Russell*, 5 Bing. 357; 2 M. & P. 590.

152 actually been committed by some person or another, and that the circumstances were such that any reasonable person acting without passion or prejudice would have fairly suspected that the plaintiff committed it, or was implicated in it (*s*); whereas a constable, having reasonable ground to suspect that a felony has been committed, although in fact none has been, is authorized to detain the person suspected, not being an infant under the age of seven years, incapable of committing a felony (*t*), until he can be brought before a justice of the peace to have his conduct investigated (*u*).

Rights of liberty—Arrest—Reasonable and probable cause.—There is no standard or fixed rule as to what is reasonable ground of suspicion which can be laid down as applicable to all cases. "The charge," observes Watson, B., "may be reasonable or unreasonable with reference to the circumstances and the character of the party making it; and, while, on the one hand, a constable ought to be protected in the execution of his duties, he ought, on the other, to be guided in the discharge of those duties by ordinary reason, care, and caution." Where, therefore, a travelling showman told the defendant, a police-constable, at a fair, that he had had some harness stolen a year before, and that the stolen harness was on the plaintiff's horse, and the constable went to the plaintiff and asked him where he got the harness, and the plaintiff gave the common thief's answer—that he had bought the harness of a man he did not know, and had given him a shilling for it,—whereupon the constable took the plaintiff into custody, but it appeared that the constable had known the plaintiff for twenty years as a respectable householder, it was held that there was no reasonable cause for the arrest, and that the constable was responsible in damages for a wrongful imprisonment (*x*). But, if one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment because it turns out that the charge is false, and that no felony has in fact been committed (*y*); for, if one man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, "it would be most mischievous," observes Lord Mansfield, "that the officer should be bound first to try, and at his peril exercise his judgment on the truth of, the charge. He that makes the charge alone is answerable. The officer does his duty in carry-

(*s*) Tindal, C. J., *Allen* v. *Wright*, 8 C. & P. 526. *Hall* v. *Booth*, 3 N. & M. 316.

(*t*) *Marsh* v. *Loader*, 14 C. B., N. S. 535.

(*u*) *Beckwith* v. *Philby*, 6 B. & C. 635; 9 D. & R. 487. *Lawrence* v. *Hedger*, 3 Taunt. 14. *Buckley* v. *Gross*, 3 B. & S. 566; 32 L. J., Q. B. 129.

(*x*) *Hogg* v. *Ward*, 3 H. & N. 417; 27 L. J., Ex. 443.

(*y*) Hale, P. C. 177. *Davis* v. *Russell*, 5 Bing. 354; 2 M. & P. 607.

153 ing the accused before a magistrate, who is authorized to examine and commit or discharge" (*z*). If an arrest by a constable is in its inception wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in strict discharge of their official duty (*a*).

The question of reasonable and probable cause is a question for the judge and not for the jury (*b*). "Probable cause," observes Tindal, C. J., "is, no doubt, a question of law, and within the province of a judge to decide; but the jury must not only find the facts which are supposed to constitute probable cause, but they are also warranted in forming their conclusion from those facts, and it is frequently difficult to draw the line between matter of law and matter of fact" (*c*). If, in the opinion of the judge, founded on facts proved before a jury, there was reasonable ground for suspecting, either that the plaintiff had committed, or that he was about to commit, a felony, he cannot recover damages from a constable for arresting and detaining him, although no felony had, in fact, been committed (*d*). The fact that the defendant acted upon hearsay evidence alone in causing the plaintiff to be arrested, if such evidence could easily have been tested, is one element—though not a conclusive one, if the informant is a trustworthy person, or other circumstances exist—in considering the question of reasonable and probable cause (*e*).

A justification of an imprisonment on the ground that the plaintiff had committed felony, and an abandonment of the plea at the trial, or a failure to prove it, are evidence of malice, and a great aggravation of the original wrong; but a justification of a false imprisonment on the ground that a felony had been committed, and that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of it, is very different. Such a justification is in the nature of an apology for the defendant's conduct (*f*).

Rights of liberty—Arrest for a misdemeanour.—Regularly neither a private person nor a constable can of his own authority, without warrant, arrest another for a misdemeanour, except for a breach of the peace, while the strife is going on, and to prevent its con-

(*z*) *Samuel* v. *Payne*, 1 Doug. 360.
(*a*) *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134. *Wright* v. *Court*, 4 B. & C. 596; 6 D. & R. 625.
(*b*) *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J., Ex. 392.
(*c*) *Davis* v. *Russell*, 5 Bing. 354; 2 M. & P. 604.
(*d*) *Beckwith* v. *Philby*, 6 B. & C. 635; 9 D. & R. 487.
(*e*) *Perryman* v. *Lister*, L. R., 3 Ex. 197; 4 H. L. 521; 37 L. J., Ex. 166.
(*f*) *Warwick* v. *Foulkes*, 12 M. & W. 509.

154 tinuance (*g*). But it is said in Hawkins' "Pleas of the Crown," "that any private person may lawfully arrest a suspicious night-walker and detain him till he make it appear that he is a person of good reputation. Also it hath been adjudged that any one may apprehend a common notorious cheat going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace; for the public good requires the utmost discouragement of all such persons; and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity of escaping" (*h*). "These cases in Hawkins," observes Lord Tenterden, "are where the party is caught in the fact; and the observation there added assumes that the person arrested is guilty. Where the case is only one of suspicion, the arrest is unjustifiable. The instances in Hale of arrest on suspicion, after the act has been done, relate to felony. In cases of misdemeanour, the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands" (*i*).

Rights of liberty—Arrest to preserve the peace.—For the preservation of the peace, any individual who sees it broken may restrain the liberty of him he sees breaking it, so long as the conduct of such person shows that the public peace is likely to be endangered by his acts. Any bystander may, and ought to, arrest an affrayer at the moment of the affray, and detain him until his passion is cooled, and then deliver him to a peace-officer, to be carried before a justice of the peace, to be compelled to find sureties for keeping the peace; but a private individual who has witnessed an affray cannot after the affray has ceased lawfully give the affrayers into custody, unless they continue on the spot, and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray (*j*). If the affrayers, on hearing or seeing that the police-constables are coming, run away and disperse, they cannot lawfully be pursued and taken by constables, or given into custody by private individuals, for the affray that is then ended (*k*). If during an affray a bystander calls up a policeman, and directs him to take one of the affrayers into custody, the bystander does not thereby render himself amenable to an action for false imprisonment (*l*).

A constable may *ex officio* arrest a breaker of the peace in his

(*g*) *Bowditch* v. *Balchin*, 5 Exch. 380. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134.
(*h*) Hawkins, 2 P. C., c. 12, s. 20.
(*i*) *Fox* v. *Gaunt*, 3 B. & Ad. 800.
(*j*) *Timothy* v. *Simpson*, 1 C. M. & R. 757. *Price* v. *Seeley*, 10 Cl. & Fin. 39.
(*k*) *Baynes* v. *Brewster*, 2 Q. B. 385.
(*l*) *Devecourt* v. *Corbishley*, 5 El. & Bl. 188; 24 L. J., Q. B. 313.

155 view, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. "If *A* be dangerously hurt, and the common voice is that *B* hurt him, or if *C* thereupon come to the constable and tell him that *B* hurt him, the constable may imprison *B* till he knows whether *A* lives or dies, and until he can bring him before a justice But, if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without warrant" (*m*). If an assault is committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression "recently," not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate (*n*). If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow (*o*), nor in handcuffing him.

Rights of liberty—Arrest—What amounts to a breach of the peace.—The continued ringing at a door-bell without cause or excuse does not in itself amount to a breach of the peace, so as to justify the arrest of a person by a private individual; but it is eminently calculated to lead to a breach of the peace; and, if it is done and persisted in within view of a constable, the latter may take the aggressor into custody (*p*). If a man threatens to force his way into the house of another, and collects a mob at the door, and refuses to go away when directed so to do, the owner of the house is justified in directing a constable to take him into custody, in order to preserve the peace (*q*).

It must be shown that there was an actual breach of the peace in order to justify an imprisonment. It is not enough to show that the plaintiff "made a great noise and disturbance, and refused to depart, and was in great heat and fury, ready and desirous to make an affray and commit a breach of the peace" (*r*). Disturbance and annoyance of a public meeting, by putting questions to the speakers, making observations on their statements, and saying, "That's a lie," do not constitute a breach of the peace (*s*). Nor can an imprisonment be justified on the ground that the plaintiff unlawfully entered the defendant's house and made a

(*m*) Hale, P. C. 587.

(*n*) *Reg.* v. *Light*, Dears. & B. C. C. 332; 27 L. J., M. C. 1.

(*o*) *Levy* v. *Edwards*, 1 C. & P. 40.

(*p*) *Grant* v. *Moser*, 5 M. & G. 123; 6 Sc. N. R. 466. And, if the nuisance is committed within the metropolitan police district, the offender may, if found in the act, be apprehended by the master of the house. *Simmons* v. *Millingen*, 2 C. B. 524.

(*q*) *Ingle* v. *Bell*, 1 M. & W. 516.

(*r*) *Wheeler* v. *Whiting*, 9 C. & P. 262.

(*s*) *Wooding* v. *Oxley*, 9 C. & P. 1.

156 great noise and disturbance therein, and would not depart when requested so to do, whereupon the defendant sent for a police-officer and gave the plaintiff into custody (*t*). In an action for an assault and false imprisonment the defendant justified, on the ground that he was possessed of a house and shop, that the plaintiff was unlawfully therein, and was requested to depart, which he refused to do, whereupon the defendant gently laid hands on him to remove him, and that the plaintiff then assaulted the defendant in the presence of a police-officer, and was given into custody. At the trial it was not shown that any assault had been committed by the plaintiff upon the defendant, and it was held that the imprisonment was unlawful, and the plaintiff entitled to damages (*u*). But, if a man comes into a public-house, and makes a very great noise and disturbance therein, and creates alarm and disquiets the neighbourhood, his conduct amounts to a breach of the peace, and justifies the landlord in giving him into custody, and the constable in taking him into custody, if the disturbance occurs within view of the constable (*x*). If a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace (*y*).

Rights of liberty—Arrest under the Larceny Act.—Every person to whom property is offered to be sold, pawned, or delivered, may, if he has reasonable cause to suspect that an offence punishable by the Larceny Amendment Act, 24 & 25 Vict. c. 96, has been committed on or with respect to such property, apprehend the person offering the same, and take him, together with the property, before a justice of the peace; and any person "found committing" an offence punishable by the Act, except the offence of angling in the daytime, may be immediately (*z*) apprehended by any person without a warrant, and taken before a justice, together with the property, if any (*a*).

Rights of liberty—Arrest for malicious injuries to property.—The statute for consolidating the laws relative to malicious injuries to property, enacts, that any person found committing any offence under that Act may be immediately apprehended without a

(*t*) *Green* v. *Bartram*, 4 C. & P. 308. *Rose* v. *Wilson*, 1 Bing. 353; 8 Moore, 362.

(*u*) *Reece* v. *Taylor*, 4 N. & M. 469.

(*x*) *Howell* v. *Jackson*, 6 C. & P. 723. *Webster* v. *Watts*, 11 Q. B. 311; 17 L. J., Q. B. 73.

(*y*) *Cohen* v. *Huskisson*, 2 M. & W. 482.

(*z*) Immediately, that is, after the commission of the offence, not immediately after the discovery of it. *Downing* v. *Capel*, L. R., 2 C. P. 461; 36 L. J., M. C. 97. See also *Fox* v. *Gaunt*, 3 B. & Ad. 798. *Derecourt* v. *Corbishley*, 5 El. & Bl. 188; 24 L. J., Q. B. 313.

(*a*) 24 & 25 Vict. c. 96, s. 103. A similar provision is contained in the Coinage Act, 24 & 25 Vict. c. 99, s. 31.

157 warrant by any peace-officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law (*b*). To justify an arrest under this statute, it must be shown that the offence prohibited and made punishable was actually committed (*c*), that the plaintiff was found and taken in the act (*d*), and that the person arresting was either the occupier or the landlord of the property injured. It must also be shown that the trespass was a wilful and malicious trespass. A trespass can only be wilful and malicious where it is committed by a person who knows that he has no claim or pretence of right to enter the land. If he had reasonable ground for supposing that he had a right, his conduct can neither be called wilful nor malicious (*e*).

Rights of liberty—Arrest of persons committing indictable offences in the night—And other offences.—It is lawful for a private individual to apprehend any one who shall be "found committing" any indictable offence in the night, *i.e.*, between 9 p.m. and 6 a.m., and to convey him, or deliver him to some constable or other peace-officer to be conveyed, before a justice of the peace, to be dealt with according to law (*f*). Arrests may also be made of persons "found committing" offences against the Rural Police Act (*g*), by the owner of the property or his servant, or any person authorized by him. So, also, owners and occupiers of land and their gamekeepers, &c., have power to arrest poachers (*h*).

Rights of liberty—Arrest of persons disturbing divine service.—Any person who is guilty of riotous, violent, or indecent behaviour in any church or chapel, or duly certified place of religious worship, or in any churchyard or burial-ground, or who molests, disturbs, vexes, or troubles any preacher duly authorized to preach therein, or any clergyman celebrating divine service, &c., may, immediately on the commission of the misdemeanour, be apprehended by any constable or churchwarden of the place and taken before a magistrate (*i*). To bring the offender within the statute it must be shown that the disturbance was wilful and intentional (*k*). A clergyman engaged in collecting the offertory while another clergyman is reading the offertory sentences is not celebrating divine service within the meaning of this Act; though it would seem that for the churchwardens or other persons to

(*b*) 24 & 25 Vict. c. 97, s. 61.
(*c*) *Parrington* v. *Moore*, 2 Exch. 225.
(*d*) *Simmons* v. *Millingen*, 2 C. B. 530.
(*e*) *Looker* v. *Halcomb*, 4 Bing. 183; 12 Moore, 416.
(*f*) 14 & 15 Vict. c. 19, s. 11.
(*g*) 10 & 11 Vict. c. 89, s. 15.
(*h*) 9 Geo. 4, c. 69, s. 2.
(*i*) 23 & 24 Vict. c. 32, ss. 2, 3.
(*k*) *Williams* v. *Glenister*, 2 B. & C. 699.

158 interfere with him while so doing might render them guilty of the offence of brawling within the first part of the section (*l*).

Rights of liberty—Arrest of vagrants and persons found committing acts of public indecency.—The Vagrant Act, 5 Geo. 4, c. 83 (*m*), authorizes any person whomsoever to apprehend any one found committing any of the acts of vagrancy specified in sect. 4 of the statute, such as fortune-telling; indecent exposure of the person in any street, road, or place of public resort, or within view thereof, with intent to insult any female; gathering of alms by exposure of wounds and deformities; collection of alms by false pretences; playing or betting in streets or public places with instruments of gaming, &c.

Rights of liberty—Arrest of fugitives.—By the 44 & 45 Vict. c. 69, persons accused of committing offences (*n*) and absconding, are liable to be arrested under an indorsed or provisional warrant and brought before a magistrate.

Rights of liberty—Arrest under the Merchant Shipping Act.—By the 25 & 26 Vict. c. 63, s. 37, power is given to the master or other officer of any duly surveyed passenger steamer and his assistants to detain persons whose name and address are unknown, and who have committed any of the offences specified in the Act, such as being drunk and disorderly, and refusing to leave a steamer after request and return or tender of the fare paid; molesting passengers after warning by an officer not to do so; persisting in entering or refusing to leave a steamer having its full complement of passengers; travelling or attempting to travel, without previous payment of the fare, with intent to avoid payment; proceeding beyond the distance for which the fare is paid, with intent to avoid payment for the additional distance; refusing to leave the steamer on arriving at the point to which the fare is paid; refusing either to pay the fare, or to exhibit the ticket or receipt for the fare, when demanded; wilfully obstructing any of the crew in the execution of their duty upon or about the steamer, &c.

Rights of liberty—Metropolitan police.—Persons may also be arrested in many cases for offences committed within the Metropolitan Police District.

Rights of liberty—Arrest by servants of railway companies.—Many Acts of Parliament under which railway companies are incorporated, authorize any officer or agent of the company to seize and detain any person whose name and residence shall be unknown, who shall commit any offence against the Act, and to convey him

(*l*) *Cope* v. *Barber*, L. R., 7 C. P. 393; 41 L. J., M. C. 137.

(*m*) Extended by the 34 & 35 Vict. c. 112, and the 36 & 37 Vict. c. 38.

(*n*) Punishable with hard labour for twelve months, or any greater punishment. Sect. 9.

159 with all convenient dispatch before some justice, &c., without any other warrant or authority than that given by the Act. These statutes do not authorize railway companies, their officers or agents, to take a person into custody, or to detain him, for riding in a first-class carriage with a second-class ticket, or for riding in a carriage without a ticket, or for refusing to pay his fare when it is demanded, or for mere acts of omission or offences against by-laws (*o*). By the 8 Vict. c. 20, ss. 103, 104, a penalty is imposed upon any person travelling on a railway without having paid his fare, with intent to avoid payment thereof, and power is given to all officers and servants, on behalf of the company, to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the company must determine whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and, as the decision whether a particular passenger shall be arrested or not must be made without delay, it must be presumed that the officers of the company charged with the management of traffic have authority to determine whether passengers are to be taken into custody for this offence; and, if by mistake an innocent person is apprehended by order of a superintendent, the company will be answerable for the wrong done (*p*). Pulling down boards set up by the company, and other injuries to their property, seem to be offences for which persons found in the commission of them are liable to be at once taken into custody, and carried before a magistrate.

Rights of liberty—Imprisonment by order of a judge or judicial officer.—All judges of a Court of record have power to commit to the custody of their officer *sedente curiâ*, by oral command, without any warrant made at the time. This proceeds upon the ground that there is, in contemplation of law, a record of such commitment, which record may be drawn up when necessary. A prisoner is in lawful custody although committed to prison for the purpose of being brought up again for re-hearing, without any warrant or commitment in writing (*q*).

All Courts of record have power to fine and imprison for any contempt committed in the face of the Court; for the power is necessary for the due administration of justice, to prevent the Court being interrupted. The superior Courts at Westminster may also imprison for contempt out of Court; for they were

(*o*) *Chilton* v. *London and Croydon Rail. Co.*, 16 M. & W. 231. *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148. See *Poulton* v. *L. & S. W. Rail. Co.*, L. R., 2 Q. B. 534; 36 L. J., Q. B. 294.

(*p*) *Goff* v. *Great Northern Rail. Co.*, 3 El. & El. 672; 30 L. J., Q. B. 148.

(*q*) *Kemp* v. *Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 165. *Throgmorton* v. *Allen*, 14 M. & W. 70.

160 originally carved out of the one supreme Court, and are all divisions of the *Aula Regis*, where it is said the king in person dispensed justice; and their power of committing for contempt is an emanation of the royal authority; for any contempt of the Court is a contempt of the sovereign. But inferior Courts of record have no power to imprison for contempt of Court when that contempt is committed out of Court, as the writing or publication of articles reflecting on the conduct of the judge (*r*).

Under the Bankruptcy Act, 1883 (*s*), the Court may order the arrest of a debtor who has been served with a notice if the Court thinks he is going to abscond or remove his goods, or if he fails to attend his examination.

Rights of liberty—Malicious arrest.—By the 32 & 33 Vict. c. 62, s. 6 (which is a re-enactment in effect of the 1 & 2 Vict. c. 110, ss. 1 to 10), arrest on mesne process is abolished; but it is enacted that, if a plaintiff shall at any time before final judgment prove, by evidence on oath, to the satisfaction of a judge, that he has a cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, then it shall be lawful for the judge to order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives the requisite security, not exceeding the amount claimed in the action, that he will not leave England without the leave of the Court. The foundation, therefore, on which the liability of a person for a malicious arrest must now rest is, that the party obtaining the order or authority from a judge for the arrest has imposed on the latter by some false statement, some *suggestio falsi* or *suppressio veri*, and has thereby satisfied him, not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor to be about to quit the country. If, without fraud or falsehood, upon an affidavit fairly stating the facts, the party succeeds in satisfying the judge that the defendant is about to quit the country, and so obtains an order for a *capias* to arrest him, he is not liable to an action, though the defendant had no such intention.

The party arrested has the power of making an application to a judge or the Court praying to be discharged out of custody; and the discharge will be granted as a matter of course, if such party succeeds in satisfying the judge or Court that he has not, nor ever had, the intention imputed to him; but the discharge affords no ground of action against the party procuring the arrest, if the

(*r*) Per Cockburn, C. J., *Reg.* v. *Lefroy*, L. R., 8 Q. B. 134; 42 L. J., Q. B. 121.

(*s*) 46 & 47 Vict. c. 52, s. 25.

161 original order for the arrest was fairly obtained (*t*), as it is a judicial act, and a person concerned in enforcing it is not responsible for its correctness (*u*). Where, however, the facts are not truly stated, and the Court or judge has been put in motion without reasonable and probable cause, and the party making the affidavit, or procuring the order for the arrest, was guilty of falsehood, or of culpable negligence in swearing to facts without knowing whether they were true or false, there will be evidence of malice, and he will be responsible in damages (*x*). Any statements or declarations made by the defendant tending to show that he had no reasonable or probable cause for believing, and did not believe, that the plaintiff was about to quit England, are, of course, evidence against him to show that he was actuated by malicious motives in procuring the order for the arrest (*y*).

Where the defendant, for purposes of extortion, had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer finding his way to the plaintiff's sick bed produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff yielded to the pressure, and gave up the property, it was held that these facts amounted in judgment of law to an arrest (*z*).

Where the plaintiff who had been arrested under a writ of *ne exeat* paid the sheriff the sum for which the writ was marked, but did not move to discharge the writ, it was held that it must be taken to have been properly issued, and, consequently, that the plaintiff could not recover (*a*).

(*t*) *Daniels* v. *Fielding*, 16 M. & W. 207.

(*u*) *Williams* v. *Smith*, 14 C. B., N. S. 596.

(*x*) *Gibbons* v. *Alison*, 3 C. B. 185. *Ross* v. *Norman*, 5 Exch. 359.

(*y*) *Petrie* v. *Lamont*, 3 M. & G. 702; 4 Sc. N. R. 339.

(*z*) *Grainger* v. *Hill*, 4 Bing. N. C. 212; 5 Sc. 580. In an action for a malicious arrest under a judge's order, the plaintiff must, under the plea of not guilty, be prepared to prove the affidavit made by the defendant before the judge by production of the original or an examined or office copy (*Arundell* v. *White*, 14 East, 224. *Crook* v. *Dowling*, 3 Doug. 75. *Casburn* v. *Reid*, 2 Moore, 60), and must show that the defendant made the affidavit, or used it (*Rees* v. *Bowen*, McClel. & Y. 392). The judge's order for holding the plaintiff to bail should be proved by production of the original order, purporting to be signed by one of the judges of the superior courts (8 & 9 Vict. c. 113, s. 2). Where the plaintiff put in evidence the judge's order, and a writ of capias which had been issued thereon and lodged with the sheriff, but the capias was not shown to have been returned, neither was any warrant produced, but it was proved that on the defendant being told that the plaintiff was in custody he said, as he had got him fast he would punish him, and further, that his attorney attended before the judge to oppose the plaintiff's discharge, it was held that there was sufficient proof against the defendant, without the production and proof of any warrant (*Petrie* v. *Lamont*, 3 M. & G. 707; 4 Sc. N. R. 339). If the defendant has not by his conduct and declarations admitted that the arrest was made by his orders and directions, the writ under which the arrest was effected may be proved by production of the original writ, sealed with the seal of the Court; or, if it has been returned and become matter of record, it may be proved by a certified or examined copy.

(*a*) *Lees* v. *Patterson*, 7 Ch. D. 866; 47 L. J., Ch. 616.

162 If a solicitor maliciously, and without reasonable and probable cause, knowing that his client has no just claim against the plaintiff, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorised the proceeding, will be responsible in damages (*b*).

Rights of liberty—Detention of recruits and deserters.—The Articles of War do not justify the arrest and detention by an officer of any but a recruit or a soldier. The annual Mutiny Act generally enacts, that every person who shall knowingly receive enlistment-money from certain persons employed in the recruiting service "shall be deemed to be enlisted as a soldier in Her Majesty's service" (*c*). If a person apprehended as a deserter turns out to be a civilian, and not a recruit or soldier, the parties who apprehended him, or ordered or procured his imprisonment, will be responsible in damages for the wrong done; for none are bound by the Mutiny Act or the Articles of War except Her Majesty's forces (*cc*).

Rights of liberty—Imprisonment of dangerous lunatics.—A private person may, without any warrant or authority, confine a person disordered in his mind, who seems disposed to do mischief to himself or to any other person (*d*), the restraint being necessary both for the safety of the lunatic and the preservation of the public peace; but, as the custody of these unfortunate persons is matter of great public interest, the legislature has, by a series of enactments, established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition, and imposing the necessary restraint upon their actions, under the supervision of public functionaries.

The Lunacy Acts (*e*) establish a form of proceeding, based upon medical certificates, for the purpose of facilitating the reception of persons of unsound mind, who are dangerous to themselves or to others, in asylums where they are to be properly restrained and treated. If the forms of proceeding prescribed by the Acts are not strictly complied with, the imprisonment is unlawful (*f*). The fact of a person's acting so as to appear to be of unsound mind is no justification to another for locking him up as a lunatic, without compliance with the requisite form of proceeding. It must be proved that the person imprisoned was, at the time the restraint was put upon him, a dangerous lunatic. The statutes

(*b*) *Stockley* v. *Hornidge*, 8 C. & P. 16.
(*c*) *Wolton* v. *Gavin*, 16 Q. B. 48.
(*cc*) See *ante*, p. 149.
(*d*) Bro. Abr. *Faux Imprisonment*, pl. 28.
(*e*) 8 & 9 Vict. c. 100. 16 & 17 Vict. c. 96. 18 & 19 Vict. c. 105, s. 9. 25 & 26 Vict. c. 111. 48 & 49 Vict. c. 52. See *Gore* v. *Grey*, 13 C. B., N. S. 138; 33 L. J., C. P. 109. As to the care of idiots, see 49 Vict. c. 25.
(*f*) Coleridge, J., *Reg.* v. *Pinder*, 24 L. J., Q. B. 148. *Reg.* v. *Munster*, 20 *ib.*, M. C. 48. *Norris* v. *Seed*, 3 Exch. 782.

163 now in force as to the certificates required to be made by the friend of a supposed lunatic and the medical men, protect every person acting in pursuance of the Act, except the person signing the order for the confinement of the lunatic. The certificates of all the doctors and physicians in the world will not justify one person in taking and confining another as a lunatic, unless it is proved that the person confined was really a dangerous madman, or unless the person justifying the imprisonment is the medical man, or the keeper of the asylum, or his servant, entitled to statutory protection (*g*).

Rights of liberty—Arrest of a principal by his bail.—The bail may, whenever they please, render their principal in their own discharge. They may take him up even upon a Sunday, and confine him until the next day, and then render him; and the doing it on a Sunday is no service of process, but rather like the case where a sheriff arrests by virtue of a process of Court on Saturday, and the party escapes, and the sheriff takes him upon a Sunday, which he may do, for it is only a continuance of the former imprisonment (*h*). A person who has given bail is always supposed to be in the custody of his bail, and may be taken and rendered at any time, even while he is attending as a witness in a court of justice in obedience to his subpœna (*i*).

Remedies for injuries to the person—Damages recoverable.—"The Court," observes Tindal, C. J., "never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter" (*k*). The circumstances of time and place as to when and where the assault was committed, and the degree of personal insult, must be considered in estimating the nature of the offence and the amount of damages. "It is a greater insult to be beaten upon the Royal Exchange than in a private place" (*l*). When the assault is accompanied by a false charge, affecting the honour, character, and position in society, of the plaintiff, the offence will, of course, be greatly aggravated, and the damages proportionably increased; and, if the plaintiff has been assaulted and imprisoned under a false charge of felony, where no felony has been committed, or where there was no reasonable ground for suspecting and charging the plaintiff, exemplary damages will be recovered.

Where some printers' devils, who had been unlawfully im-

(*g*) *Fletcher* v. *Fletcher*, 1 El. & El. 420; 28 L. J., Q. B. 134.
(*h*) Per Cur., *Anon.*, 6 Mod. 231.
(*i*) *Ex parte Lyne*, 3 Stark. 132. *Horn* v. *Swinford*, D. & Ry. N. P. C. 20; 1 D. & Ry. Office of Magistrates, 361.
(*k*) *Edgell* v. *Francis*, 1 M. & G. 222; 1 Sc. N. R. 121. *Huckle* v. *Money*, 2 Wils. 206.
(*l*) *Tullidge* v. *Wade*, 3 Wils. 18.

164 prisoned for six hours, brought their several actions, and the jury gave each of them 300*l.* damages, the Court declined to meddle with the verdict, although it was proved that each of the plaintiffs had been civilly treated and fed upon beef-steaks and porter during the period of their imprisonment (*m*). "If the jury," observes Pratt, C. J., "had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial."

Money paid by the solicitor of the plaintiff to procure the release of the plaintiff from an unlawful imprisonment is recoverable as part of the damages naturally and directly resulting from the wrongful act; "for a man may say that he has been forced to pay that which another who is his agent has been forced to pay for him" (*n*). Every expense that the plaintiff necessarily incurs in order to restore himself to a complete state of freedom from imprisonment is recoverable as part of the damages. Where a plaintiff, by being bailed, obtained only an imperfect release, being in the hands and at the mercy of persons who might at any time render him back to gaol, it was held that the expense of removing himself from that position was only one of the steps necessary for completing his discharge from the original imprisonment, and that, if it were necessary for the plaintiff to set aside an inquisition in order to restore himself to a complete state of freedom, he was entitled to recover the expense thereof, as part of the damages of the original wrongful act (*o*).

Remedies for injuries to the person—Damages too remote.—Where a passenger on board ship was assaulted and imprisoned for one night by the captain, and in consequence thereof took the first opportunity of leaving the ship, and paid 100*l.* for his passage home in another vessel, it was held that, in order to recover the 100*l.* as part of the damages for the assault and imprisonment, it was necessary for the plaintiff to prove that there was fair and reasonable ground for fearing a renewal of the ill-treatment, and that he left the vessel under the influence of such fear, and not merely because he was angered and displeased with the captain, and could not continue on board with ease and comfort (*p*).

(*m*) *Huckle* v. *Money*, 2 Wils. 205.
(*n*) *Pritchet* v. *Boevey*, 1 Cr. & M. 778.
(*o*) *Foxall* v. *Barnett*, 2 El. & Bl. 298; 23 L. J., Q. B. 7.
(*p*) *Boyce* v. *Bayliffe*, 1 Campb. 58. And see *Walker* v. *Olding*, 1 H. & C. 621; 32 L. J., Ex. 142. *Wilson* v. *Lancashire and Yorkshire Rail. Co.*, 9 C. B., N. S. 642; 30 L. J., C. P. 232.

165 Where the plaintiff, in an action for an assault and false imprisonment, sought to make the defendant responsible for the consequences of a remand by the magistrate, it was held that he was liable only for the first imprisonment and taking before the magistrate, and not for the remand or any subsequent detention thereunder, they being the acts of the justice (*q*). Where a railway company removed a passenger from the train (without any unnecessary violence) under a mistaken impression that he had no ticket, and the passenger left a pair of race-glasses behind him, it was held he could not recover the value of them as part of the damages for the assault, although the Court admitted it would have been otherwise had he lost any part of his property in a scuffle with the railway servants (*r*).

Remedies for injuries to the person—Mitigation of damages.—Where it was contended that the blow was unintentionally struck, the defendant intending to strike *A*, when he accidentally in the scuffle struck *B*, Bosanquet, J., told the jury that there could be no doubt but that, as the defendant struck the plaintiff, the plaintiff was entitled to a verdict, whether it was done intentionally or not, but that the intention was material in determining the amount of damages (*s*). If it is proved that the blow was unintentionally struck, and that an apology was immediately offered, the evidence would tend materially to reduce the amount of damages.

In an action for false imprisonment in giving the plaintiff in charge to a police-officer, it may be shown in mitigation of damages, that the plaintiff had for several days annoyed and insulted the defendant, by following him about the streets, and telling him to pay his debts (*t*).

(*q*) *Lock* v. *Ashton*, 12 Q. B. 876; but, in an action for a malicious prosecution, the defendant will be liable for the injury resulting from a remand.

(*r*) *Glover* v. *L. & S. W. Rail. Co.*, L. R., 3 Q. B. 25; 37 L. J., Q. B. 57.

(*s*) *James* v. *Campbell*, 5 C. & P. 372.

(*t*) *Thomas* v. *Powell*, 7 C. & P. 807.

CHAPTER VII.

INJURIES TO REPUTATION.

SECTION I.

DEFAMATION OF CHARACTER.

Distinction between slander and libel.—Slander in writing or in print has always been considered in our law a graver and more serious wrong and injury than slander by mere word of mouth, inasmuch as it is accompanied with greater coolness and deliberation, indicates greater malice, and is in general propagated wider and further than oral slander. Hence words of a depreciatory character, which, if spoken only, would not be actionable, may become so by being put into writing or print and published. "There is a very material distinction," observes Gould, J., "between libels and words. A libel is punishable both criminally and by action, when mere speaking the words would not be punishable in either way." For speaking the words "rogue" and "rascal" of any one, an action will not lie; but, if these words were written and published of any one, an action would lie (*a*). Merely to call a man a swindler, or a cheat, or dishonest person, by word of mouth, is not actionable (*b*), unless it is spoken of him in his trade or business, so as to have damaged him with his cus-

(*a*) *Villiers* v. *Mousley*, 2 Wils. 403. 5 Co. 125 b. The true distinction between slander and libel is in the difference in the mode of communication, and the consequent presumed difference in the effect upon the reputation of the person to whom they relate. Slander consists in words *spoken* of another to a third person, or ideas communicated by signs or other means not durable, the natural or actual effect of which is calculated to or actually does injure him in his reputation or business: *White* v. *Nicholls*, 3 How. (U. S.) 266. A libel consists of a malicious publication respecting another, either by printing, writing, painting, picture, or other durable mode, which charges him, expressly or by innuendo, with something which is calculated to injure him in his business, trade or profession, or which is calculated to make him infamous, odious, or ridiculous, or exposes him to the hatred and contempt of others: Daniels, J., in *White* v. *Nicholls*, *ante*; *Hillhouse* v. *Dunning*, 9 John. (N. Y.) 214; *Taylor* v. *State*, 4 Ga. 14; *Dexter* v. *Spear*, 4 Mass. (U. S.) 115; *State* v. *Farley*, 4 McCord. (S. C.) 317; *Com.* v. *Clap*, 4 Mass. 165. To publish of another anything which is *per se* slanderous, or which in law is regarded as such, by reason of the special damage resulting from their speaking, is libellous: *Vicle* v. *Gray*, 18 How. Pr. (N. Y.) 336; *Thomas* v. *Croswell*, 7 John. (N. Y.) 264; *Robbins* v. *Treadway*, 2 J. J. Mar. (Ky.) 540.

(*b*) *Savile* v. *Jardine*, 2 H. Bl. 532.

tomers (*c*); but, if such words are published in writing or printing, they are actionable *per se* (*d*). Verbal reflections upon the chastity of a young lady are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they are published in a newspaper, they are at once actionable, and substantial damages are recoverable (*e*).

Before, therefore, a person gives general notoriety to oral calumny, by circulating it in print, he must be prepared to prove its truth to the letter; for he has no more right to take away the **167** character of the plaintiff, without being able to prove the truth of the charge that he has made against him, than he has to take his property without being able to justify the act by which he possessed himself of it. "Indeed," observes Best, C. J., "if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter" (*f*).

Oral slander uttered under circumstances not rendering it actionable, may therefore become actionable by being printed and published; and the publisher may become responsible in damages for publishing and circulating in writing what would not be actionable so long as it was circulated only by word of mouth. In cases of this sort, the author who has spoken the words is exempt from all legal responsibility; while the man who prints them and circulates them in writing, and all who aid and assist therein, are liable to an action for damages (*g*). "What has been said by word of mouth is known only to a few persons; and, if the statement is untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known; and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But, if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known,

(*c*) Bac. Abr. SLANDER, B.

(*d*) *D'Anson* v. *Stuart*, 1 T. R. 748.

(*e*) Bl. Com., by Christian, 12 , n. 6. In several States, by statute, words charging a female with unchastity are made actionable, while in others, where fornication is made a crime, indictable and punishable as such, a charge of this description is held actionable, because it imputes a crime (*Miller* v. *Parrish*, 8 Pick. (Mass.) 385), while in others such words are held *per se* actionable, because they necessarily tend to degrade her and detract from her position in society (*Frisbie* v. *Fowler*, 2 Conn. 707; *Cleveland* v. *Detwieler*, 18 Iowa, 299; *Wilson* v. *Robbins*, Wright (Ohio) 40; *Downing* v. *Wilson*, 36 Ala. 317; *Rodgers* v. *Lacey*, 23 Ind. 507); and in all of them, that such words are actionable where attended with special damage: *Underhill* v. *Wilson*, 32 Vt. 40; *Malone* v. *Stewart*, 25 Ohio, 319. But in the United States Court, *Pollard* v. *Lyon*, 91 (U. S.) 225, and in most of the States, the doctrine stated in the text is recognized, and such a charge against a female is not *per se* actionable.

(*f*) *De Crespigny* v. *Wellesley*, 5 Bing. 406.

(*g*) *M'Gregor* v. *Thwaites*, 3 B. & C. 35. *Thorley* v. *Lord Kerry*, 4 Taunt. 354.

would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, completely to remove." As to the question of the publisher of a libel being allowed to exonerate himself from the responsibility of the act by naming the author, "Of what use is it," observes Best, C. J., "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; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic" (*h*).

It is no defence, therefore, to an action for a libel, to show that a ludicrous narrative in a newspaper concerning the plaintiff was only a repetition of a story told by the plaintiff of himself; "for there is a great difference between a man's telling a ludicrous story of himself to a circle of his own acquaintance, and a

168 publication of it to all the world through the medium of a newspaper" (*i*).

What is a libel.—Every false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, is a libel. All publications in writing or in print, imputing to another disgraceful, or fraudulent, or dishonest, conduct (*k*), or which are injurious to the private character or credit of another (*l*), or tend to render a man ridiculous or contemptible in the relations of private life, are libellous; and an action for damages is maintainable against the writer and publisher, unless the publication ranges within that class of communications which are termed privileged communications, presently mentioned, or unless the libeller can prove the truth of the libel. To impute to a landlord that, in putting in a distress, he was colluding with an insolvent tenant, is libellous (*m*). It is a libel, also, to describe a man in writing as an "infernal villain" (*n*), or an "itchy old toad" (*o*), or as being in insolvent circumstances and unable to pay his debts (*p*), or as being a mere man of straw (*q*), unfit to be trusted

(*h*) *De Crespigny* v. *Wellesley*, 5 Bing. 403.
(*i*) *Cook* v. *Ward*, 6 Bing. 415.
(*k*) *Digby* v. *Thompson*, 4 B. & Ad. 821.
(*l*) *Fray* v. *Fray*, 17 C. B., N. S. 603; 34 L. J., C. P. 45.
(*m*) *Haire* v. *Wilson*, 9 B. & C. 645.
(*n*) *Bell* v. *Stone*, 1 B. & P. 331.
(*o*) Gould, J., *Villiers* v. *Mousley*, 2 Wils. 403.
(*p*) *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 146; 28 L. J., Ex. 201. See *Cox* v. *Lee*, per Kelly, C. B., L. R., 4 Ex. 284; 38 L. J., Ex. 219.
(*q*) *Eaton* v. *Johns*, 1 Dowl. N. S. 612.

with money (*r*), or as being guilty of ingratitude to his friends and benefactors, although the facts upon which the charge is founded are also stated, and they do not support the charge (*s*), or of misconduct in an office of trust, or of general misconduct, corruption, or neglect of duty, in the management of business that has been intrusted to him to execute.

Every publication in writing, imputing insanity to the plaintiff (*t*), or holding him up to public hatred, contempt, or ridicule, or having a tendency to make him feared, or his society shunned and avoided, is a libel. To publish in writing, therefore, of a man that he has been guilty of gross misconduct, and has insulted two females and a gentleman in the most barefaced manner, is a libel (*u*). It is a libel, also, to publish of a person soliciting relief from a charitable society that she prefers unworthy claims, and that she has squandered away the funds of the benevolent in printing circulars abusive of the society's secre-
169 tary (*x*); or to impute in writing to the captain of a ship that his ship is unseaworthy, as the imputation reflects upon the personal character and professional conduct of the captain. "It is like saying of an innkeeper or tea-dealer that his wine or his tea is poisoned" (*y*). To impute to a physician of character and eminence that he is concerned in vending quack medicines is also libellous; and, therefore, if a vendor of pills falsely advertises his pills as being prepared and furnished by a physician in practice, without the authority of the latter, he is guilty of a libel upon the physician (*z*). But merely to write of a person that he has done something in bad taste or manner (*a*), or that he has kept company unworthy of his position in society, or of his position in his profession, is not actionable (*b*).

To publish falsely in placards or newspapers, or through the medium of letters or writings, of a publican, that his licence has been refused (*c*), or of a tradesman, that he knowingly sells bad articles, or of a gunsmith or manufacturer, that he is a bad workman, and unable to turn out a good gun or other article, is actionable; but mere puffs between rival tradesmen, the one depreciating the other's wares and exalting his own above them, are defensible (*d*). It is a libel, also, to say in writing of the publisher of a newspaper that he is a "libellous journalist;" for

(*r*) *Cheese* v. *Scales*, 10 M. & W. 488.
(*s*) *Cox* v. *Lee*, L. R., 4 Ex. 284; 38 L. J., Ex. 219.
(*t*) *Morgan* v. *Lingen*, 8 L. T. R., N. S. 800.
(*u*) *Clement* v. *Chivis*, 9 B. & C. 176.
(*x*) *Hoare* v. *Silverlock*, 12 Q. B. 624.
(*y*) *Ingram* v. *Lawson*, 6 Bing. N. C. 212; 8 Sc. 478.
(*z*) *Clark* v. *Freeman*, 11 Beav. 117.
(*a*) But see *Jenner* v. *A'Beckett*, L. R., 7 Q. B. 11; 41 L. J., Q. B. 14.
(*b*) *Clay* v. *Roberts*, 11 W. R. 649; 9 Jur. N. S. 580.
(*c*) *Bignell* v. *Buzzard*, 3 H. & N. 217; 27 L. J., Ex. 355.
(*d*) *Harman* v. *Delaney*, 2 Str. 898. *Evans* v. *Harlow*, 5 Q. B. 624.

the words either mean that the plaintiff has been habitually publishing libels in his paper, or that he has permitted them to be published from base and malicious motives. To show, therefore, that the plaintiff has been guilty, on one occasion only, of publishing a libel, is not enough to justify the use of the term "libellous journalist;" but the evidence would go in mitigation of damages (*e*).

Where a man complains of a libel, written respecting an illegal transaction in which he is engaged, the illegality of the transaction is an answer to his complaint; but fraud *ultra* that transaction is not, on that account, to be imputed to him with impunity (*f*). If, therefore, a man is charged in writing with having cheated at dice, he is entitled to recover damages for the libel, although gambling and playing at dice are illegal (*g*).

What is a slander.—The old cases respecting the liability of persons for the utterance of verbal slander are of the most
170 unsatisfactory and contradictory character. "They are," observes Pratt, C. J., "very odd cases" (*h*). At one period the Courts seemed to have regarded actions for slander by word of mouth with great disfavour, and to have done all they could to discourage them; at another time they favoured the action, because men's tongues were growing more and more virulent and dangerous, and people were apt to take the law into their own hands, and revenge themselves on the slanderer if they failed to obtain redress in a court of justice (*i*). In some cases we find judges complaining of the growth of actions for verbal slander, saying that they would spoil all communications between man and man, and repress all expression of opinion, so that one would be afraid to speak disparagingly of the accommodation afforded by a particular inn, or of the wine sold therein, or of the surveys furnished by a particular surveyor (*k*). At another period we find judges lamenting the frequency of scandals and the licence given to the tongue of the slanderer, and expressing their surprise that cases are to be found in the books in which a clergyman failed to obtain compensation in damages for an imputation of adultery (*l*), and that a schoolmistress had been declared incompetent to maintain an action for verbal charges of prostitution (*m*).

"The opinions of later times," observes Holt, C. J., "have been in many instances different from those of former days in

(*e*) *Wakley* v. *Cooke*, 4 Exch. 518.
(*f*) Best, C. J., *Frisarri* v. *Clement*, 3 Bing. 441.
(*g*) *Greville* v. *Chapman*, 5 Q. B. 744.
(*h*) *Button* v. *Heaven*, 8 Mod. 24.
(*i*) *Harrison* v. *Thornborough*, 10 Mod. 198.
(*k*) *King* v. *Lake*, 2 Ventr. 28. *Crofts* v. *Brown*, 3 Bulstr. 167.
(*l*) *Parrot* v. *Carpenter*, Cro. Eliz. 502; Noy, 64.
(*m*) Per Twisden, J., *Wharton* v. *Brook*, 1 Ventr. 21. *Welby* v. *Elston*, 8 C. B. 142. Ld. Denman, C. J., *Ayre* v. *Craven*, 2 Ad. & E. 7.

relation to actions for words, and judgments have gone different ways; . . . but for my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace" (*n*).

As the law at present stands, mere vituperation and abuse by word of mouth, however gross, are not actionable, unless spoken of a professional man or tradesman in the conduct of his profession or business. Thus, to call a man a scoundrel, or a blackguard, or a swindler, or a rogue, or to say of a man, "You are a low fellow, a disgrace to the town, and unfit for decent society, on account of your conduct with whores," is not actionable (*o*). Neither is it actionable to call a man a blackleg, unless it is shown that by the use of the term the defendant intended to impute to the plaintiff that he is a cheating gambler (*p*); nor to say of a young lady that she is a notorious liar, an infamous

171 wretch, and has been all but seduced by a notorious libertine (*q*). Words imputing to a lady that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable without special damage (*r*); nor are the words, "He is a rogue, and has robbed and cheated his brother-in-law of upwards of 2,000*l*." (*s*).

Defamatory words actionable per se without proof of any special damage.—But words imputing a criminal offence are actionable *per se* without proof of any special damage, as they render the accused person liable to the pains and penalties of the criminal law (*t*). Such are words imputing felony, bigamy (*u*), forgery (*v*), robbery (*x*), the receipt of stolen goods, knowing them to be stolen (*y*), the careless or unskilful administration of mercury, or any other poisonous or dangerous drug, and thereby causing death (*z*), the keeping of a bawdy-house (*a*), or the doing of any other criminal or indictable offence. But words conveying only a vague sort of suspicion in the mind of the speaker (*b*), uttered *bonâ fide* with a view of obtaining information, or by way of warn-

(*n*) *Baker* v. *Pierce*, 6 Mod. 24. Fortescue, J., *Button* v. *Heyward*, 8 Mod. 24.

(*o*) *Lumby* v. *Allday*, 1 Cr. & J. 301. *Savile* v. *Jardine*, 2 H. Bl. 531.

(*p*) *Barnett* v. *Allen*, 3 H. & N. 376; 27 L. J., Ex. 412.

(*q*) *Lynch* v. *Knight*, 9 H. L. C. 577.

(*r*) *Wilby* v. *Elston*, 8 C. B. 142.

(*s*) *Hopwood* v. *Thorn*, 8 C. B. 313.

(*t*) *Webb* v. *Beavan*, 11 Q. B. D. 609; 52 L. J., Q. B. 544. In order to render words actionable *per se*, they must either impute to the plaintiff some infamous crime, or they must have been spoken of him concerning his office, trade, profession or business: *Kinnis* v. *Stiles*, 44 Vt. 351; *Magee* v. *Stark*, 1 Humph. (Tenn.) 506; *Jacobs* v. *Tyler*, 3 Hill (N. Y.) 572; *Waters* v. *Jones*, 3 Post (Ala.), 442; *Hogg* v. *Wilson*, 1 N. & M. (S. C.) 216; *Cole* v. *Grant*, 3 Hun. (Del.) 327; *Beckett* v. *Sterritt*, 4 Blackf. (Ind.) 499; *Shaffer* v. *Kintzer*, 1 Binn. (Penn.) 537; *Nye* v. *Otis*, 8 Mass. 122; *Miller* v. *Miller*, 8 John. (N. Y.) 74.

(*u*) *Heming* v. *Power*, 10 M. & W. 570.

(*v*) *Jones* v. *Herne*, 2 Wils. 87.

(*x*) *Roweliffe* v. *Edmonds*, 7 M. & W. 13.

(*y*) *Alfred* v. *Farlow*, 8 Q. B. 854.

(*z*) *Edsall* v. *Russell*, 4 M. & G. 1090; 5 So. N. R. 801.

(*a*) *Brayne* v. *Cooper*, 5 M. & W. 250.

(*b*) *Tozer* v. *Mashford*, 6 Exch. 539.

ing, will not create any cause of action, as the circumstances rebut the presumption of malice; nor any words of mere suspicion or opinion, which do not convey any positive imputation of guilt (*c*); but, if a man says of another, "I am thoroughly convinced you are guilty of stealing, &c.," this is equivalent to a positive averment of the fact (*d*).

Simply to call a man a "thief" is *primâ facie* actionable, as it imputes felony; but, if it appears that the word was used as a mere term of abuse, and that there was in point of fact no imputation of actual theft conveyed by it, there is no cause of action. Thus, where the defendant said of the plaintiff, "He is a damned thief, and so we'll make him rather before him," but it appeared that the words were uttered in the heat of anger during a conversation respecting the plaintiff's refusal to pay over some money which he had received as executor, Lord Ellenborough directed a nonsuit, saying that it was manifest from the whole conversation that the words as used did not impute a felony (*e*). The jury ought not to find for the plaintiff, if from the accompanying words or the

172 surrounding circumstances they believe that the defendant did not intend to impute actual theft to the plaintiff (*f*).

Where the defendant said of the plaintiff, "Thou art a thief, for thou hast taken my beasts under an execution, and I will hang thee," it was held that there was no actionable slander; for the reason given for the plaintiff's being a thief manifestly showed that he was no thief at all, and that no theft had been committed (*g*). To call a man a felon after he has been convicted of felony but has received a pardon or has undergone his sentence is actionable, as by the 9 Geo. 4, c. 32, s. 3, the suffering the punishment has the like consequence and effect as a pardon under the great seal, and a felony is by pardon extinct (*h*).

Defamatory words imputing a contagious disorder are actionable *per se*. Thus, to say seriously and positively of a person that he has got the leprosy, or the pox, is actionable, without proof of any special damage, because it causes him to be shunned and avoided by society (*i*). The imputation must refer to the time present, and

(*c*) Com. Dig. Action on the case for Defamation, F. 13.

(*d*) *Peake* v. *Oldham*, Cowp. 275.

(*e*) *Thompson* v. *Bernard*, 1 Campb. 47. *Cristie* v. *Cowell*, 1 Peake, N. P. C. 5.

(*f*) Mansfield, C. J., *Penfold* v. *Westcote*, 2 B. & P. N. R. 335.

(*g*) *Wilk's case*, 1 Roll. Abr. 51. *Brittridge's case*, 4 Rep. 19. Bac. Abr. SLANDER, R. *McNemara* v. *Shannon*, 8 Bush (Ky.) 557. But to say of a man, "He is a thief, he picked my corn and carried it away," is not actionable, because the application of the term is qualified, and nullifies itself by showing that he did not commit larceny, because growing corn is not the subject of larceny; and this is the rule, even though the statute makes the taking of the corn under such circumstances a misdemeanor: *Stitzell* v. *Reynolds*, 67 Penn. St. 54.

(*h*) *Leyman* v. *Latimer*, 3 Ex. D. 352; 47 L. J., Ex. 470.

(*i*) *Bloodworth* v. *Gray*, 7 M. & G. 334; 8 Sc. N. R. 9. *James* v. *Rutlech*, 4 Rep. 17 b. *Watson* v. *McCarthy*, 2

not to the time past: for words are not actionable which merely impute to the plaintiff that at some previous period he had the disease (*k*).

Defamatory words concerning tradesmen and professional men, spoken of them in the way of their trade or profession, will sustain an action when such words would not be actionable if spoken of a person having no trade or profession (*l*); for every publication is slanderous which tends directly to injure a man in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business, that has a natural tendency to lessen its profit. Words imputing to a tradesman fraudulent conduct in the transaction of business, such as the use of false weights, are actionable *per se*, without proof of special damage (*m*); and so are words imputing to a tradesman that he is in the constant habit of cheating and defrauding his customers, and those who deal with him (*n*), and words imputing bankruptcy or insolvency to a person engaged in trade, such as, "if he does not come and make terms with me, I will make a bankrupt of him, and ruin him" (*o*). And it is not

173 necessary that the office or trade should be one of which the Court can take judicial notice; for it is actionable without special damage to say of a gamekeeper that he kills foxes if it is his duty as a gamekeeper not to do so (*p*).

But "if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way;" and, consequently, it is not actionable for one tradesman to depreciate the wares and merchandise of another in comparison with his own. So long as it is a mere puff by one of

Kelley (Ga.), 57; *Williams* v. *Holdridge*, 22 Barb. (N. Y.) 396; *Nichols* v. *Gay*, 2 Ind. 82; *Hewitt* v. *Mason*, 24 How. Pr. (N. Y.) 366; *Pike* v. *Van Wormer*, 5 *ib.* 171.

(*k*) *Carslake* v. *Mapledoram*, 2 T. R. 475.

(*l*) Per Cur., *Harman* v. *Delaney*, 2 Str. 898; 1 Barnard. 289. Any words spoken of a person in his office, trade, profession or business, which tend to impair his credit, or charge him with fraud or indirect dealings, or with incapacity, and tend to injure him in his business or calling, are actionable: *Ostram* v. *Calkins*, 5 Wend. (N. Y.) 263; *Chaddock* v. *Briggs*, 13 Mass. 248. Thus to charge a clergyman with incontinence (*Demarest* v. *Haring*, 6 Cow. (N. Y.) 76), or with being a drunkard (*McMillan* v. *Birch*, 1 Binn. (Penn.) 178), or an attorney with being "a d——d rascal" (*Brown* v. *Nimas*, 2 Tread. (S. C.) 235), or dishonest (*Chipman* v. *Cook*, 2 Tyler (Vt.) 45), that he discloses his client's secrets to injure him (*Gan* v. *Seldon*, 6 Barb. (N. Y.) 416; *Riggs* v. *Dennison*, 3 John. Cas. (N. Y.) 198), or a physician with malpractice or want of skill (*Secor* v. *Harris*, 18 Barb. (N. Y.) 425; *Bergold* v. *Puchter*, 2 T. & C. (N. Y.) 532; *Carroll* v. *White*, 33 Barb. (N. Y.) 425), is actionable *per se*.

(*m*) *Griffiths* v. *Lewis*, 7 Q. B. 65.

(*n*) *Reeve* v. *Holgate*, 2 Lov. 62.

(*o*) *Brown* v. *Smith*, 13 C. B. 599. Ld. Denman, C. J., *Robinson* v. *Marchant*, 7 Q. B. 918.

(*p*) *Foulger* v. *Newcomb*, L. R., 2 Ex. 327; 36 L. J., Ex. 169.

two rival tradesmen, recommending his own articles in preference to those of another, it is defensible on account of the interest the defendant has in the matter; but to say generally of a tradesman that he is in the habit of selling goods which he knows to be bad, is actionable (*q*).

In order to recover damages for slanderous words spoken of a tradesman or professional man in his trade or profession, it must be shown how the words are connected with his profession. To impute immorality to a clerk of a gas company, to say that he "consorts with whores," is "a disgrace to the town," and "unfit to hold his situation," is not actionable, because they are not connected with his character and conduct as a clerk. He may be a very good clerk, well fitted for his duties, although he is scandalously immoral (*r*).

Words imputing misconduct, or gross ignorance or incapacity, to professional men, in the discharge of their professional duties, are actionable *per se*, without proof of any special damage; such as words imputing to a practising physician that he is a quack or a mountebank (*s*), or that he has killed a patient through ignorance of the first principles of his profession (*t*); or words imputing to a surgeon or accoucheur the want of a proper qualification for his profession or business, or the want of skill, or of any professional requisite, or that his character is so bad amongst his professional brethren that they will not meet him (*u*); or to say of a master mariner in command of a vessel that he was frequently drunk, and in that state had to be carried on board his vessel (*x*). But words conveying an imputation against a medical man not necessarily connected with his profession, such as a general imputation of adultery, are not actionable (*y*); but, if the statement is that he has seduced or committed adultery with one of his patients, it would be otherwise.

(*q*) *Evans* v. *Harlow*, 5 Q. B. 633. *Ante*, p. 9.

(*r*) *Lumby* v. *Allday*, 1 Cr. & Jerv. 301.

(*s*) *Goddart* v. *Haselfoot*, 1 Roll. Abr. 54.

(*t*) *Tatty* v. *Atewin*, 11 Mod. 221.

(*u*) *Southee* v. *Denny*, 1 Exch. 196.

(*x*) *Irwin* v. *Brandwood*, 2 H. & C. 960; 33 L. J., Ex. 257.

(*y*) *Ayre* v. *Craven*, 2 Ad. & E. 2. *Kenney* v. *Nash*, 3 N. Y. 177; *Wier* v. *Allen*, 51 N. H. 177; *Herrick* v. *Lapham*, 10 John. (N. Y.) 281; *Squier* v. *Gould*, 14 Wend. (N. Y.) 151; *Birch* v. *Benston*, 26 Miss. 155; *Barnes* v. *Trundey*, 31 Me. 321. To say of a person whose business necessarily leads to dealing on credit, "He keeps false books" (*Rathburn* v. *Emigh*, 6 Wend. (N. Y.) 407), as of a merchant (*Backus* v. *Richardson*, 5 John. (N. Y.) 476), or a blacksmith (*Burtch* v. *Nickerson*, 17 *ib.* 207), is actionable *per se*, because the natural and necessary effect of the words is to injure him in his business. But where the words do not *necessarily* have that effect, they are only actionable when *special* damage results from their speaking, and such special damage must be alleged and proved: *Woodbury* v. *Thompson*, 3 N. H. 194; *Underhill* v. *Wilton*, 32 Vt. 40; *Fry* v. *Burnett*, 28 N. Y. 324; *Cook* v. *Cook*, 100 Mass. 194. And it must be made to appear by proper averments *how* the special damage arises, and the defect cannot be cured by proof: *Snell* v. *Stone*, 13 Met. (Mass.) 278: *Swan* v. *Tappan*, 5 Cush. (Mass.) 104.

174 Words imputing to a barrister that he has wilfully and corruptly deceived his client, and revealed the secrets of his cause, or that he has given vexatious counsel, and seeks only to fill his own pockets, without regard to the interests of his clients, are actionable (*z*); and so are words imputing to a practising solicitor that he is well known to be a corrupt man, and to deal corruptly in his profession (*a*); or words imputing to him that he betrays the secrets of his clients, or that he is ignorant of his profession, and is no lawyer, and that fools only go to him for law, or that he is guilty of malpractice, or is a cheat, a rogue, or a knave, in his profession (*b*). But mere vituperative language or general abuse of a professional man is not actionable, unless it has reference to his conduct in his profession. Thus, to call a solicitor a cheating knave is not actionable; but to say that he cheats his clients is actionable (*c*). In all actions founded on words imputing to a professional man conduct which disgraces and injures him in his profession, it must be proved that the plaintiff was in the exercise and practice of his profession at the time of the utterance of the slander; for, if he has ceased to exercise his profession or employment at the time the words are spoken, the words are not actionable on the ground that they were spoken of him in his profession (*d*).

To say of a beneficed clergyman that he is drunk in church, or that he preaches false doctrine, lies, and malice, and ought to be degraded (*e*), or that he is an old rogue, and a contemptible fellow, hated and despised by his parishioners (*f*), or that he has preached a seditious sermon, and has moved the people to sedition (*g*), is actionable. Words also imputing fraudulent and dishonest conduct to a beneficed clergyman in some clerical matter (*h*), or accusing him of incontinence, or the preaching of false doctrine, are actionable, as they tend to injure him in his professional character, and, if true, to subject him to a deprivation of

(*z*) *Seeg* v. *Gray*, 1 Roll. Abr. 57. *King* v. *Lake*, 2 Ventr. 28.

(*a*) *Birchley's case*, 4 Rep. 16 a, pl. 6.

(*b*) *Banks* v. *Allen*, 1 Roll. Abr. 54. *Baker* v. *Morfue*, 1 Sid. 327. *Day* v. *Buller*, 3 Wils. 59.

(*c*) *Alleston* v. *Moore*, Het. 167.

(*d*) *Bellamy* v. *Burch*, 16 M. & W. 590. Where the libel imputes to the plaintiff misconduct in his practice of a physician or surgeon, or as a solicitor, and does not call in question or deny his qualification to practise, it will not be necessary for him to do more than prove that he was acting in the particular professional capacity imputed to him at the time of the publication of the libel. *Berryman* v. *Wise*, 4 T. R. 366. *Smith* v. *Taylor*, 1 B. & P. N. R. 204. *Rutherford* v. *Evans*, 6 Bing. 451. But, when the libel or slander imputes to a medical or legal practitioner that he is not properly qualified, and the professional qualification is denied, the plaintiff must be prepared to prove it, by producing his diploma or certificate, duly sealed or signed, and stamped, where a stamp is requisite.

(*e*) *Dodd* v. *Robinson*, Aleyn, 63. *Cranden* v. *Walden*, 3 Lev. 17; 1 Roll. Abr. 58.

(*f*) *Musgrave* v. *Bovey*, 2 Str. 946.

(*g*) *Brittridge's case*, 4 Co. 19 b.

(*h*) *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J., Q. B. 403.

175 his benefice, and to a degradation of orders, and, consequently, to a loss of temporal emolument. But, if, at the time of the speaking of the words, the plaintiff is not beneficed, and is not in the actual receipt of professional, beneficial emolument as a preacher, lecturer, curate, or the like, there is no actual damage, and an action for slander is not maintainable (*i*); and, whenever the words imply only general abuse, and do not affect the plaintiff in his professional and clerical character, they are not actionable without proof of special damage (*k*).

Defamatory words imputing official misconduct to a person in an office of profit or trust are actionable *per se*.—Thus, to say publicly of a man who is in the enjoyment of an office of honour, profit, or trust, that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes, is actionable; but, if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage (*l*). Whenever words are sought to be made actionable on the ground that they were spoken of a man in office, it must be shown that they were spoken of him in his character or conduct in his office, and that they impute to him the want of some qualification for, or misconduct in, his office; for, if they impute to him only general misconduct and unfitness for his situation, they will fail to support an action, without proof of special damage (*m*).

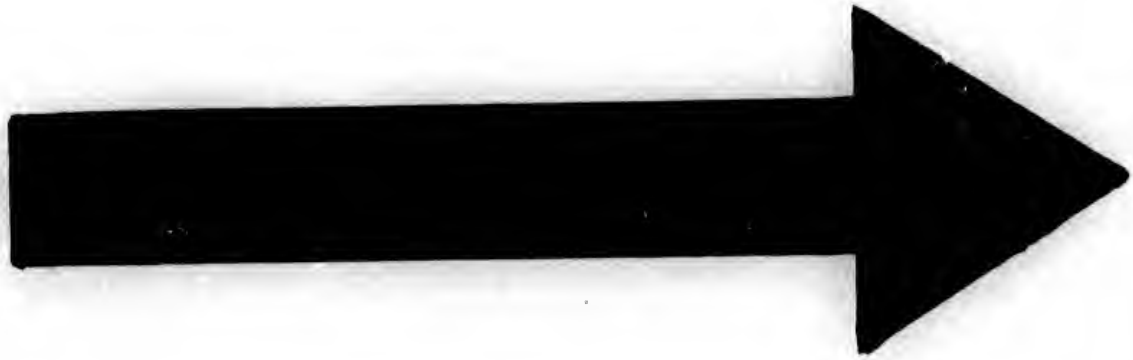
Defamatory words rendered actionable by reason of special damage.—If any special damage has been sustained by the plaintiff by reason of the utterance of slanderous words, an action for damages is then maintainable. Thus, to say of a spinster that she is in the family way, or that she has had a child, is not *per se* actionable; but, if the girl is about to be married, and she loses her marriage in consequence of the utterance of the slander, a very grave cause of action arises (*n*). If, in consequence of the utterance of slanderous words by the defendant, the plaintiff has lost a situation, or been refused employment, there is special damage resulting from the wrongful act, capable of sustaining an action. Thus, where the plaintiff was chaplain to a peer, and the defendant falsely alleged of him that he had had a bastard, whereby he lost the chaplaincy, it was held that the plaintiff was entitled to maintain an action for compensation in damages on the ground that the chaplaincy was a temporal preferment (*o*). So the loss by a

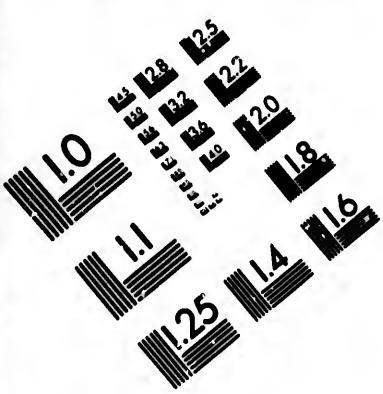
(*i*) *Gallwey* v. *Marshall*, 9 Exch. 295; 23 L. J., Ex. 78.
(*k*) *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J., Q. B. 403.
(*l*) Bac. Abr. SLANDER, B.
(*m*) *Lumby* v. *Allday*, 1 Cr. & J. 301, *ante*, p. 173. *Hopwood* v. *Thorn*, 8 C. B. 313.
(*n*) *Davis* v. *Gardiner*, 4 Co. 16 b, pl. 11.
(*o*) *Payne* v. *Beaumorris*, 1 Lev. 248.

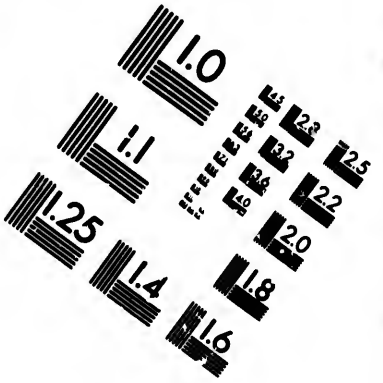
176 married woman of the hospitality of friends by reason of slander, is a sufficient "temporal" damage to sustain an action (*p*), although the loss of her husband's society and conjugal attentions only has been held insufficient (*q*), unless the slander amounts to an imputation of adultery on the wife, and the husband leaves her in consequence of such imputation (*r*). But words spoken of a married woman imputing want of chastity to her, whereby she was not allowed to continue a member of a religious society, do not constitute sufficient temporal damage (*s*).

When proof of special damage is essential to the maintenance of the action, it must appear to be the natural and necessary result of the speaking or publishing of the words, or it will fail to sustain the action. Where the plaintiff alleged that he had engaged Madame Mara to sing at his oratorio, and that the defendant published a libel concerning her, in consequence of which she was prevented from singing, from an apprehension of being hissed, whereby the plaintiff lost the benefit of her services, it was held that the injury complained of was too remote, and not to be connected with the cause assigned for it; that, if the libel was injurious to Madame Mara, she might have an action for it; but her refusing to perform might have proceeded from groundless apprehension or mere caprice, and not from the publication of the libel; and the plaintiff therefore was non-suited (*t*). So, where the plaintiff was a candidate for membership of a club, and was not elected on a ballot, and afterwards, upon a meeting being called to consider the rules of the club, the defendant spoke certain words, not actionable in themselves, of the plaintiff, whereby he induced a majority of the members to retain the rules under which the plaintiff had been rejected; it was held that the damage was not pecuniary, and was incapable of being estimated in money, and was not the natural or probable consequence of the defendant's words (*u*). A statement false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably, under some circumstances and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action. Thus, where the defendant falsely and maliciously spoke of the plaintiff, a working stone-mason, "He was the ringleader of the nine hours' system," and, "He has ruined the town by bringing about the nine hours' system," and, "He has stopped several good jobs from being

(*p*) *Davies* v. *Solomon*, L. R., 7 Q. B. 112; 41 L. J., Q. B. 10.
(*q*) *Lynch* v. *Knight*, 9 H. L. C. 577.
(*r*) Per Ld. Campbell and Ld. Cranworth, *ib.* 591, 596.
(*s*) *Roberts* v. *Roberts*, 5 B. & S. 384; 33 L. J., Q. B. 249.
(*t*) *Ashley* v. *Harrison*, 1 Esp. 48.
(*u*) *Chamberlain* v. *Boyd*, 11 Q. B. D. 407; 52 L. J., Q. B. 277.







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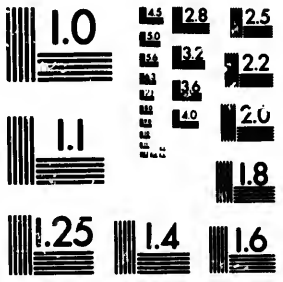

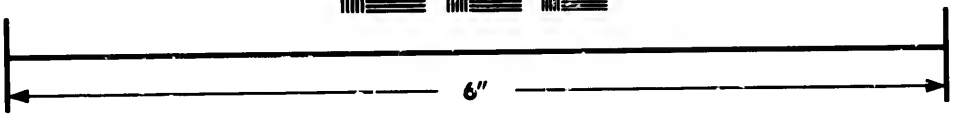

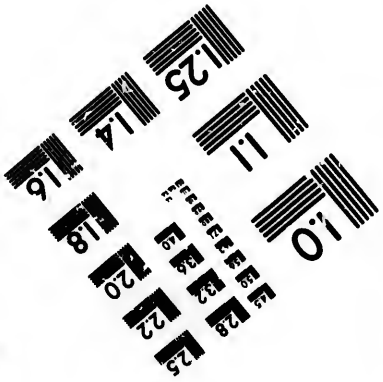

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177 carried out, by being the ringleader of the system at L," whereby the plaintiff was prevented from obtaining employment in his trade at L, it was held that the words, not being in themselves defamatory, nor connected by averment or by implication with the plaintiff's trade, and the alleged damage not being the natural or reasonable consequence of the speaking of them, the action could not be sustained (*x*). If there are two distinct causes of special damage, one proceeding from the act of the defendant and another from the act of a third party, and the special damage may have resulted from either, it will fail to support an action (*y*). If the special damage alleged is that several named persons have ceased to have dealings with the plaintiff in the way of his trade, the persons themselves must be called to prove the fact (*z*).

If a priest, or clergyman, or minister of any religious denomination, singles out any particular member of his congregation, and denounces him for misconduct in his trade or profession, or in the execution of any office of trust, or if he defames him generally, and slanders him in the face of the congregation, whereby he loses a situation, or is dismissed from his employment, and sustains special damage, the priest or clergyman will be answerable in damages, if he cannot prove the truth of the charge he makes; for no minister of religion has a right to propagate slander under the guise of disseminating religious truth or suppressing vice (*a*).

Defamatory words—Where the special damage is a wrongful act on the part of some third person.—It has been very generally reputed and accepted for law that the illegal act of a third party cannot constitute special damage; in other words, that one illegal (wrongful) act cannot be a natural and proximate consequence of another illegal (wrongful) act. This idea appears very frequently in the reports in the expression that special damage must be the natural *and legal* consequence of the act complained of. The case usually referred to in support of this proposition is one (*b*) in which the defendant falsely asserted that the plaintiff had cut his (the defendant's) cordage, in consequence of which the plaintiff's master, although under a binding contract to employ him for a term which had not then expired, discharged him, and it was held that the plaintiff could not recover. "The supposed special damage," observed Lawrence, J., "was the loss of the advantages to which the plaintiff was entitled under his contract with his master; but he could not be considered

(*x*) *Miller* v. *David*, L. R., 9 C. P. 118; 43 L. J., C. P. 84.
(*y*) *Vicars* v. *Wilcocks*, 8 East, 2.
(*z*) *Tilk* v. *Parsons*, 2 C. & P. 202. *Tunnicliffe* v. *Moss*, 3 C. & K. 83.
(*a*) *Gilpin* v. *Fowler*, 9 Exch. 625; 23 L. J., Ex. 152. *Barnabas* v. *Traunter*, 1 Vin. Abr. 396.
(*b*) *Vicars* v. *Wilcocks*, 8 East, 1.

178 in law as having lost them, for he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service." "The special damage," further observed Lord Ellenborough, "must be the legal and natural consequence of the words spoken; and here it is an illegal consequence: a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond, by way of punishment for his supposed transgression." In a subsequent case, however, in an action for words whereby one who was under a contract to marry the plaintiff broke his contract, and refused to marry her, it was urged against the maintenance of the action that the plaintiff had her remedy on the contract to marry her, that the breach of that contract was an *illegal* act of the contracting party, and therefore not special damage, because not a legal consequence of the publication; but the action was sustained (*c*). It is obvious that an illegal act, equally with a legal act, may be the natural, and even the intended, consequence of a publication; and, where, as in the case of a promise to marry, the breach of it, although illegal, is nevertheless a natural consequence of the slander, in that case the illegal act constitutes special damage. But, where the breach of a contract is not the natural consequence of the publication, it does not constitute special damage, not because it is an illegal act, but because it is not the natural consequence of the slander (*d*).

If the dismissal of the servant has been caused by the utterance of the slander against him, the special damage results from the slander, so as to render an action maintainable, although the master did not believe in the slander, and did not dismiss the servant because he thought him guilty of the charge made against him, or considered him untrustworthy. Thus, where the plaintiff set forth that she was a straw bonnet-maker, in the employ of a Mrs. Enoch, and that the defendant, who was the landlord, came to her mistress, and told her that the plaintiff tapped at the windows, and conducted herself shamefully and disgracefully, so that the house looked like a bawdy-house, and Mrs. Enoch dismissed the plaintiff, but stated in her evidence that she did not dismiss her because she believed what the defendant told her, but because he was her landlord, and she was afraid he would be offended if she did not send the plaintiff away after what he had said, it was held that the dismissal was the consequence of the slanderous words, and that damages were recoverable in respect

(*c*) *Moody* v. *Baker*, 5 Cowp. 351.

(*d*) Townsend's Slander and Libel, 2nd ed. p. 201.

179 thereof, although the mistress, to whom the slander was uttered, did not believe it (*e*).

Defamatory words—Unauthorized repetition of verbal slander.—Whenever proof of special damage is necessary to maintain an action of slander, it must appear that the special damage is the immediate and natural consequence of the words spoken (*f*). If, therefore, the use of slanderous words by the defendant, not actionable *per se*, would have wholly failed to produce any injurious consequences, unless aided by the act of another, the injury resulting from that act of the other is not to be ascribed to the defendant. The unauthorized repetition of slanderous words is not the necessary consequence of the original uttering of the words; and the original utterer, therefore, is not responsible in damages for the subsequent repetition of the slander by persons who had no authority from him to repeat what he had said.

Thus, where the substance of the plaintiff's allegation of special damage was that, by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff, and the evidence was, that the words were addressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer, so that the repetition of the words, and not the original statement, occasioned the damage, it was held that the action was not maintainable. "Every man," observes Tindal, C. J., "must be taken to be answerable for the necessary consequence of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed from the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We therefore think that, as each count in the declaration alleges as the only grievance the original false speaking

(*e*) *Knight* v. *Gibbs*, 1 Ad. & E. 46. *Humphries* v. *Parker*, 52 Me. 502; *Hooly* v. *Brooks*, 20 Ill. 115. In *Moore* v. *Stevenson* (27 Conn. 14), the plaintiff, in an action for a libellous publication in a newspaper charging her with theft, alleged as special damage that she had in consequence been discharged by one W. from his employment as a seamstress in a neighbouring town; and on the trial offered evidence that a few days after the publication W. had said to her that there were flying reports in the newspaper about her and her sister, and that it would injure his shop to have such girls there, and that he thereupon discharged her: it was held, that such evidence was admissible, although there was no other evidence to show that W. had ever seen the articles in question.

(*f*) *Vicars* v. *Wilcocks*, 8 East, 3.

of the words, the allegation that, 'by reason of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence" (*g*).

But, where the utterer of the slander directs it to be repeated in any particular quarter, or mentions it to a person whose known
180 duty it is to repeat it, he is responsible for the repetition of it. It is then his act, and is the natural and necessary result of the utterance of the words (*h*).

Where loss of custom is alleged as special damage, it may be proved by general evidence of the falling off of the plaintiff's business, without showing who the persons were who had ceased to deal with the plaintiff (*i*).

False statements not defamatory.—False statements which are not of a defamatory character are not actionable, even although they may have caused damage to the subject of them (*k*), unless they are spoken under circumstances likely to create damage to the subject of them, and with the intention that that damage should ensue (*l*).

Defamation—Malice in law.—Malice is said to be the gist of an action for defamation or slander; but the word is not used in the popular sense, but only in the sense the law puts upon the expression. If I traduce a man, whether I know him or not, the law considers it as done of malice, because I do it intentionally, and without just cause or excuse (*m*); and the circumstance of the jury having negatived actual malice does not render the communication justifiable (*n*); for every person who publishes matter injurious to another, is considered in point of law to have intended the consequences resulting from his act (*o*).

If the tendency of the publication is injurious to the plaintiff, the law will presume that the defendant, by the act of publishing it, intended to produce the injury it was calculated to effect; and it is the duty of a judge, if he thinks the publication injurious

(*g*) *Ward* v. *Weeks*, 7 Bing. 211; 4 M. & P. 808. *Parkins* v. *Scott*, 1 H. & C. 153; 31 L. J., Ex. 331. *Stevens* v. *Hartwell*, 11 Met. (Mass.) 542.

(*h*) *Kendillon* v. *Maltby*, Car. & M. 402; but on another point this case has been overruled in *Munster* v. *Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726.

(*i*) *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J., Ex. 281.

(*k*) *Milier* v. *David*, L. R., 9 C. P. 118; 43 L. J., C. P. 84.

(*l*) *Per* Lord Wensleydale, *Lynch* v. *Knight*, 9 H. L. C. 600. *Ante*, p. 4.

(*m*) *Bromage* v. *Prosser*, 4 B. & C. 255. *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J., Q. B. 230.

(*n*) Maule, J., *Wenman* v. *Ash*, 13 C. B. 845; 22 L. J., C. P. 190. *Gossert* v. *Gilbert*, 6 Gray (Mass.) 94; *Bush* v. *Prosser*, 11 N. Y. 357; *Zuckerman* v. *Sanenschien*, 62 Ill. 115; *Pennington* v. *Meeks*, 46 Me. 217; *Fry* v. *Bennett*, 28 N. Y. 328; *Dale* v. *Harris*, 109 Mass. 193; *Halsey* v. *Brooks*, 20 Ill. 116; *Jarnigan* v. *Fleming*, 43 Miss. 710. In *Curtis* v. *Mussey*, 6 Gray (Mass.) 261, it was held that the fact that the defendant had no intent to villify the plaintiff, or that he did not know that the matter was libellous, was no excuse: *Watson* v. *Moore*, 2 Cush. (Mass.) 133; *Bodwell* v. *Swan*, 3 Pick. (Mass.) 376.

(*o*) *Fisher* v. *Clement*, 10 B. & C. 475.

to the plaintiff, to tell the jury it is a libel and actionable (*p*). It has, indeed, been held that, if the circumstances connected with the utterance of the words rebut the presumption of malice, there is no cause of action. Thus, where the plaintiff brought an action against one for falsely and maliciously saying of him that he had heard he was hanged for stealing a horse, and on the evidence it appeared that the words were spoken in grief and sorrow for the news, Hobart, J., caused the plaintiff to be nonsuited, for it was not said maliciously (*q*). But it may be doubted whether this decision would be followed at the present day.

131 *Defamation—Malice in law—Privileged communications.*—Privileged communications are divided into those which are privileged absolutely, as statements made by suitors, witnesses, advocates, or judges, in a court of justice, and those which are privileged only where the communication is made without actual malice, such as communications made in discharge of a moral or social duty, fair and true reports of judicial or legislative proceedings, or fair comment and criticism on the acts of public men, public performances, or published writings or works of art.

Defamation—Malice in law—Privilege—Courts of justice.—An action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction, such as defamatory proceedings filed in the courts, or affidavits containing false and scandalous assertions against others (*r*). Therefore, if a man goes before justices of the peace and exhibits articles against the plaintiff containing divers false and scandalous charges concerning him, the plaintiff cannot have an action for a libel in respect of any matter contained in such articles; for the party preferring them "has pursued the ordinary course of justice in such a case; and, if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation" (*s*). There is a large collection of cases where parties have from time to time attempted to get damages for slanderous and malicious charges contained in affidavits made in the course of a judicial proceeding;

(*p*) *Haire* v. *Wilson*, 9 B. & C. 645. *Sanford* v. *Bennett*, 24 N. Y. 20; *Smart* v. *Blanchard*, 42 N. Y. 137; *Hogan* v. *Hendry*, 18 Md. 177; *Com.* v. *Odell*, 3 Pittsb. (Penn.) 419; *Garr* v. *Selden*, 4 N. Y. 91. Actual ill-will need not be shown: *Com.* v. *Snelling*, 15 Pick. (Mass.) 337. In some of the States, the defendant may rebut the inference by proving that, from facts and circumstances, he believed the charge to be true (*King* v. *Root*, 4 Wend. (N. Y.) 113); and the fact that rumours of the matter were current may be shown in investigation: *Skinner* v. *Powers*, 1 Wend. (N. Y.) 451.

(*q*) *Crawford* v. *Middleton*, 1 Lev. 82.

(*r*) *Ram* v. *Lamley*, Hutt. 113. *Weston* v. *Dobniet*, Cro. Jac. 432. *Astley* v. *Younge*, 2 Burr. 809.

(*s*) *Cutler* v. *Dixon*, 4 Co. 14 b.

but in no one instance has the action been held to be maintainable (*t*). The libeller, however, may be punished, and the abuse repressed, by a prosecution for perjury (*u*).

Where the cause of action against a defendant was, that he falsely and maliciously, and without any reasonable or probable cause, went before a Commissioner for taking oaths in the Court of Chancery, and swore an affidavit stating of the plaintiff, in his character of an auctioneer, that he conducted his business fraudulently and improperly, and that he was not, in the deponent's opinion, a fit and proper person to be intrusted with the sale of certain property then the subject of a suit in the Court of Chancery, and the court, upon the evidence before it, decided that the plaintiff was not a fit and proper person to conduct the sale, it was held that the affidavit, being made in the course of a judicial proceeding, could form no ground of action (*x*). But, if the court

182 has no jurisdiction in the matter, and no right to entertain the proceeding, and the charge is recklessly and maliciously made, it will not be regarded as a privileged communication (*y*).

The privilege of a witness in a court of justice, for words spoken with reference to the inquiry on which he is called as a witness, is absolute and unqualified; and a statement as to another matter, made to justify the witness in consequence of a question going to his credit, has reference to the inquiry within the above rule (*z*). But what a witness says before he enters or after he has left the witness-box, is not privileged (*a*); nor, it would seem, what he may say in the witness-box maliciously for his own purposes, and without reference to the cause or matter of inquiry (*b*).

Defamation—Malice in law—Courts of justice—Advocates.—The freedom of speech at the bar is the privilege of the client vested in the counsel who represents him. It would be impossible properly to conduct a cause in court, unless considerable latitude were allowed to the advocate; and, if any evil follows therefrom, it must be endured for the sake of the greater good which attends it. "A counsellor, therefore, hath a privilege to enforce anything which is informed unto him for his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it

(*t*) *Henderson* v. *Broomhead*, 4 H. & N. 579; 28 L. J., Ex. 360.

(*u*) As to a certificate from a military officer that his inferior officer left his quarters without permission, see *Keighly* v. *Bell*, 4 F. & F. 763.

(*x*) *Revis* v. *Smith*, 18 C. B. 126; 25 L. J., C. P. 195.

(*y*) *Buckley* v. *Wood*, 4 Co. 14 b. *Lewis* v. *Levy*, El. Bl. & El. 554; 27 L. J., Q. B. 282.

(*z*) *Seaman* v. *Netherclift*, 1 C. P. D. 540; 2 C. P. D. 53; 46 L. J., C. P. 128.

(*a*) *Trotman* v. *Dunn*, 4 Camp. 211.

(*b*) Cockburn, C. J., *Seaman* v. *Netherclift*, 2 C. P. D. 53, 56; 46 L. J., C. P. 128.

be true or false"(*c*). "It would be impossible," observes Abbott, J., "that justice could be well administered, if counsel were to be questioned for the too great strength of their expressions; but they ought not to avail themselves of their situation maliciously to utter words wholly unjustifiable." Where, therefore, an attorney was mixed up in the concoction of a pretended cause of action, and in suing for a sum of money, when he knew that there was no legal claim and that the action must fail, and the counsel for the defendant said that the action was founded on the knavery of the attorney, that it was one of the most profligate things ever done by a professional man, and that the attorney was a fraudulent and wicked attorney, it was held that these observations and expressions of opinion were privileged. "Perhaps," observes Lord Ellenborough, "the words were too strong, and, in the exercise of a candour fit to be adopted, might have been spared. But still a counsel might, *bonâ fide*, think the expressions justifiable under the circumstances"(*d*). An action will not lie against an advocate for defamatory words although they were uttered maliciously, and not **183** with the object of supporting the client's case, and are utterly irrelevant and without justification or excuse, and arise from previous personal illwill and anger towards the person defamed (*e*).

(*c*) *Brook* v. *Montague*, Cro. Jac. 90. *Garr* v. *Selden*, 4 N. Y. 81; *Homer* v. *Englehardt*, 117 Mass. 539; *Ring* v. *Wheeler*, 7 Cow. (N. Y.) 725; *Stanley* v. *Webb*, 4 Sandf. (N. Y.) 21; *Bennett* v. *Williamson*, 4 Id. 60; *Hastings* v. *Lusk*, 22 Wend. (N. Y.) 410. Statements made by counsel, material to the cause, and warranted by the facts and circumstances, are privileged (*Hoar* v. *Wood*, 4 Met. (Mass.) 193; *Didenay* v. *Powell*, 4 Ky. 77; *Badgeley* v. *Hedges*, 1 N. J. L. 169); but he must not abuse the privilege: *Jennings* v. *Paine*, 4 Wis. 358; *McMillan* v. *Birch*, 1 Binn. (Penn.) 178.

(*d*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 241.

(*e*) *Munster* v. *Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726. *Briggs* v. *Byad*, 12 Ind. (N. C.) 377; *Hoar* v. *Wood*, 3 Met. (Mass.) 193; *Hitt* v. *Miles*, 9 N. H. 9; *Burlingame* v. *Burlingame*, 8 Cow. (N. Y.) 141; *Gosslin* v. *Cannon*, 1 Harr. (Del.) 3; *Gilbert* v. *People*, 1 Den. (N. Y.) 41; *Thorn* v. *Blanchard*, 5 John. (N. Y.) 525. But in order to render this privilege absolute, the proceedings must be had before a court of competent jurisdiction, and the matter complained of must be germane thereto. Thus, an affidavit made to secure the arrest of a person for a crime, is not libellous, although insufficient to secure a warrant (*Hartsock* v. *Reddick*, *ante*; *Sanderson* v. *Rollinson*, 2 Strob. (S. C.) 447; *Bailey* v. *Dean*, 5 Barb. (N. Y.) 597); and the same is true of libellous matter in a bill in chancery (*Torrey* v. *Field*, *ante*; *Forbes* v. *Johnson*, 11 B. Mon. (Ky.) 48), in a complaint to a grand jury (*Kidder* v. *Parkhurst*, 3 Allen (Mass.), 373; *Sands* v. *Robinson*, 12 S. & M. (Miss.) 704; *Vanderzee* v. *McGregor*, 12 Wend. (N. Y.) 345), in a writ (*Hardin* v. *Comstock*, 2 A. K. Marsh. (Ky.) 480), or in any pleading (*Hoar* v. *Wood*, *ante*), or in a special notice or affidavit required in a legal proceeding (*Garr* v. *Selden*, 4 N. Y. 91; *Suydam* v. *Moffatt*, 1 Sandf. (N. Y.) 495); and the same rule prevails in reference to quasi-judicial proceedings. In *McMillan* v. *Birch*, 1 Bin. (Penn.) 178, Tilgham, J., in a very able opinion, reviews this subject, and holds that words otherwise actionable are privileged if spoken in proceedings before a church presbytery in defence of a charge brought against the defendant by the plaintiff. Words spoken by a witness in the trial of a cause, which were thought untrue and malicious, if in answer to inquiries put to him, are privileged, and the fact that the evidence is not material does not change the rule. A witness cannot be expected to know what is material, and public policy requires that he should not be put in jeopardy of a civil action for any answer that he may give: *Calkins* v. *Sumner*, 13 Wis. 193. As, where a witness in bankruptcy proceedings cer-

Defamatory statements by a party in open court conducting his own cause are also privileged and protected, if they are relevant to the subject-matter of inquiry, or are spoken during the heat and excitement of a trial. "The party himself," observes Holroyd, J., "from his comparative ignorance of what is and what is not relevant, may be indulged in a greater latitude, and not be restricted within the same limits as a counsel, whose superior knowledge should be sufficient to restrain him within due bounds" (*f*).

Defamation—Malice in law—Courts of justice—Judges and magistrates.—Judges are not responsible for slanderous words spoken by them in the exercise of their judicial functions in reference to a matter before them, although spoken maliciously and without reasonable cause (*g*). "Neither party, witness, counsel, jury or

tified that the bankrupt had fraudulently concealed some of his property: *Marsh* v. *Ellsworth*, 50 N. Y. 309. In some of the States the privilege is only held to apply when the answer is responsive and pertinent. That the answer should be responsive is admitted, *but the witness ought not to be required at his peril to know whether it is pertinent.* See *Perkins* v. *Mitchell*, 31 Barb. (N. Y.) 461; *Barnes* v. *Crate*, 32 Me. 442; *Nelson* v. *Ruhl*, 6 Blackf. (Ind.) 204; *Lea* v. *White*, 4 Sneed (Tenn.) 111; *Warner* v. *Paine*, 2 Sandf. (N. Y.) 195; *Vaussee* v. *Lee*, 2 Hill (S. C.) 197; *Gosslin* v. *Cannon*, 1 Harr. (Del.) 3; *Allen* v. *Crofoot*, 2 Wend. (N. Y.) 515; *Badgeley* v. *Hedges*, 2 N. J. L. 169. Judicial proceedings are not confined to actions in a court of law, but include all proceedings before a judge or judicial body in due course of law: *Perkins* v. *Mitchell*, 31 Barb. (N. Y.) 471; *McMillan* v. *Birch*, 1 Binn. (Penn.) 176. The parties to a cause are privileged in reference to statements made by them in their justification and defence in a legal way, and if they conduct their own cause, as they may do as a matter of right in some States, and by leave of court in others, they are entitled to the same privilege as an attorney: *Ring* v. *Wheeler*, 7 Cow. (N. Y.) 725; *Hastings* v. *Lusk*, 22 Wend. (N. Y.) 410; *Badgeley* v. *Hedges*, 2 N. J. L. 233; *Shelfer* v. *Gooding*, 2 Jones (N. C.) 175; *Kean* v. *McLaughlin*, 2 S. & R. (Penn.) 470; *Didenay* v. *Powell*, 4 Bush (Ky.) 77; *Dunn* v. *Winters*, 2 Humph. (Tenn.) 512. Even counsel in a cause may abuse his privilege, and if he departs from the questions at issue, and designedly and maliciously villifies a party or a witness, he may be held amenable therefor: *McMillan* v. *Birch*, 1 Binn. (Penn.) 186; *York* v. *Pease*, 2 Gray (Mass.) 282. Words spoken by a judge, or written by him in the course of a judicial proceeding before him are privileged, and the same rule applies to all official duties: *South* v. *Maryland*, 18 How. (U. S.) 403; *Goodenow* v. *Tappan*, 1 Ohio, 60; *Rector* v. *Smith*, 11 Iowa, 302; *Dunham* v. *Powers*, 42 Vt. 1; *Brown* v. *Smith*, 24 Barb. 419; *Sands* v. *Robinson*, 12 S. & M. (Miss.) 704. Thus, a petit jury (*Dunham* v. *Powers*, *ante*), a grand jury (*Sands* v. *Robinson*, *ante*), or any judicial officer in discharge of their legitimate functions, are privileged against words spoken or written by them (*Weaver* v. *Devendorf*, 3 Den. (N. Y.) 117; *Hill* v. *Sellick*, 21 Barb. (N. Y.) 207); but if they have no jurisdiction of the matter, or if they exceed their privilege, liability attaches: *Homer* v. *Loveland*, 19 Barb. (N. Y.) 111; *Hastings* v. *Lusk*, *ante*; *Howard* v. *Thompson*, 21 Wend. (N. Y.) 319. So legislative proceedings are absolutely privileged, and words spoken or written by a member of the legislature in the discharge of his official duties are not actionable (*Coffin* v. *Coffin*, 4 Mass. 1); but the fact that a person is a member of the legislature, and that the words are spoken in reference to a matter before it, and in the house, will not operate as a defence if the house is not then in session, or the words are not spoken or written in the discharge of his duties as a member thereof. See Opinion of Parsons, C. J., in *Coffin* v. *Coffin*, *ante*.

(*f*) *Hodgson* v. *Scarlett*, 1 B. & Ald. 244; Roll. Abr. 87, pl. 4. *Revis* v. *Smith*, 18 C. B. 126; 25 L. J., C. P. 195.

(*g*) *Scott* v. *Stansfield*, L. R., 3 Ex. 220; 37 L. J., Ex. 155. *Munster* v. *Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726. Provided they had jurisdiction over the matter: *Ackerman* v. *Jones*, 37 N. Y. Superior Court, 42; *Faucett* v. *Charles*, 13 Wend. (N. Y.) 473; *Cain* (*Mrs.*) v. *Burnside*, Brev. (S. C.) 295; *O'Donoghue* v. *McGovern*, 23 Wend. (N. Y.) 26; *Howard* v. *Thompson*, 21 *Id.* 319. What is said by jurors in the jury room (*Dunham* v. *Powers*, 42 Vt. 1), or by a witness before the grand jury

judge, can be put to answer civilly or criminally for words spoken in office" (*h*). An action is not maintainable against a coroner for anything said by him whilst he is addressing a jury impannelled before him, however defamatory, false, or malicious in fact it may be (*i*).

The absolute immunity accorded to judges, counsel, jurymen, witnesses, and others engaged in the administration of justice, against actions for statements made in the course of duty, rests upon grounds of public policy and convenience (*k*); and the same protection has been extended to evidence given by a military man before a military court of inquiry (*l*), and to reports made by a military officer in the ordinary course of his military duty for the information of the commander-in-chief (*m*); the object being, in the one case, to secure the free and fearless discharge of high public duty in the administration of justice, and, in the other, the maintenance of military discipline on which the welfare and safety of the state depend (*n*). The same immunity has also been held to extend to witnesses giving evidence before a select committee of the House of Commons (*o*).

184 *Defamation—Malice in law—Communications privileged when not malicious.*—When a communication is fairly made by one person to another in the discharge of some public or private duty, whether legal, moral, or social, or in the conduct of his own affairs in matters where his interest is concerned, "the occasion," observes Parke, B., "prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits" (*p*). "A communication," says Lord Campbell, "made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference

(*Rector* v. *Smith*, 11 Iowa, 302), or by a party in papers connected with the case germane thereto (*Wyatt* v. *Buell*, 47 Cal. 624; *Ruohs* v. *Barker*, 6 Heisk. (Tenn.) 395; *Lathrop* v. *Hyde*, 25 Wend. (N. Y.) 448), or in pleadings in the case (*Hill* v. *Miles*, 9 N. H. 9), are privileged.

(*h*) *Reg.* v. *Skinner*, Lofft. 55. *Munster* v. *Lamb*, 11 Q. B. D. 588; 52 L. J., Q. B. 726.

(*i*) *Thomas* v. *Churton*, 2 B. & S. 475; 31 L. J., Q. B. 139.

(*k*) *Munster* v. *Lamb*, *supra*.

(*l*) *Dawkins* v. *Lord Rokeby*, L. R., 7 H. L. 744; 45 L. J., Q. B. 8.

(*m*) *Dawkins* v. *Lord Paulet*, L. R., 5 Q. B. 94; 39 L. J., Q. B. 53.

(*n*) *Hart* v. *Gumpach*, L. R., 4 P. C. 439: 42 L. J., P. C. 25.

(*o*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307; 50 L. J., Q. B. 303.

(*p*) *Toogood* v. *Spyring*, 1 C. M. & R. 193. *Somerville* v. *Hawkins*, 10 C. B. 583; 20 L. J., C. P. 131. *Croft* v. *Stevens*, 7 H. & N. 570; 31 L. J., Ex. 143. *Whiteley* v. *Adams*, 15 C. B., N. S. 392; 33 L. J., C. P. 94. *Wright* v. *Woodgate*, 2 C. M. & R. 577. *Cowles* v. *Potts*, 34 L. J., Q. B. 247.

to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter which without this privilege would be slanderous and actionable;" and he adds, "The duty cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation" (*q*). In *Whiteley* v. *Adams* (*r*), the rule was laid down that a communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without this interest would be slanderous or actionable.

In *Davis* v. *Snedd* (*s*), Blackburn, J., thus expresses the rule: "Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts; then, if he *bonâ fide* and without malice does tell, it is a privileged communication."

"A communication of this sort," observes Alderson, B., "is not strictly what is called a privileged communication, but is rather a communication privileged by the occasion; and, if it was made *bonâ fide*, the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good" (*t*).

185 Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the court has assumed the jurisdiction of determining (*u*). But, if there is any dispute about those circumstances, the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege, if he believes the charge imputed untrue, unless he at the same time declares his belief of its untruth. If a man knowingly makes a false charge, there is at once actual malice, and the privilege is blown to the winds (*u*).

Where the auditors of a public company, employed in accordance with the provisions of the articles of association, made a report reflecting upon the conduct of the company's manager, and

(*q*) *Harrison* v. *Bush*, 5 El. & Bl. 344; 25 L. J., Q. B. 25.
(*r*) 15 C. B., N. S. 392; 33 L. J., C. P. 89.
(*s*) L. R., 5 Q. B. 608, 611.
(*t*) *Woodward* v. *Lander*, 6 C. & P. 550.
(*u*) *Stace* v. *Griffith*, L. R., 2 P. C. 420.

the directors had the report printed and circulated among the shareholders, and it was used at an adjourned meeting, it was held that, the directors having done nothing contrary to the usual practice, the communication was privileged, and that, in the absence of express malice, no action lay against the directors for such publication (*x*). "Independently of any authority," says Mellor, J., "I am quite prepared to hold that a company having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report relating to the conduct of their officers to all shareholders, whether present or absent, if the communication is made without malice and *bonâ fide*." "I think," further observes Hannen, J., "that the failure of the directors to report to the shareholders a statement made by the auditors upon their own responsibility of what they found to be the state of the accounts, might have led the directors into a position of great difficulty."

So, where the plaintiff proved that he had been in the service of the defendant, and had been dismissed on a charge of theft, and that he afterwards came to the defendant's house and had some communication with the defendant's servants, when the defendant said to them, "I have dismissed that man for robbing me; do not speak to him any more in public or in private, or I shall think you as bad as him," it was held that the statement, being honestly made by a master as a warning to his servants, was a privileged communication, and that it was incumbent on the plaintiff to

186 give some evidence of malice in order to raise a question for the jury (*y*). So, where a vestry meeting was held for the purpose of nominating and electing constables, and hearing and deciding upon any objections that might be brought forward against any of the candidates for the office, and the defendant, a ratepayer, made a statement imputing perjury to the plaintiff, who was one of the candidates, and said that he was a person not to be believed on his oath, it was held that the statement was privileged and protected if it was *bonâ fide* and honestly made in full belief of its truth, and that it was incumbent on the plaintiff to bring forward evidence of his general character for truthfulness, in order to raise the question as to whether the defendant in making the statement had been actuated by any malicious motive (*z*). But, although a man who makes a charge against another may be

(*x*) *Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R., 4 Q. B. 262; 38 L. J., Q. B. 129.

(*y*) *Somerville* v. *Hawkins*, 10 C. B. 590.

(*z*) *Kershaw* v. *Bailey*, 1 Exch. 743.

justified by the occasion in making it, yet he may make the charge in such a way, accompanied by such expressions, and under such circumstances, as to furnish proof that it was made maliciously (*a*). Thus the transmission unnecessarily by a post-office telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege (*b*). When once a confidential relation is established between two persons with regard to an inquiry of a private nature in which they are mutually interested, whatever takes place between them relative to the same subject at subsequent interviews, may be as much privileged as what passed at the original interview (*c*).

Defamation—Malice in law—Extent of the privilege.—The privilege must be exercised within the limits which the interest or duty indicates; and in many of the instances of privilege to which attention will be drawn, a public statement to an individual not having any interest in the matter might be held libellous. The statement must be such as the occasion warrants, and made to a person interested in receiving it. The mere fact, however, of the presence of a person uninterested has been held to be insufficient to take away the privilege (*d*).

Where the managing director of a brewery company wrote a defamatory statement about the secretary of the company to the chairman under circumstances which made the communication privileged, and rebutted the legal implication of malice, but negligently put the statement in an envelope addressed to another person who received and read it, it was held that in the absence of

187 malice the publication to the other person, though negligent, was privileged (*e*).

Defamation—Malice in law—Privileged charges of felony made bonâ fide, *with reasonable grounds for suspicion.*—For the sake of public justice, charges and communications which would otherwise be slanderous are protected if made *bonâ fide* in the prosecution of an inquiry into a suspected crime. "It is argued," observes Coleridge, J., "that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of

(*a*) *Senior* v. *Medland*, 4 Jur., N. S. 1039.

(*b*) *Williamsen* v. *Freer*, L. R., 9 C. P. 393; 43 L. J., C. P. 161.

(*c*) *Beatson* v. *Skene*, 5 H. & N. 838, 855; 29 L. J., Ex. 430. *Wallace* v. *Carroll*, 11 Ir. C. L. R. 485.

(*d*) *Henwood* v. *Harrison*, L. R., 7 C. P. 606, 623; 41 L. J., C. P. 206.

(*e*) *Tompson* v. *Dashwood*, 11 Q. B. D. 43; 52 L. J., Q. B. 425. See *post*, p. 197. Words spoken in good faith, from a sense of duty, public or private, and only to those who have an interest in the subject-matter, are privileged: *Bradley* v. *Heath*, 12 Pick. (Mass.) 163; *Smith* v. *Higgins*, 16 Gray (Mass.) 252; *Lewis* v. *Chapman*, 16 N. Y. 369; *Ormsly* v. *Douglass*, 37 N. Y. 477; *Rlink* v. *Colly*, 46 N. Y. 427; *Howard* v. *Thompson*, 21 Wend. (N. Y.) 317; *Fowler* v. *Bowen*, 30 N. Y. 20; *Moore* v. *Butler*, 48 N. H. 171; *Braen* v. *Hathaway*, 13 Allen (Mass.), 237.

society could never permit such a restriction. If I stop a party suspected, must I not say why I do so? The presence of other parties would not do away with the privilege." It is for the jury to say whether the circumstances warranted the charge made by the defendant, whether it was made *bonâ fide*, or before more persons than was necessary, or in language stronger than the occasion justified (*f*). Thus, information that a robbery has taken place, naming the suspected thief, is a privileged communication (*g*); and so is a hand-bill, offering a reward for the recovery of bills of exchange, stating that they were suspected of being embezzled by the plaintiff, such hand-bill being published for the protection of the person on the bills, or to secure the conviction of the offender (*h*).

Defamation—Malice in law—Defamatory petitions to the Queen, to Parliament, or to ministers or officers of state respecting the conduct of magistrates and officers.—As all persons have an interest in the pure administration of public justice, and as it is the duty of all persons who witness misconduct on the part of magistrates to try by all means in their power to bring such misconduct to the notice of those whose duty it is to inquire into and punish it, it has been held that petitions and memorials prepared *bonâ fide*, and forwarded to the proper authorities, complaining of the conduct of magistrates, and containing statements and allegations honestly believed to be true, are privileged communications; but, if they are made on frivolous grounds, or with knowledge of their being untrue, or without knowledge of their truth or falsehood, and without inquiry, when inquiry would have made the truth apparent, and would have shown the allegation of misconduct false, the calumniator will be deemed to have acted from malicious motives, and his statements will not be privileged (*i*). Petitions to the Crown upon matters

188 respecting which it cannot directly interfere, and petitions to Parliament, although the petitioners, besides presenting them to the House, print them and distribute them amongst the members, fall within the same rule. All these are protected, that men may not be prevented by the dread of a prosecution or action from making communications which may be beneficial to the public (*k*). An action of libel may, however, be maintained for statements in

(*f*) *Padmore* v. *Lawrence*, 11 Ad. & E. 382. *Amann* v. *Damm*, 8 C. B., N. S. 597; 20 L. J., C. P. 313. *Hooper* v. *Truscott*, 2 Bing. N. C. 457.

(*g*) *Kine* v. *Sewell*, 3 M. & W. 297.

(*h*) Tindal, C. J., *Finden* v. *Westlake*, 8 M. & W. 461.

(*i*) *Harrison* v. *Bush*, 5 El. & Bl. 354; 25 L. J., Q. B. 25. *Sturt* v. *Blagg*, 10 Q. B. 906.

(*k*) *Lake* v. *King*, 1 Saund. 132. *Blake* v. *Pilfold*, 1 M. & Rob. 198. *Woodward* v. *Lander*, 6 C. & P. 548.

a letter addressed to the Privy Council injurious to the character of the plaintiff, a public officer removable by the Privy Council, upon proof of express malice (*l*).

Defamatory statements respecting the conduct of public officers, contained in an application for the redress of a grievance, or to expose some public abuse, and made *bonâ fide* to one of the king's ministers who is supposed to have authority to afford redress, do not render the person making the application liable to an action. Thus, where the creditor of an officer in the army sent a petition to the secretary-at-war, inclosing bills of exchange accepted by the officer, and containing statements derogatory to the character of the officer as a man of honour, and concluded with a prayer that the officer might be ordered to discharge the debts due on the bills, it was held that, although neither the secretary-at-war nor the king had power to order the money to be paid, yet that, if the jury thought that the petition contained only an honest statement of facts, according to the understanding of the person who sent it, and that it was addressed to the secretary-at-war *bonâ fide* for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff, they ought to find a verdict for the defendant (*m*). "Inasmuch as the defendant," observes Maule, J., "might, reasonably enough, conceive that the public officer to whom he addressed himself had power to assist him in obtaining payment of a just debt, the occasion justified the communication, however mistaken the defendant might be as to the extent of the jurisdiction of the person to whom he was addressing himself" (*n*). But, if the statements contained in the application are wholly or partly false, that may be sufficient to renew the presumption of malice, which *primâ facie* the nature of the communication would rebut (*o*).

Defamation—Malice in law—Privilege—Criminatory communications by public officers acting in discharge of a public duty.—A criminatory communication made by a clerk of the peace to the

189 justices at quarter sessions is privileged, provided it is confined to a statement of facts pertinent to a matter which it is his duty to investigate, and contains nothing but what the clerk of the peace believes to be true; but, if he imputes improper motives to others, and accuses them of attempts to extort money by misrepresentation, if irrelevant calumny is introduced into it, or if it contains strictures upon the motives and conduct of others which the facts

(*l*) *Proctor* v. *Webster*, 16 Q. B. D. 112; 55 L. J., Q. B. 150.
(*m*) *Fairman* v. *Ives*, 5 B. & Ald. 644.
(*n*) *Wenman* v. *Ash*, 13 C. B. 845; 22 L. J., C. P. 190.
(*o*) *Blagg* v. *Sturt*, 10 Q B. 905.

stated do not warrant, he will exceed his privilege, and subject himself to an action for damages (*p*).

Defamation — Malice in law — Privilege — Criminatory pastoral letters and printed communications from clergymen to their parishioners.—There is nothing in the position of a rector of a parish, or a vicar, curate, or any other minister of religion, which entitles him to publish or circulate defamatory letters in his parish; and such letters, though written and published under the gravest sense of duty, or the sincerest desire to improve the morals of the community, are actionable, if they cast serious imputations on the character or conduct of private persons. Where the schoolmaster of a national school, established in a parish of which the defendant was rector, had been dismissed by the trustees of the school from his situation, and had then obtained possession of a dissenting chapel, and opened a school there, it was held that the rector had no right to circulate letters in the parish, injuriously reflecting upon the conduct of the schoolmaster and the tendency of his teaching, under the pretext that he was watching over the souls of his parishioners, and exerting himself for their spiritual welfare. The parson in this case had, in a pastoral letter to divers parishioners, stigmatized the schoolmaster as not being a rightly-disposed Christian, and as being imbued with a spirit of opposition to authority and the commands of Scripture, and designated his school as a schismatic school, upon which God's blessing could not rest; and he warned the rich against supporting it with subscriptions of money, and the poor against sending their children to it to be educated; and it was held that the libel was not privileged, and that there was evidence of malice for a jury. "What was there," observes Maule, J., "in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter, not only in his own, but in the adjoining parish, and so endeavour to prevent persons from subscribing and sending their children to the plaintiff's school? It is difficult to understand how the slightest right to do so can be suggested. As rector he might, no doubt, visit and remonstrate with any of his flock; but, when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine. We think that there was sufficient

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(*p*) *Cooke* v. *Wildes*, 5 El. & Bl. 340; 24 L. J., Q. B. 367. *Popham* v. *Pickburn*, 7 H. & N. 891; 31 L. J., Ex. 133.

evidence for the jury to infer malice, and that, in determining the question of malice, the particular nature of the libel itself cannot be excluded from the consideration of the jury. . . . In this case the terms of the letter itself are not without the character of malice. The endeavour to make the plaintiff's conduct a matter of spiritual delinquency,—to represent it as something not only opposed to some worldly rule, but unchristian-like, and contrary to what would be done by a person who had faith in, and a willingness to obey, scriptural precepts,—are matters on the face of the libel which make it proper that the jury, looking at the libel itself, should say whether or not there was actual malice" (*q*).

Defamation—Malice in law—Privilege—Defamatory letters respecting clergymen, addressed to the bishop of the diocese, will be privileged, if there was fair and reasonable cause for a resort to the bishop, but not if they were written on light and frivolous grounds. Where a parishioner wrote a letter to the bishop of the diocese, informing him of reports current in the parish derogatory to the character of the clergyman and throwing scandal upon the Church, and praying that an inquiry might be instituted, it was left to the jury to determine whether the letter was written with the malicious intention of slandering the plaintiff to the bishop, and giving currency to idle rumours, or with the honest intention of obtaining an inquiry (*r*). If the writer of the letter has means at hand for ascertaining whether the rumours are true or false, and neglects to avail himself of them, and chooses to remain in ignorance when he might have obtained full information, there will be no pretence for any claim of privilege.

Defamation—Malice in law—Privileged confidential communications between relations respecting the character of a person proposing marriage.—Where the defendant, being the son-in-law of a widow lady to whom the plaintiff was paying his addresses, wrote a letter to the lady charging the plaintiff with various acts of gross misconduct, and warned her against listening to his addresses, it was held that the communication was privileged. "If no explanation," observes Alderson, B., "had been given of the circumstances under which the letter was written, the law would, from the contents,

191 infer it to have been published with a malicious motive against the plaintiff. But, when it is shown that the parties were standing

(*q*) *Gilpin* v. *Fowler*, 9 Exch. 627; 23 L. J., Ex. 152. In *Joannes* v. *Bennett* (5 Allen (Mass.), 269), a letter from a former pastor to a woman to whom the plaintiff was paying his addresses, written at the request of her parents, was held not to be privileged. Said Bigelow, J., "He stood in no such relation towards the parties as conferred on him a right, or imposed on him a duty, to write a letter, containing calumnious statements concerning the plaintiff's character."

(*r*) *James* v. *Boston*, 2 C. & K. 8.

in circumstances of confidence and near relationship towards each other, I think the defendant's conduct justifiable, if he really believed in the truth of the statements which he made, though such statements were, in fact, erroneous; for it is for the common good of all that communications between parties situated as these were should be free and unrestrained. The whole question is, whether this is a *bonâ fide* letter" (*s*).

Defamation—Malice in law—Privileged confidential communications between friends to prevent an injury.—If a confidential communication is honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, the occasion justifies the act, and the communication is privileged (*t*). But no moral duty will justify the repetition and communication in writing of all the idle gossip a man hears to the prejudice of his neighbour. If a person is, under certain circumstances, under the pressure of a moral obligation to disclose the truth, he is, under all circumstances, under the pressure of a moral obligation to abstain from circulating and propagating falsehoods. No person, therefore, ought to hazard statements or assertions in writing injurious to the character of another, until he has by inquiry, where the means of inquiry exist, satisfied himself that they are founded in truth. The benefit to one man by the disclosure of the information, supposing it to be true, is counterbalanced by the injury done to another if it should turn out to be false.

Where the defendant had received a letter from his friend, the mate of a ship, containing a long narrative of dangers which the mate had incurred from the drunkenness of the captain, and asking for the defendant's advice, and the defendant, honestly believing in the truth of his friend's statement, handed the letter to the shipowner, who dismissed the captain, and the latter sued the defendant for damages, the court were equally divided in opinion as to whether the communication was privileged or not; Tindal, C. J., and Erle, J., being of opinion that the occasion and circumstances under which the communication took place, and the purity of motive of the defendant in making it, rendered it a privileged and protected communication; while Cresswell, J., and Coltman, J., were of a contrary opinion. "It was not contended," observes Cresswell, J., "that any legal duty bound the defendant to communicate to the shipowner the contents of the letter he had received; nor was the communication made in the

192 conduct of his own affairs; nor was his interest concerned.

(*s*) *Todd* v. *Hawkins*, 2 M. & Rob. 21; 8 C. & P. 88; *Joannes* v. *Bennett*, 5 Allen (Mass.), 269.

(*t*) Holroyd, J., *Fairman* v. *Ives*, 5 B. & Ald. 645.

The authority for the publication, if any, must therefore be derived from some moral duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any public duty to make the communication; neither his own situation, nor that of any of the parties concerned, nor the interests at stake, were such as affect the public weal. Was there any private duty? There was no relation of principal and agent between the shipowner and the defendant; nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers; and the duty, if it existed at all, as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the plaintiff and the defendant. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty, not to publish defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the shipowner that which he believed to be true" (*u*). Here, however, the defendant had no means of ascertaining the truth or falsehood of the information; and the responsibility of acting upon it, without due inquiry, ought to rest with the shipowner. If the defendant had been possessed of any personal interest in the subject-matter to which the letter related: if he had been a part-owner of the ship, or an underwriter on the ship, or had any property on board, the communication of the letter to the shipowner would have fallen clearly within the rule relating to excusable publications; and so, if the danger disclosed by the letter, either to the ship, or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbour, the defendant would have been not only justified in making, but would have been bound to make, the disclosure (*x*).

Defamation—Malice in law—Privileged communications by persons having a pecuniary interest involved in the matter of the communication.—A communication made by a person immediately interested in the subject-matter to which it relates for the purpose of protecting his own interest, in the full belief that the communi-

(*u*) Cresswell, J., *Coxhead* v. *Richards*, 2 C. B. 605. *Bennett* v. *Deacon*, *ib.* 633. *Bell* v. *Parke*, 10 Ir. C. L. R. 284.

(*x*) Tindal, C. J., *Coxhead* v. *Richards*, 2 C. B. 596. *Wilson* v. *Robinson*, 7 Q. B. 68. Willes, J., *Amann* v. *Damm*, 8 C. B., N. S. 602; 29 L. J., C. P. 313.

193 cation is true, and without any malicious motive, is a privileged communication, and protected from liability in an action for libel. Where a letter was written confidentially to certain bankers, conveying charges injurious to the professional character of a solicitor in the management of certain concerns which they had entrusted to him, and it appeared that the writer of the letter was himself interested in the affairs which he supposed to be mismanaged, and wrote the letter *bonâ fide* under the impression that his statements were well founded, it was held that the communication was privileged. "If a communication of this sort," observes Lord Ellenborough, "which was not meant to go beyond those immediately interested in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted" (*y*).

Among the various communications which have been held to be protected, in consideration of the private interest of the person making them, may be enumerated notices of the commission of an act of bankruptcy by the plaintiff, given by a creditor whose pecuniary interests required the information to be given (*z*), and communications respecting the character of servants (*a*).

Defamation—Malice in law—Privilege—Disclosures made bonâ fide *in the course of an investigation set on foot by the plaintiff himself* are also privileged and protected. If, therefore, the plaintiff, or another person at the plaintiff's request, writes to the defendant asking for information on some point affecting the plaintiff's character, and the defendant merely relates *bonâ fide* what he has heard, the communication is privileged (*b*). Where the defendant having given notice of dismissal to his footman and cook, they separately went to him and asked his reason for discharging them, when he told each, in the absence of the other, that (he or she) was discharged because both had been robbing him, whereupon each brought an action for the words so spoken to the other, it was held that the statement was privileged (*c*).

Answers to inquiries, therefore, made by persons interested in making the inquiry are privileged, if they are given *bonâ fide* in the discharge of any legal, moral, or social duty, as where the writer is, by his situation, bound to protect the interests of the inquirer, and they are believed to be true by the parties who give them. Thus, the answer to an inquiry addressed by a landlord to his tenant, respecting the character of a person proposing to be

(*y*) *M'Dougall* v. *Claridge*, 1 Campb. 266.
(*z*) *Blackham* v. *Pugh*, 2 C. B. 611.
(*a*) *Infra*, p. 194.
(*b*) *Hopwood* v. *Thorn*, 8 C. B. 316. *Warr* v. *Jolly*, 6 C. & P. 497.
(*c*) *Manby* v. *Witt*, 18 C. B. 544; 25 L. J., C. P. 294. *Davies* v. *Snead*, L. R., 5 Q. B. 608.

194 appointed gamekeeper, or to take a farm, is privileged by the occasion, if made *bonâ fide* (*d*). But, if a person is supposed to have libelled or slandered another, and the party aggrieved asks him if he has done so, and he replies that he has, and repeats it, such a communication is not privileged (*e*); and per Wightman, J., "If the reports had originated elsewhere than with the defendant, and he had been merely called upon for information, and had given it, the case would have been different."

Defamation—Malice in law—Privilege—Communications between subscribers to charities.—It has been held that words spoken by one subscriber to a charity in answer to inquiries by another subscriber, respecting the conduct of a medical man employed by the charity, in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. "There may be a thousand subscribers to a charity," observes Lord Denman. "Such a claim of privilege is too large" (*f*). But it seems that this view would not now be sustained (*g*).

Defamation—Malice in law—Privileged communications respecting the character of servants.—One of the most ordinary and common instances of the application in practice of the privilege of protection to confidential communications of a criminatory character, is that of a former master giving the character of a discharged servant, which, if given with honesty of purpose to a person who has any interest in the inquiry, is a privileged communication, although made in the presence and hearing of a stranger (*h*). Even though the statement is untrue in fact, the master will be held justified by the occasion in making the statement, unless it can be shown to have proceeded from a malicious mind. Malice may be established by various proofs: one may be that the statement is false to the knowledge of the person making it; and, if there is any evidence of wilful untruth in the statements as to character, there is evidence of malice to be submitted to a jury. Generally speaking, anything said or written by a master when he gives the character of a servant is a privileged communication, if made *bonâ fide* in answer to inquiries that have been addressed to him. It is not essential that the person making the communication should be put into action in consequence of a third party's putting questions to him. He may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion to induce that

(*d*) *Cockayne* v. *Hodgkisson*, 5 C. & P. 543.
(*e*) *Griffiths* v. *Lewis*, 7 Q. B. 64.
(*f*) *Martin* v. *Strong*, 5 Ad. & E. 538.
(*g*) *Waller* v. *Lock*, 7 Q. B. D. 619; 51 L. J., Q. B. 274.
(*h*) *Toogood* v. *Spyring*, 1 C. M. & R. 193. *Weatherston* v. *Hawkins*, 1 T. R. 110. *Taylor* v. *Hawkins*, 16 Q. B. 308; 20 L. J., Q. B. 313.

195 other to seek information and put questions to him. The answers to such questions given *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury, whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant. When he volunteers to give the character, stronger evidence that he acted *bonâ fide* will be required than in the case where he has given the character after being requested so to do (*i*).

If the employer has received credible information of the misconduct of a servant after the latter has left his situation, it is his duty to disclose the fact in answer to inquiries as to character, in order that a proper investigation may be made by the persons interested in knowing the truth (*k*). If a good character is given to a servant, and then circumstances are discovered which show that the character was not deserved, it is the duty of the person who has given the good character to communicate the discovery to the person to whom such character has been given, and the communication, if made *bonâ fide*, is privileged and protected (*l*). But, if it appears from the terms and language of the communication and the surrounding circumstances of the case that there was any malicious or spiteful feeling actuating the master when making the communication, then it is not protected. If, therefore, it is proved that the bad character given of the servant is false, and that the master knew it at the time he gave it, there is evidence of express malice, and the privilege is annihilated. If the master characterizes his servant as a "bad-tempered, lazy, impertinent fellow," and the servant brings forward persons with whom he has previously lived who give him a good character, and contradict the allegation of his bad temper, laziness, and impertinence, it is incumbent on the master to give some general evidence, showing that he had a reasonable ground for using the language he did use, and that the statement was not totally unfounded and wholly devoid of truth. If he fails to give some general evidence of this sort, the charge against the servant will be considered reckless and unfounded, and there will be evidence of malice for a jury (*m*).

(*i*) *Pattison* v. *Jones*, 8 B. & C. 578. *Gardner* v. *Slade*, 13 Q. B. 796; 18 L. J., Q. B. 334. See *Fryer* v. *Kinnersly*, 15 C. B., N. S. 422; 33 L. J., C. P. 97.

(*k*) *Child* v. *Affleck*, 9 B. & C. 403.

(*l*) *Gardner* v. *Slade*, 13 Q. B. 801; 18 L. J., Q. B. 334.

(*m*) *Rogers* v. *Clifton*, 3 B. & P. 591. *Acc.* in the case of a governess, *Fountain* v. *Boodle*, 3 Q. B. 11.

196 Where a libel imputed to the plaintiff incompetency and unskilfulness in a particular transaction in which the plaintiff had been employed by the defendant, it was held that it was not competent to the plaintiff to give evidence of general competency and skilfulness, without meeting the specific instance relied upon by the defendant (*n*).

Where the plaintiff, being secretary of an association called the Brewers' Company, was dismissed for alleged misconduct, and the defendant, who was a director of the company, and also a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, called the attention of the directors of the last-named company to the plaintiff's misconduct and dismissal from the secretaryship of the other company, alleging that he had been charged with obtaining money from the solicitors of the company by false pretences, and taking up a bill of his own with it, it was held that the defendant might properly, in his character of director of the Necropolis Company, make the communication he did, although it charged the plaintiff with the actual commission of the offence imputed to him, or amounted to an assertion on the defendant's part that he believed the charges to be true; for it was both his duty and interest to make the communication; and it was held that, in order to render the defendant liable in damages, actual malice must be shown, in the shape of proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff (*o*).

Defamation—Malice in law—Comments in excess of the privilege.—"The proper meaning of a privileged communication," observes Parke, B., "is only this, that the occasion on which the communication was made rebuts the inference of malice *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact *i. e.*, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made" (*p*). This may be established by the language of the communication itself, by showing that it was made in virulent and abusive terms, and that the words used were stronger than the occasion justified (*q*). When the communication is in writing, the jury are entitled to look at and read the writing, in order to judge of its true character.

Any one, in the transaction of business with another, has a

(*n*) *Brine* v. *Bazalgette*, 3 Exch. 694.
(*o*) *Harris* v. *Thompson*, 13 C. B. 348. See *Lawless* v. *Anglo-Egyptian Cotton Co.*, L. R., 4 Q. B. 262; 38 L. J., Q. B. 129. *Ante*, p. 185.
(*p*) *Wright* v. *Woodgate*, 2 Cr. M. & R. 577.
(*q*) *Brown* v. *Croome*, 2 Stark. 297. *Godson* v. *Horne*, 1 B. & B. 7.

197 right to use language, *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly, or by its consequences, be injurious or painful to another; but he has no right to make defamatory comments on the motives or conduct of the party with whom he is dealing. Where, therefore, the defendant claimed a sum of money from the plaintiff, and the plaintiff's clerk wrote, by direction of the plaintiff, to the defendant, telling him that the plaintiff denied his liability, whereupon the defendant wrote to the clerk, alleging facts in support of his claim, and added "this attempt to defraud me is as mean as it is dishonest," it was held that the comment was not privileged, and was libellous and actionable (*r*).

Defamation—Malice in law—Reckless and inconsiderate communications.—But it is not sufficient in every case of a confidential communication made by a person having an interest in the subject-matter thereof to show that it was made *bonâ fide*, and without malice. A man has no right, as we have seen, to make himself the medium of propagating scandalous and defamatory accusations, unless he himself honestly believes them to be true; and his belief is not an honest belief, if it is formed in a reckless and inconsiderate manner. If he has the means by inquiry of ascertaining whether the charge is true or false, and neglects to make inquiry, and exercises no effort to arrive at the truth, his belief can hardly be said to be an honest belief; for whoever publishes and circulates in writing opinions and statements unfavourable to another, ought to be prepared to show that he had some reasonable ground for it. There is a wide distinction between reckless assertions made by a man who assumes to have a knowledge of the facts he communicates, and honest communications made with a view to inquiry and information by a person interested in knowing the truth (*s*). If a question is asked concerning the character of another, the person interrogated is not justified in giving a damaging answer, unless he has some fair and reasonable foundation for it.

Defamation—Malice in law—Of the effect of addressing privileged communications to a wrong party by mistake.—An honest mistake, made in sending a privileged communication to the wrong person, does not destroy the privilege (*t*).

Defamation—Malice in law—Matters of public interest—Reports of trials.—"Newspapers and other publications," observes Tindal, C. J., "which narrate what passes in courts of justice, are, to a

(*r*) *Tuson* v. *Evans*, 12 Ad. & E. 733.
(*s*) *James* v. *Boston*, 2 Car. & K. 7.
(*t*) *Tompson* v. *Dashwood*, 11 Q. B. D. 43; 52 L. J., Q. B. 425. See *ante*, p. 187. *Harrison* v. *Bush*, 5 El. & Bl. 350; 25 L. J., Q. B. 25.

198 certain extent, privileged. No one can read their accounts of judicial proceedings without being sensible that, on several occasions, they do, to a certain extent, serve the cause of public justice. Everybody knows that the statement of counsel is *ex parte*, and that he is often instructed to make allegations which it is afterwards impossible to support in proof. If, therefore, after a cause has been tried, a defamatory statement by counsel, which the evidence has not at all supported, is published in a newspaper, the publication is not privileged, because it is not a fair account of what passed in court" (*u*). The cases in which reports of legal proceedings, whether *ex parte* or not, have been held to be libellous and actionable are, where the account published has been false or highly coloured, or where the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or conduct of others (*x*), or where the matters given in evidence and published are of a grossly scandalous, blasphemous, or immoral character (*y*). A report of a judgment may be privileged though unaccompanied by a report of the evidence (*yy*). The publication of proceedings in a court of justice is not absolutely privileged; and, therefore, if the publisher is actuated by express malice, he is liable to an action (*z*).

Defamation—Malice in law—Matters of public interest—Ex parte *statements.*—"We are not prepared," observes Lord Campbell, "to lay down for law, that the publication of preliminary inquiries before magistrates is universally lawful, nor that the publication of such inquiries is universally unlawful. One of the resolutions of this court, in *Duncan* v. *Thwaites* (*a*), lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful, where the party accused has been committed or held to bail for an indictable offence; there the actual pendency of a prosecution was a main ingredient in the decision: but, where the party accused has neither been committed nor held to bail, but absolved by the magistrate, we think we are at liberty to hold that an impartial and correct report of the proceedings is lawful. In the cases relied upon to establish the general doctrine that reports of preliminary proceedings before magistrates are not lawful, it will be seen that there were either vituperative comments accompanying the statement of the evidence, or some aggravation attending the publication of the report, or some peril which was

(*u*) *Saunders* v. *Mills*, 6 Bing. 218. *Hoare* v. *Silverlock*, 9 C. B. 20; 19 L. J., C. P. 210. *Beauchamp (Ld.)* v. *Croft*, Dyer, 285 a. *Curry* v. *Walter*, 1 B. & P. 525. *Lewis* v. *Walter*, 4 B. & Ald. 614.

(*x*) *Stiles* v. *Nokes*, 7 East, 492. *Lewis* v. *Clement*, 3 B. & Ald. 710. *Andrews* v. *Chapman*, 3 C. & K. 288.

(*y*) *R.* v. *Carlile*, 3 B. & Ald. 169. *Steele* v. *Brannan*, L. R., 7 C. P. 261; 41 L. J., M. C. 85.

(*yy*) *Macdougall* v. *Knight & Son*, 17 Q. B. D. 636.

(*z*) *Stevens* v. *Sampson*, 5 Ex. D. 53; 49 L. J., Exch. 120.

(*a*) 3 B. & C. 556.

199 likely to be caused to the person complaining of it" (*b*). The privilege is not confined to the publication of the proceedings of the superior courts. The dignity of the court cannot be regarded; and "no distinction can be made for this purpose between a court of *pie poudre* and the House of Lords."

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private; and the publication of any such proceedings before him would undoubtedly be unlawful. But, while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), the court in which he sits is to be considered a public court of justice, provided the magistrate has jurisdiction over the matters brought before him, and authority to inquire into them. But, "if magistrates publicly hear slanderous complaints respecting matters over which they have no jurisdiction, a report of what passes before them is as little privileged as if they were illiterate mechanics assembled in an ale-house" (*c*).

Defamation—Malice in law—Matters of public interest—Proceedings in Parliament.—Information printed merely for the use of members of Parliament and circulated amongst them is privileged; but reports containing defamatory matter, though printed for the use of members, could not at common law be lawfully circulated amongst those who were not members of Parliament (*d*); now, however, the 3 & 4 Vict. c. 9, enacts that a defendant in any civil or criminal proceeding brought for the publication of any report, paper, vote, or proceeding published under the authority of either House of Parliament, may, on the production of a certificate from the speaker of either House, duly verified, stating that such report, paper, &c., was published by the authority of the House, apply to the court, or judge of the court, in which the proceedings are pending, and have them stayed. By the 2nd section it is provided, that any suit or criminal proceeding for the publication of a copy of such authorized report, paper, &c., may be stayed on the production of the original report, paper, &c., and of an affidavit verifying the correctness of the copy; and by the 3rd section it is enacted that in any civil or criminal proceeding for the publication of any extract or abstract of such report, paper, &c., the defendant may give evidence

(*b*) Ld. Campbell, C. J., in *Lewis* v. *Levy*, El. Bl. & El. 557; 27 L. J., Q. B. 289. *Usill* v. *Hales*, 3 C. P. D. 319; 47 L. J., C. P. 323.

(*c*) *Lewis* v. *Levy*, El. Bl. & El. 557; 27 L. J., Q. B. 288. *M'Gregor* v. *Thwaites*, 3 B. & C. 24.

(*d*) *Stockdale* v. *Hansard*, 9 Ad. & E. 1.

200 under the general issue, that the extract or abstract was published *bonâ fide* and without malice, and, on the jury being satisfied of that, shall be entitled to a verdict.

A member of Parliament may make what reflections he pleases upon the character of others from his place in the House of Commons; but, if he prints and publishes his speeches (except, perhaps, *bonâ fide* for the information of his constituents (*e*)), he will be responsible in damages if they are of a libellous character (*f*). However, a faithful report by a public newspaper of an entire debate in either House of Parliament, containing matter disparaging to the character of an individual as having been spoken in the course of the debate, is not actionable at the suit of the party whose character is thus called in question; but the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, *viz.*, that the advantage of publicity to the community at large outweighs any private injury resulting to the individual from the publication (*g*).

Defamation—Malice in law—Matters of public interest—Proceedings at public meetings, &c.—The principle which protects newspaper proprietors and others, who publish a fair and correct statement of what takes place in courts of justice, did not at common law extend to protect the publication of reports, speeches, and proceedings, at vestries and public meetings, or meetings of commissioners appointed to be holden by statute for public purposes (*h*). But by the Newspaper Libel and Registration Act, 1881 (*i*), s. 2, it is enacted that any report published in any newspaper (*k*) of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit. The protection afforded by this section will not, however, be available as a defence in any proceeding if the plaintiff can show that the defendant has refused to insert in the newspaper in which the report containing the matter

(*e*) *Wason* v. *Walter*, L. R., 4 Q. B. 95; 38 L. J., Q. B. 34.

(*f*) *R.* v. *Creevey*, 1 M. & S. 280. *R.* v. *Ld. Abingdon*, 1 Esp. 226; cited 7 El. & Bl. 233; 26 L. J., Q. B. 107.

(*g*) *Wason* v. *Walter*, *supra*.

(*h*) *Davison* v. *Duncan*, 7 El. & Bl. 231; 26 L. J., Q. B. 106. *Popham* v. *Pickburn*, 7 H. & N. 891; 31 L. J., Ex. 133. See *Cox* v. *Feeney*, 4 F. & F. 13.

(*i*) 44 & 45 Vict. c. 60.

(*k*) This word is by sect. 1 of the Act defined to mean any paper containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale, and published in England or Ireland periodically, or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two of such papers, parts or numbers; also any paper printed in order to be dispersed, and made public, weekly, or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

201 complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff.

The privilege which covers fair and accurate reports of proceedings in parliament and in courts of justice does not extend to fair and accurate reports of statements made to editors of newspapers (*l*).

Defamation—Malice in law—Matters of public interest—Reviews and criticisms.—"Every man," observes Lord Ellenborough, "who publishes a book, commits himself to the judgment of the public; and anyone may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right; but, if he follows the author into domestic life for the purpose of slander, that will be libellous. Authors are liable to criticism, to exposure, and even to ridicule, if their compositions are ridiculous; otherwise the first who writes a book upon any subject will maintain a monopoly of sentiment and of opinion respecting it, which would tend to the perpetuity of error." "The critic does a great service to the public who writes down a vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and their money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider an injury, because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled" (*m*).

"The editor of a public newspaper," observes Lord Kenyon, "may fairly and candidly comment on any place or species of public entertainment, or the persons who perform there; but it must be done without malice or view to injure or prejudice the proprietor in the eyes of the public. If fairly done, however severe the censure, the justice of it screens the editor from legal animadversion; but, if it can be proved that the comment is malevolent, and exceeds the bounds of fair opinion, then it is a libel and actionable" (*n*). The same rule applies to an article in a newspaper upon a debate in either House of Parliament upon a subject of public interest. It must be honest and fair, *i.e.*, the writer must believe it to be true or just; and it must be made with a reasonable degree of judgment and moderation, and be justified

(*l*) *Davis & Sons* v. *Shepstone*, 11 App. Cas. 187.

(*m*) *Carr* v. *Hood*, cited in *Tabart* v. *Tipper*, 1 Campb. 357. *Fryer* v. *Kinnersley*, 15 C. B., N. S. 422; 33 L. J., C. P. 96. *M'Leod* v. *Wakley*, 3 C. & P. 311.

(*n*) *Dibdin* v. *Swan*, 1 Esp. 26. *Gregory* v. *Duke of Brunswick*, 1 Car. & K. 24.

202 by the circumstances as disclosed in an accurate report of the debate (*o*). So, also, the conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair and *bonâ fide* discussion in a public newspaper; and unfavourable comments made on such conduct in the course of the discussion are privileged (*p*).

It is competent to one public writer to criticise another and ridicule his sentiments and opinions; but he is not justified in making calumnious remarks on the private character of the individual, or in imputing to him sordid and dishonest motives, or base and dishonourable conduct. In that respect, the editor of a newspaper enjoys a right of protection in common with every other subject (*q*). A paragraph in one newspaper charging another with being a vulgar, ignorant, and scurrilous journal, is not actionable; but it is otherwise if it asserts that it is in low circulation, and calls the attention of advertisers to the fact, as the plain object of it is to damage the sale of the paper, and diminish the profits from advertising (*r*).

Works of art are as much the subjects of criticism as the writings of an author. "Any man has a right," observes Lord Tenterden, "to express his opinion of them; and, however mistaken, in point of taste, that opinion may be, or however unfavourable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression, although through the medium of ridicule. If it is unfair and intemperate, and written for the purpose of injuring the artist in his profession, it is actionable" (*s*). Thus, it is not libellous fairly and honestly to criticise a painting publicly exhibited (*t*).

If a man circulates a printed hand-bill, or posts it up in a public thoroughfare, or advertises in the public papers, the hand-bill, or the advertisement, is as much open to fair and candid comment and criticism as any published book or pamphlet. But those who criticise it must not go out of their way to impute motives, and make reflections upon private character not fairly warranted by the terms and tendency of the writing or advertisement (*u*).

Defamation—Malice in law—Matters of public interest—Criticisms

(*o*) *Wason* v. *Walter*, L. R., 4 Q. B. 95; 38 L. J., Q. B. 34.
(*p*) *Davis* v. *Duncan*, L. R., 9 C. P. 396; 43 L. J., C. P. 185.
(*q*) Ld. Ellenborough, *Stuart* v. *Lovell*, 2 Stark. 97. *Campbell* v. *Spottiswoode*, 3 B. & S. 769; 32 L. J., Q. B. 185.
(*r*) *Heriot* v. *Stuart*, 1 Esp. 436.
(*s*) *Soane* v. *Knight*, M. & M. 74.
(*t*) *Thompson* v. *Shackell*, Moo. & Mal. 187.
(*u*) *Paris* v. *Levy*, 9 C. B., N. S. 342; 30 L. J., C. P. 11.

203 *upon sermons and clergymen.*—The law permits comments to be made upon the sermons delivered by clergymen from their pulpits, provided the comments are fairly, justly, and truly made. A clergyman also may be fairly characterised as a remarkably bad preacher, or as a preacher of erroneous doctrines; and, if the parson sustains an injury from the criticism, it is an injury for which there is no redress at law by damages. But the preaching of a sermon in the ordinary mode of a clergyman's duty in the parish church does not make the sermon public property, so as to invite observation upon it, and authorize the same freedom of criticism and comment from the press in general as is extended to the publication of a literary work (*x*); and all reflections upon the private character or conduct of the clergyman, calculated to bring him into disrepute with his parishioners, are libellous and actionable. However, what he does in the vestry-room, or allows to be done in the church during Divine service, is a matter of public interest; and therefore any comments upon it, unless stronger language is used than the occasion justifies (which is a question for the jury), are not actionable (*y*).

Defamation—Malice in law—Matters of public interest—Comments upon the public character of public men.—There is a wide difference between publications relating to public and private individuals. Every person has a right to comment upon those acts of public men which concern him as a subject of the realm, if he does not make his commentary a vehicle for malice and the indulgence of some private spite or pique. "You have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor; but you have no right to impute to them such conduct as disgraces and dishonours them in private life" (*z*).

Defamation—Malice in law—Matters of public interest—Criticism on matters of public and national importance.—Every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, and to state his own views and to advance those of others for the consideration of all or any of those who have a common interest

(*x*) *Gathercole* v. *Miall*, 15 M. & W. 344. *Hearne* v. *Stowell*, 12 Ad. & E. 719.

(*y*) *Kelly* v. *Tinling*, L. R., 1 Q. B. 699; 35 L. J., Q. B. 940.

(*z*) *Parmiter* v. *Coupland*, 6 M. & W. 108. The right to canvass the acts of public officers is subject to the limitation that it must be exercised fairly in good faith, and without wantonness or a reckless disregard of private rights. If charges against them are made without probable cause and from improper motives, or if they are untrue, liability attaches to the party making them: *Snyder* v. *Fulton*, 34 Md. 128; *Cramer* v. *Riggs*, 17 Wand. (N. Y.) 209; *Powers* v. *Dubois*, 17 *ibid.* 63; *Usher* v. *Severance*, 20 Me. 9; and the same rule prevails as to candidates for office. Their characters may be canvassed but not calumniated: *Seely* v. *Blair Wright* (Ohio), 358; *Wilson* v. *Fitch*, 41 Cal. 363.

in the subject; and, whilst he does so, he has a privilege attaching to such right of free discussion of the same character which has been held to attach in the instances given above, in which liberty of speech has been allowed upon grounds of public and social convenience, where the speaker or writer and the person or persons

204 addressed have had a duty or interest in common, the existence of which is held to rebut the inference of malice (*a*). The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may be made freely by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals. To justify the publication in a newspaper of defamatory matter, not being a report of what has passed in a court of justice, it must be shown, either that the person of whom the defamatory matter was written was a person whose position and character were of general interest to the whole country, or that the subject-matter dealt with was one of general interest to the whole community. The administration of the poor laws, both by the government department and by the local authorities, including the conduct of the medical officers, is matter of public interest. But, although the subject-matter may be of general interest, there still remains the question whether the occasion on which the words were uttered was privileged; and, although a fair report of proceedings in a court of justice or of the proceedings of parliament is privileged, yet the meetings of poor law guardians are not necessarily public; and, consequently, the publication of a report of proceedings at such a meeting, at which *ex parte* charges of misconduct against the medical officer of the union were made, was held not to be privileged by the occasion (*b*).

Defamation—Malice in law—Matters of public interest—Disparaging criticisms by one tradesman upon the goods of a rival tradesman are not actionable, unless they are made falsely and without lawful occasion, and special damage results from them (*c*). But, where a gunsmith published an advertisement in a newspaper of his being the inventor of a short gun which shot as far as other longer guns, and another gunsmith inserted a counter advertisement cautioning persons against these guns, and stating that the inventor durst not engage with any artist in town, and had made no such experiment, &c., it was held that this was a libel; for, though any one in the trade might contradict the fact asserted respecting the short gun,

(*a*) *Henwood* v. *Harrison*, L. R., 7 C. P. 606; 41 L. J., C. P. 206. *Dunn* v. *Anderson*, 3 Bing. 88; R. & M. 287.

(*b*) *Parcell* v. *Sowler*, 2 C. P. D. 215; 46 L. J., C. P. 308.

(*c*) *Ante*, p. 9.

no one had a right to indulge in any general reflections upon the character of the inventor and his conduct of his business: that the advice to all persons to be cautious was a reflection on the inventor's honesty, as leading people to suppose that he would
205 deceive them; and the allegation that he would not engage with any other artist was setting him below the rest of his trade (*d*).

Defamation—Malice in fact.—If the publication of defamatory matter is brought within the limits of privilege, the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact (*e*); and the evidence to prove express malice, though not such as necessarily to lead to the conclusion that malice existed, or be inconsistent with the non-existence of malice, should yet raise a probability of malice, and be more consistent with its existence than with its non-existence (*f*). "The rule," observes Lord Campbell, "is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of actual malice; if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a non-suit or a verdict for the defendant; otherwise there might be a question for the jury in every case where a master, however fairly, gives the character of a servant; and, if they conceived that there was malice lurking in the mind of the master, they might give a verdict for the plaintiff, on the ground merely of the communication having taken place; and this would apply to all cases in which the occasion has been said to repel the presumption of malice" (*g*). If the defamatory words were used with a wrong motive, as from anger, or with a knowledge that they were untrue, or without caring whether they were true or false, there is proof of malice; but, if the defendant made the statements believing them to be true, he will not necessarily lose the protection of privilege, although he had no reasonable grounds for his belief (*h*).

The defendant's conduct in putting a justification on the record which he does not attempt to prove, and will not abandon, may be taken into consideration by a jury, as proving malice and aggravating the injury; and every other part of the defendant's conduct down to the time of the trial may be considered by the jury; for acts, although subsequent, may indicate the existence of motives at a former time (*i*).

(*d*) *Harman* v. *Delaney*, 1 Barnard. 289; 2 Str. 898.

(*e*) Cresswell, J., *Coxhead* v. *Richards*, 2 C. B. 605.

(*f*) *Somerville* v. *Hawkins*, 10 C. B. 590; 20 L. J., C. P. 131. *Laughton* v. *Bishop of Sodor and Man*, L. R., 4 P. C. 495; 42 L. J., P. C. 11.

(*g*) *Taylor* v. *Hawkins*, 16 Q. B. 321. *Spill* v. *Maule*, L. R., 4 Ex. 232; 38 L. J., Ex. 138.

(*h*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J., Q. B. 230.

(*i*) *Simpson* v. *Robinson*, 12 Q. B. 513:

Where the defendant sets up as a defence that the communication was a privileged communication, but the judge holds that there are comments by the defendant in excess of the privilege, the judge is not thereby justified in telling the jury that the

206 defendant, by exceeding his privilege, has been guilty of a libel: for whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine. Whenever there are expressions in a publication which may reasonably be contended to prove malice, the plaintiff has a right to have the whole matter submitted to the jury, for them to say whether, in writing and publishing it, the defendant was acting *bonâ fide* or maliciously (*k*). But, if words used in a privileged communication are capable of two interpretations, one compatible with, the other incompatible with, the absence of malice, the former interpretation, it seems, should be allowed to prevail (*l*).

Defamation—Of the interpretation of the words used.—"In former times," observes Pratt, C. J., "words were construed in *mitiori sensu*, to avoid voxatious actions, which were then very frequent; but *distinguenda sunt tempora*, and we ought to expound words according to their general signification to prevent scandals, which are at present too frequent" (*m*). "The rule," observes Lord Ellenborough, "which at one time prevailed, that words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts as they always ought to have been, in the plain, popular sense in which the rest of the world naturally understand them" (*n*). The effect of the words used, and not the meaning of the party uttering them, is the test of their being actionable. "You must first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them" (*o*).

It must appear to the court that the words complained of are capable of conveying or bearing a defamatory meaning (*p*); and, if so, it is for the jury to determine whether, in point of fact, they

Harbison v. *Shook*, 41 Ill. 142; *Ormsby* v. *Douglass*, 37 N. Y. 477; *Wilson* v. *Nations*, 5 Yerg. (Tenn.) 211; *Gorman* v. *Sutton*, 32 Penn. St. 247; *Updegove* v. *Zimmermann*, 13 *ibid.* 619. But if the plea was filed in good faith, and under an honest belief that it would be sustained, it does not, as a matter of course, aggravate the damages; but the plea, with all its attendant circumstances, is proper for the consideration of the jury and the question of malice and damages: *Freeman* v. *Linsley*, 50 Ill. 497; *Sloan* v. *Petrie*, 15 Ill. 425.

(*k*) *Cooke* v. *Wildes*, 5 El. & Bl. 342; 24 L. J., Q. B. 367.

(*l*) *Spill* v. *Maule*, L. R., 4 Ex. 232; 38 L. J., Ex. 138.

(*m*) *Button* v. *Heyward*, 8 Mod. 24.

(*n*) *Roberts* v. *Camden*, 9 East, 96. *Woolnoth* v. *Meadows*, 5 East, 468.

(*o*) *Hankinson* v. *Bilby*, 16 M. & W. 442.

(*p*) *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741; 52 L. J., Q. B. 232. *Mulligan* v. *Cole*, L. R., 10 Q. B. 549; 44 L. J., Q. B. 153.

do bear such a meaning (*q*). When the words are susceptible of a harmless meaning, it is for the plaintiff to show that they were used in a libellous and not in a harmless sense; and their true import and signification may be established by evidence of the surrounding circumstances (*r*).

207 Where the words used have an equivocal meaning, but are well understood and known in a libellous sense, it is for a jury to say whether they were used in that sense or not (*s*). "We ought to attribute," observes Coleridge, J., "to a jury an acquaintance with ordinary terms and allusions, whether historical, or figurative, or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used." The term "frozen snake" has an application very generally known, which is calculated to bring into contempt a person against whom it is directed. If, therefore, a publication imputes to a person that his friends, who have been assisting him, have realized in him the fable of the frozen snake, it is for a jury to say whether these words do not convey an imputation of ingratitude to friends and benefactors; and, if they do, they are actionable (*t*).

If the meaning is so obscure and doubtful as to render the document incomprehensible, it is not actionable, although the plaintiff's name may be mentioned therein in an impertinent manner, and the publication may have been evidently intended to vex and annoy him (*u*).

In an action for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jury may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation as to show that they were not intended to give the idea which their ordinary and primary meaning would give (*x*).

Defamation—Interpretation of the words—Evidence of surrounding circumstances.—The ordinary popular sense of the writing, language, or words, alleged to be libellous or defamatory, is to be taken to be the meaning of the printer, publisher, or speaker of them; but a foundation may be laid for showing another and

(*q*) *Solomon* v. *Lawson*, 8 Q. B. 823. *Hemmings* v. *Gasson*, El. Bl. & El. 346; 27 L. J., Q. B. 253. *Homer* v. *Taunton*, 5 H. & N. 663; 29 L. J., Ex. 318. *Harvey* v. *French*, 1 Cr. & M. 11. *Roberts* v. *Camden*, 9 East, 92. *Watkin* v. *Hall*, L. R., 3 Q. B. 396; 37 L. J., Q. B. 125.

(*r*) *Griffiths* v. *Lewis*, 8 Q. B. 851. *Gallwey* v. *Marshall*, 9 Exch. 294; 23 L. J., Ex. 78.

(*s*) *Wakley* v. *Healey*, 7 C. B. 605. *Baboneau* v. *Farrell*, 15 C. B. 360. *Greville* v. *Chapman*, 5 Q. B. 745.

(*t*) *Hoare* v. *Silverlock*, 12 Q. B. 624.

(*u*) *Capel* v. *Jones*, 4 C. B. 263.

(*x*) *Shipley* v. *Todhunter*, 7 C. & P. 680.

different meaning. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word, which ordinarily, or popularly, is used in one sense, may, from something that has gone before, have a meaning different from its usual one. When, therefore, it is wished to get rid of the ordinary meaning, the witness must be asked if there was anything to prevent those words from conveying the meaning they ordinarily would convey; and, if evidence is given,

208 and a foundation laid for it, then the further question may be put, "What did you understand by them?" (*y*). It must first be shown that the word is used in, and has acquired, a peculiar sense, and then a witness may be asked whether he understood it in that sense. The phrase "lame duck" would be actionable if applied to a person on the Stock Exchange, because there it has acquired a particular meaning which could be shown. So of the word "black-sheep," as applied to a solicitor; or of the word "blackleg," if it can be shown that it has acquired a similar signification as applied to gamesters (*z*).

The defendant has a right to have the whole of the publication read, in order that the meaning of particular passages may be illustrated and explained by the context of the whole writing (*a*); and, in an action for oral slander, he is entitled to have the whole conversation of which the slanderous words formed part given in evidence, in order to explain the meaning of particular expressions, and to show that they did not convey the imputation sought to be fastened upon them.

Defamation—Interpretation of the words—Proof of subsequent libels may be given; but, if the evidence is offered for the mere purpose of swelling the damages, it will be rejected. "The distinction," observes Lord Abinger, "is, you may give evidence of subsequent words to explain the words in the declaration: but, when there is nothing equivocal in the words charged, you cannot give evidence of subsequent words of the same import, for which subsequent words another action may be brought and damages recovered; inasmuch as the record in this action would be no bar

(*y*) *Daines* v. *Hartley*, 3 Exch. 205. If words have acquired a local or provincial meaning, such meaning may be shown, even though the effect is to render words, whose meaning is apparently innocent, slanderous or libellous. Thus, in *Pike* v. *Van Wormer* (5 How. Pr. (N. Y.) 171), the defendant called the plaintiff a "bogus pedlar," and it was held that, in order to render the words actionable, it must be shown that they had acquired a different meaning. See also *Mills* v. *Van Dorn*, 17 Ind. 245; *Peterson* v. *Sentman*, 37 Md. 140; *Shepley* v. *Snyder*, 45 Ind. 541; *Smith* v. *Gifford*, 33 Ala. 168; *Edgerley* v. *Swain*, 32 N. H. 478; *Gosling* v. *Morgan*, 32 Penn. St. 273; *Bloss* v. *Foley*, 2 Pick. (Mass.) 320. A person is responsible for the sense which the words used, reasonably interpreted, convey to the persons in whose presence they are uttered: *Doevus* v. *Hawley*, 11 Mass. 241; *Britton* v. *Anthony*, 103 *ib.* 37; *Britain* v. *Allen*, 3 Dev. (N. C.) 167.

(*z*) Watson, B., *Barnett* v. *Allen*, 3 H. & N. 381; 27 L. J., Ex. 415.

(*a*) *Cooke* v. *Hughes*, Ry. & M. 115.

to a subsequent action for the same words, though the evidence now offered would tend to aggravate the damages in this" (*b*).

Defamation—Interpretation of the words—Province of the jury.—The 32 Geo. 3, c. 60, s. 1, enacts, that on trials for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required or directed by the court or judge to find the defendant guilty merely on proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same; and (sect. 2) that the judge shall, according to his discretion, give his opinion and directions to the jury on the matter in issue (*c*), who may (sect. 3) find a special verdict. The usual course in cases of libel since the passing of this statute is, first, to give a legal definition of the offence, and then to leave it to the jury to say whether the facts necessary to con-

209 stitute that offence are proved to their satisfaction, and that, whether the libel is the subject of a criminal prosecution or a civil action. The judge, as a matter of advice to them in deciding the question, may give his own opinion as to the nature of the publication, but is not bound to do so as a matter of law (*d*). It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it; but, when the judge is satisfied of that, it must be left to the jury to say whether the publication has that meaning or not (*e*).

If the publication is, on the face of it, libellous, and the jury, nevertheless, find their verdict for the defendant, the verdict may be set aside, and a new trial obtained (*f*). If the judge and jury think the publication libellous, still, if on the record it appears not to be so, judgment must be arrested (*g*).

Defamation—Interpretation of the words—Application of the libel to the plaintiff.—If the libellous words point to no person in particular, it becomes a question of evidence whether they do or do not apply to the plaintiff (*h*). If the name of the person libelled is left in blank, or is designated by asterisks, evidence may be given to show who was meant. "It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant" (*i*). Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before a jury; and the jurors are to determine whether,

(*b*) *Pearce* v. *Ornsby*, 1 M. & Rob. 456.
(*c*) *Baylis* v. *Lawrence*, 11 Ad. & E. 924.
(*d*) *Parmiter* v. *Coupland*, 6 M. & W. 108. *R.* v. *Watson*, 2 T. R. 106.
(*e*) *Sturt* v. *Blagg*, 10 Q. B. 908. *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741; 52 L. J., Q. B. 232.
(*f*) *Parmiter* v. *Coupland*, 6 M. & W. 105.
(*g*) *Hearne* v. *Stowell*, 12 Ad. & E. 731. *Goldstein* v. *Foss*, 6 B. & C. 159. *Solomon* v. *Lawson*, 8 Q. B. 837.
(*h*) *Merywether* v. *Turner*, 7 C. B. 251; 19 L. J., C. P. 10.
(*i*) *Bourke* v. *Warren*, 2 C. & P. 310.

when a class is referred to, the slander was pointed at the plaintiff (*j*). Where, however, it appears, from the matter complained of, that there was not any intention of libelling any particular individual, but that the imputations intended to be conveyed were meant to be cast upon the public authorities, or some of several public functionaries, the plaintiff cannot recover (*k*).

Defamation—What is a publication.—If a man writes a libel, and puts it into his desk, this is no publication of it; but, if a libellous paper or placard has been notoriously circulated or posted up in places of public resort, proof of a paper in the defendant's handwriting, corresponding with the libellous placard, will be *primâ facie* evidence against him of his being the author of the libel,

210 and render it necessary for him to explain the matter (*l*). A libellous paper in the handwriting of the defendant, found in the house of the editor of a newspaper, in which the libel complained of appeared, is admissible in evidence against the defendant, notwithstanding several parts of it have been erased and are omitted in the newspaper, provided the passages erased do not qualify the libel (*m*). If the libel on which the action is founded contains any marked peculiarities in spelling, style, or composition, letters of the defendant concerning the plaintiff containing similar peculiarities are admissible in evidence, to show that the defendant was the writer of the libel (*n*). The 2 & 3 Vict. c. 12, s. 2, which is re-enacted by the 32 & 33 Vict. c. 24, requires every person who prints any paper or book intended to be published or dispersed, to print his name and place of abode or business upon the front of such paper, or upon the first and last leaves of every paper or book consisting of more than one leaf, on pain of forfeiting 5*l.* for each copy so printed.

If in an action for slanderous words it is proved that some person took down the words, that will not prevent another witness from giving parol evidence of what the words were (*o*). If a party makes a memorandum of particular facts and circumstances at the time they occur, and has not the paper with him, he may nevertheless give oral evidence of the facts independently of the writing (*p*); but the non-production of the writing is, of course, matter for comment and observation.

Where a defendant, who had a copy of a libellous caricature in his house, showed it to another on being requested so to do, Lord

(*j*) *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637.
(*k*) *Solomon* v. *Lawson*, 8 Q. B. 823.
(*l*) *R.* v. *Beare*, 1 Ld. Raym. 417. *Lamb's case*, 9 Co. 59 b. *R.* v. *Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.
(*m*) *Turpley* v. *Blabey*, 2 Bing. N. C. 437.
(*n*) *Brookes* v. *Titchborne*, 5 Exch. 929.
(*o*) *Sheridan's case*, 31 How. St. Tr. 673.
(*p*) *Thistlewood's case*, 33 How. St. Tr. 758.

Ellenborough ruled that this was not sufficient evidence of publication to support an action (*q*).

If libellous matter contained in a private letter is addressed to the plaintiff himself, and is only delivered into his own hands, there is not such a publication as will support an action (*r*). But, where it was proved that the defendant addressed a libellous letter to the plaintiff, knowing that the plaintiff's clerk, in the absence of the plaintiff, was in the habit of opening the plaintiff's letters, and the letter was, in point of fact, received and opened by the clerk before it reached the plaintiff's hands, Lord Ellenborough held that there was sufficient evidence for the jury to consider whether the defendant did not intend to put the clerk in

211 possession of the letter, and that, if he did, there was a publication of its libellous contents (*s*). The sending of a letter to a wife containing libellous charges against her husband is a sufficient publication of the libel; for, to injure a man's character with his wife, or to assail his honour by communications made to her, is to do him a grievous wrong (*t*).

If a letter is sent by post, it is *primâ facie* evidence that the person to whom it was addressed received it in due course (*u*).

Defamation — Publication — In newspapers.—Every sale of a newspaper to a person sent to purchase it is a fresh publication; and, therefore, where an action was brought in respect of a libel in a newspaper, published seventeen years before the action, and the Statute of Limitations was pleaded, it was held that the plea was negatived by proof that a copy of the paper had been purchased from the defendant by the plaintiff's servant, sent to obtain it, within the six years. Where the proof of publication relied on was the sale of a copy of a newspaper to a messenger sent by the plaintiff to procure it, who, on receiving it, carried it to the plaintiff, it was held that this was a sufficient publication to sustain an action for damages; for a defendant who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to such stranger, though he may have been sent for the work by the plaintiff himself (*x*). But, the vendor of a newspaper in the ordinary course of business is not liable if he can prove that he did not know that it contained a libel, and that his ignorance was due to no negligence on his part, and that he had no ground for supposing that the newspaper was likely to contain libellous matter; but it is doubtful whether or not he would be

(*q*) *Smith* v. *Wood*, 3 Campb. 323. *Peacock* v. *Reynal*, 2 Brownl. 151.
(*r*) *Phillips* v. *Jansen*, 1 Esp. 625.
(*s*) *Delacroix* v. *Thevenot*, 2 Stark. 63.
(*t*) *Wenman* v. *Ash*, 13 C. B. 842; 22 L. J., C. P. 190.
(*u*) *Warren* v. *Warren*, 1 Cr. M. & R. 250.
(*x*) *Brunswick* (*Duke of*) v. *Harmer*, 1 Q. B. 189.

liable if he knew or ought to know that the newspaper was likely to contain libellous matter (*y*).

If a man wraps up a newspaper, and sends it into another county by a boy, the man who sends the paper is the publisher of it, and not the boy, who, being ignorant of the contents of the paper, is an innocent agent in the transaction (*z*).

The 32 & 33 Vict. c. 24, re-enacts the 19th section of the 6 & 7 Will. 4, c. 76 (*a*), which provides that, if any person shall file a bill for the discovery of the name of any printer, publisher,

212 or proprietor of a newspaper, in order more effectually to bring or carry on an action for libel, it shall not be lawful for the defendant to plead or demur to such bill, but the defendant shall be compellable to make the discovery required. It has accordingly been held that a bill against the publisher of a newspaper to discover the name of the proprietor was not demurrable (*b*); such discovery, however, is not to be made use of against the defendant in any other proceeding than that for which the discovery is made.

Defamation—Publication—Singing of libellous songs.—Where a libellous song was sung in the streets from a printed paper, which had been destroyed, the singer of the song was allowed to prove that a paper produced was an exact copy of the song that was sung (*c*). Where a number of placards are printed by order of the defendant, no one of the printed papers is an original more than the rest. When they are printed, they all become originals, and the manuscript is discharged (*d*).

Defamation—Justification—Truth of the charge or accusation.—If the defendant can show that the defamatory charge or accusation made by him against the plaintiff is true in substance, he answers the claim for damages (*e*). The truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter scandalous matter, though true), but because it shows that the plaintiff is not entitled to recover damages; for the law will not permit a man to recover

(*y*) *Emmens* v. *Pottle*, 16 Q. B. D. 354; 55 L. J., Q. B. 51. As to the privilege of newspapers, see 44 & 45 Vict. c. 60, s. 2, *ante*, p. 201.

(*z*) Best, J., *R.* v. *Burdett*, 4 B. & Ald. 126. Proof of the delivery, by order of the defendant, of a copy of a newspaper to the officer at the Stamp Office, was held to be proof of publication in *R.* v. *Amphlit*, 4 B. & C. 35.

(*a*) The 6 & 7 Will. 4, c. 76, is repealed by the 33 & 34 Vict. c. 99.

(*b*) *Dixon* v. *Enoch*, L. R., 13 Eq. 394. Whether it would lie against a mere stranger who happened to know the name of the proprietor, *quære*, *S. C.* Under the 44 & 45 Vict. c. 60, representative proprietors are to be registered and returns made of all the proprietors under a penalty.

(*c*) *Johnson* v. *Hudson*, 7 Ad. & E. 233 n.

(*d*) *R.* v. *Watson*, 2 Stark. 130.

(*e*) An inaccurate statement is not, therefore, necessarily libellous. See *Alexander* v. *North-Eastern Rail. Co.*, 6 B. & S. 240; 34 L. J., Q. B. 152.

damages in respect of an injury to character which he either does not, or ought not to, possess (*f*).

Where the defendant justifies words which impute a felony to the plaintiff, it is competent to him to go into proof of his justification, although the plaintiff has been tried and acquitted of the charge, the trial and acquittal being *res inter alios acta* (*g*). If the plaintiff has been tried and convicted, the conviction may be given in evidence in support of the plea of justification. If a man is adjudged by the sessions to be the father of a bastard child, the adjudication is an answer to any complaint made by him against any one for saying or publishing that he has had a bastard (*h*). When the plaintiff has not been actually convicted of the felony, he must

213 be tried by the jury on the plea of justification, in the same way as if he were on his trial upon an indictment for the offence in a criminal court; so that, if there is a doubt of his guilt, the jury are bound to give him the benefit of the doubt (*i*).

Defamation—Discharge—Payment of money into court.—By the 6 & 7 Vict. c. 96, s. 2, it is enacted that in any action for a libel contained in any public newspaper, or other periodical publication, it shall be competent to the defendant to plead that the libel was inserted without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper, or other periodical publication, a full apology for the libel; or, if the newspaper or periodical publication is published at intervals exceeding a week, that he had offered to publish the apology in any newspaper or periodical publication, to be selected by the plaintiff; and that every defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained (*k*). To entitle the defendant to the benefit of an apology under this statute, the apology should be printed in such a part of the paper, and in such a type, as will be likely to ensure its perusal by the persons who read the libel, or by all who read the paper (*l*).

When a plea denying actual malice and stating the publication

(*f*) Littledale, J., *M'Pherson* v. *Daniels*, 10 B. & C. 272.

(*g*) *England* v. *Bourke*, 3 Esp. 80. *Cook* v. *Field*, *ib.* 134.

(*h*) *Thornton* v. *Pickering*, 1 Freem. 283. *Webb* v. *Cook*, Cro. Jac. 535. *R.* v. *Rislip*, 1 Ld. Raym. 394. Jervis, C. J., *Helsham* v. *Blackwood*, 11 C. B. 128.

(*i*) *Richards* v. *Turner*, Car. & M. 417. If a person publishes a libel and then pleads a justification, the court will not assist him to obtain evidence in support of his plea. *Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 4 H. & N. 87, 146; 28 L. J., Ex. 201.

(*k*) The special plea of apology and payment into court cannot be pleaded along with not guilty to the same part of the declaration. *O'Brien* v. *Clement*, 15 M. & W. 435. And see Ord. XXII. r. 1.

(*l*) *Lafone* v. *Smith*, 3 H. & N. 735; 28 L. J., Ex. 33.

of an apology is pleaded, the publication of previous libels on the plaintiff by the defendant is admissible in evidence, to show that the defendant wrote the libel in question with actual malice. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and, the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of the libel in question, merely affects the weight, not the admissibility, of the evidence (*m*).

Where to an action for a libel in a newspaper the defendant pleaded the insertion of an apology and payment of 40*s.* into court, and the jury found that the apology was not sufficient, but

214 that the money paid into court was sufficient to cover the damage sustained, and thereupon the judge directed a verdict for the plaintiff with 1*s.* damages, it was held that, the plea not being proved, the payment into court was not warranted by law, and the defendant ought to have his money back again (*n*). The damages in such cases must be assessed wholly irrespective of the plea, which is not proved; and the jury may give less or more than the amount paid in (*o*).

Defamation—Remedies—Damages.—The damages recoverable in actions for defamation will materially depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case. Where an action was brought for slanderous words, imputing subornation of perjury to the plaintiff, and the defendant suffered judgment by default, and on the execution of a writ of inquiry of damages the plaintiff gave no evidence of any actual damage, but his counsel addressed the jury, who assessed the damages at 40*l.*, and the defendant then moved to set aside the inquisition on the ground that nominal damages only were recoverable in the absence of any proof of actual damage on the part of the plaintiff, it was held that the plaintiff was not bound to give any such evidence to support the inquisition (*p*). If the defendant had any ground to urge in mitigation of damages, he should have proved it before the sheriff's jury.

The jury may give to the plaintiff damages for the publication of the libel and for the mental suffering arising from the appre-

(*m*) *Barrett* v. *Long*, 3 H. L. C. 414.
(*n*) *Lafone* v. *Smith*, 4 H. & N. 158.
(*o*) *Jones* v. *Mackie*, L. R., 3 Ex. 1; 37 L. J., Ex. 1.
(*p*) *Tripp* v. *Thomas*, 3 B. & C. 427.

hension of the consequences of the publication (*q*). The damages are almost altogether in the discretion of the jury (*r*). The court will not interfere with them, unless they are shown to be manifestly outrageous and extravagant (*s*). A new trial will not be granted on the ground of the insufficiency of the damages, unless there has been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures, or misconduct on the part of the jury (*t*).

Evidence in aggravation of damages cannot be given, if it establishes another cause of action against the defendant; for, if that were permitted, the jury would be giving damages for a

215 second libel in an action for the first (*u*). The plaintiff may, however, give evidence of actual malice in fact for the purpose of increasing the damages; and, as the spirit and intention of the person publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff, evidence tending to prove it cannot be excluded simply because it may disclose another and different cause of action. But, whenever the evidence given does disclose another cause of action, the jury should be cautioned against giving any damages in respect of it; and, if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected (*x*). Defamatory statements, therefore, made by the defendant subsequently to the publication of the libel, are admissible in evidence merely to show malice. But, if any considerable distance of time has elapsed between the publication of the libel and the speaking of the words, they ought to be received with very great caution, as they may refer to something that has taken place between the plaintiff and the defendant subsequently to the libel, and may not, therefore, amount to any proof of malice at the time of the publication of the libel (*y*); and, when such statements are given in evidence, the defendant is entitled to get rid of the effect of them by proving the truth of the words (*z*).

Although a plea of justification, imputing felony to the plaintiff, is abandoned at the trial and apologized for, still the

(*q*) *Goslin* v. *Corry*, 7 M. & G. 342; 8 Sc. N. R. 25.

(*r*) *Kelly* v. *Sherlock*, L. R., 1 Q. B. 686; 35 L. J., Q. B. 209, where the jury gave a farthing under the circumstances of the case, although the libels were gross and offensive, and had been frequently repeated.

(*s*) *Gilbert* v. *Burtenshaw*, Cowp. 230; Lofft, 771. *Highmore* v. *Earl of Harrington*, 3 C. B., N. S. 142. *Harrison* v. *Pearce*, 32 L. T. R. 298.

(*t*) *Forsdike* v. *Stone*, L. R., 3 C. P. 607; 37 L. J., C. P. 301.

(*u*) *Finnerty* v. *Tipper*, 2 Campb. 74.

(*x*) *Pearson* v. *Le Maitre*, 5 M. & G. 720; 6 Sc. N. R. 607. *Barwell* v. *Adkins*, 1 M. & G. 808. *Darby* v. *Ousley*, 1 H. & N. 13.

(*y*) *Hemmings* v. *Gasson*, El. Bl. & El. 346; 27 L. J., Q. B. 252.

(*z*) *Warne* v. *Chadwell*, 2 Stark. 457.

pleading of such a plea, and failing to prove it, are evidence of malice, and a great aggravation of the defendant's conduct, as showing an animus of persevering in the charge to the very last. The pleading of such a plea, therefore, is a matter proper to be taken into account by the jury in estimating the amount of damages (*a*).

Defamation—Remedies—Damages—Mitigation of damages.—A defendant is not now allowed to give evidence of the truth of the defamatory charge or statement in mitigation of damages (*b*), but must, if he wishes to rely upon it in any way, plead a plea of justification (*c*).

General evidence of the plaintiff's bad character is admissible in mitigation of damages, but not evidence of rumours and suspicions to the same effect as the defamatory matter complained of,

216 nor evidence of facts and circumstances tending to show the disposition of the plaintiff (*d*).

By Ord. XXXVI. r. 37, in actions for libel or slander in which the defendant does not, by his defence, assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief with a view to the mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.

Rumours current *after* the utterance of slander cannot, of course, help the defence, as they are the natural result of the dissemination of the slander, and tend only to aggravate the damages (*e*).

It is no ground for mitigation of damages that the defendant, at the time he uttered the slander, stated that he heard it from another person, naming such person (*f*).

Defamation — Remedies — Damages — Mitigation — Libel by the plaintiff on the defendant.—"If a man is in the habit of libelling others, he complains," observes Sir James Mansfield, "with a very bad grace of being libelled himself; and, if two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side" (*g*). But the defendant cannot give in evidence, in mitigation of damages, other libels published by the plaintiff concerning him, unless the defen-

(*a*) *Warwick* v. *Foulkes*, 12 M. & W. 508.
(*b*) *Underwood* v. *Parks*, 2 Str. 1200.
(*c*) *Watson* v. *Christie*, 2 B. & P. 224.
(*d*) *Scott* v. *Sampson*, 8 Q. B. D. 491; 51 L. J., Q. B. 380.
(*e*) *Thompson* v. *Nye*, 16 Q. B. 175; 20 L. J., Q. B. 85.
(*f*) *Bennett* v. *Bennett*, 6 C. & P. 588.
(*g*) *Finnerty* v. *Tipper*, 2 Campb. 72.

dant can show that the libels proceeding from the plaintiff were connected with the libels proceeding from the defendant; for one libel cannot be set off against another, unless it can be shown that they are connected together, and that the libel published by the plaintiff provoked the libel published by the defendant, and that the plaintiff is himself, to a certain extent, the cause of the injury for which he claims compensation in damages (*h*). When the object is to show that the defendant was provoked, by libels published against him by the plaintiff, to retaliate by publishing the libel of which the plaintiff complains, it is essential to prove that the plaintiff's libels came to the defendant's knowledge before he published his libel (*i*).

Defamation—Remedies—Damages—Mitigation—Offers of apology.—By the 6 & 7 Vict. c. 96, s. 1, it is enacted, that in any action

217 for defamation it shall be lawful for the defendant (after notice in writing of his intention, given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity, in case the action was commenced before there was an opportunity of offering an apology (*k*).

Defamation—Remedies—Damages—Inadequacy of damages.—A new trial may be granted for inadequacy of damages where the smallness of the amount shows that the jury have made a compromise, and, instead of deciding the issues submitted to them, have agreed to find for the plaintiff for nominal damages only (*l*).

Defamation—Remedies—Injunction.—It was formerly said that the court would not restrain the publication of a libel by injunction (*m*), even where it was injurious to property (*n*), until the matter complained of had been found by verdict to be libellous (*o*). But in more recent cases the courts have granted an injunction to restrain libels (*p*), or slanders (*q*), calculated to injure property or trade, at all events where the applicant satisfies the court that the defamation is untrue, and where the statements are not privileged; for if the statements are privileged the question of express malice

(*h*) *May* v. *Brown*, 3 B. & C. 126. *Tarpley* v. *Blabey*, 2 Bing. N. C. 441.
(*i*) *Watts* v. *Fraser*, 7 Ad. & E. 232.
(*k*) *Ante*, pp. 212, *et seq.*
(*l*) *Falvey* v. *Stanford*, L. R., 10 Q. B. 54; 44 L. J., Q. B. 7.
(*m*) *Mulkern* v. *Ward*, L. R., 13 Eq. 619; 41 L. J., Ch. 464.
(*n*) *Prudential Assurance Co.* v. *Knott*, L. R., 10 Ch. 142; 44 L. J., Ch. 500, over-ruling *Dixon* v. *Holden*, L. R., 7 Eq. 488, and *Springhead Spinning Co.* v. *Riley*, L. R., 6 Eq. 551; 37 L. J., Ch. 889.
(*o*) *Saxby* v. *Easterbrook*, 3 C. P. D. 339.
(*p*) *Thomas* v. *Williams*, 14 Ch. D. 864; 49 L. J., Ch. 605. *Quartz Hill Co.* v. *Beall*, *infra*. *Hill* v. *Hart-Davies*, 21 Ch. D. 798; 51 L. J., Ch. 845.
(*q*) *Loog* v. *Bean*, 26 Ch. D. 306.

arises, which cannot be conveniently tried on an interlocutory application (*r*).

Defamation—The wrong-doer.—Every publisher and disseminator of slander is liable to an action for damages, as well as the original inventor, author, or utterer, of the calumny. The person who repeats it may give greater weight to the scandal, and may be actuated by greater malice than the original utterer; and he cannot discharge himself from responsibility by giving up the name of the author or first utterer of the slander. The person slandered may, consequently, maintain an action for damages arising from the publication of written slander against the author and first publisher of the slander, as well as against any subsequent publisher or disseminator thereof, unless the publication can be justified or excused (*s*). Whenever loss of situation or employment,

218 or any other special damage, is the direct consequence of the utterance of oral slander, the utterer is responsible, whether he is himself the original author of the scandal, or merely repeats what he has heard some one else say (*t*). But, in the case of verbal slander, where the action is maintainable only in respect of some special damage that has accrued from the utterance of the slander, the action must be brought against the person whose wrongful act is the direct and immediate cause of the special damage (*u*).

Defamation — The wrong-doer — Joint libellers. — Where the slander is made by two persons in a joint publication, they may both be made defendants in one and the same action (*x*); but, where the same slanderous words are spoken by two different persons, separate actions should be brought (*y*).

Defamation—The wrong-doer—Agent.—Where the defendant's daughter had been employed by him to make out his bills and write letters for him on matters of business, and the daughter wrote and published a libel upon the plaintiff in her father's (the defendant's) name, it was held that this was not sufficient to fix him with the authorship of the libel; for the principal is only responsible for the acts of his agent within the limits of the authority delegated to the agent; and it does not follow, from a daughter being employed to make out bills and write letters for her father for the purpose of conducting his business, that she is authorized by him to write a libel; and there ought to be some evidence to show that the libel was written either by the command, or with the knowledge, of the defendant (*z*). If a man makes a

(*r*) *Quartz Hill Mining Co.* v. *Beall*, 20 Ch. D. 501; 46 L. T. 746.
(*s*) *M'Pherson* v. *Daniells*, 10 B. & C. 273. *Tidman* v. *Ainslie*, 10 Exch. 63. *Watkin* v. *Hall*, L. R., 3 Q. B. 396.
(*t*) *Lewis* v. *Walter*, 4 B. & Ald. 615.
(*u*) *Ante*, p. 177.
(*x*) *Maitland* v. *Goldney*, 2 East, 426.
(*y*) *Chamberlain* v. *Goodwin*, Cro. Jac. 647. *Swithin* v. *Vincent*, 2 Wils. 227.
(*z*) *Harding* v. *Greening*, 1 Moore, 479.

request to another to publish defamatory matter, of which, for the purpose, he gives him a statement, whether in full or in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language is to some extent his own, the man making the request is liable to an action as the publisher (*a*).

Defamation — The wrong-doer — Corporation. — A corporation aggregate may be made answerable for a libel published by their directions (*b*), although the body corporate had no ill-will to the plaintiff, and did not mean to injure him; for great injustice would be suffered by individuals, if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed by them. Therefore, where a railway company falsely published through their electric telegraph that a bank had

219 stopped payment, it was held that the company were responsible in damages for the false and slanderous intelligence (*c*).

SECTION II.

MALICIOUS PROSECUTION

Malicious prosecution.—To put the criminal law in force maliciously, and without any reasonable or probable cause, is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action (*d*). "Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for the prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action; for he may have good reason to make the charge and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause" (*e*). But, though abandoning a prosecution is not of

(*a*) *Parkes* v. *Prescott*, L. R., 4 Ex. 169; 38 L. J., Ex. 105.
(*b*) *Alexander* v. *North Eastern Rail. Co.*, 6 B. & S. 240; 34 L. J., Q. B. 152.
(*c*) *Whitfield* v. *South Eastern Rail. Co.*, El. Bl. & El. 121; 27 L. J., Q. B. 229.
(*d*) *Churchill* v. *Siggers*, 3 El. & Bl. 937; 23 L. J., Q. B. 308.
(*e*) Tindal, C. J., *Willans* v. *Taylor*, 6 Bing. 186; 3 M. & P. 350; 2 B. & Ad. 845.

itself proof of want of probable cause, yet, where the prosecution is persisted in and kept hanging over the head of the plaintiff for a long time, and is then dropped at the very hour of trial, there is strong ground for supposing that the prosecutor had no justifiable reason for commencing it (*f*). The want of reasonable and probable cause for a malicious prosecution, and the evidence of malice, depend so much upon the particular circumstances of the individual case as to render it impossible to lay down any general rule upon the subject; but the facts ought to satisfy any reasonable mind that the accuser had no ground for the proceeding but his desire to injure the accused (*g*).

(*f*) Gaselee, J., *Willans* v. *Taylor*, 6 Bing. 190.

(*g*) Tindal, C. J., *Willans* v. *Taylor*, 6 Bing. 186; 2 B. & Ad. 845. *Farmer* v. *Darling*, 4 Burr. 1972. *Malice and want of probable cause* are essential to render a person liable for malicious prosecution, and must be proved by the plaintiff. *Malice* alone is not enough, for if there was probable cause, however *malicious* the prosecution may be, no legal injury has been done, and, consequently, no ground for an action exists. But malice may be inferred from the acts of the defendant, as from his zeal in conducting or aiding the prosecution, *or from the fact that there was no reasonable and probable cause for* the prosecution (*Shafer* v. *Loucks*, 58 Barb. (N. Y.) 426; *Stone* v. *Stevens*, 12 Conn. 219; *Masury* v. *Whipple*, 8 R. I. 360; *Deitz* v. *Langfeet*, 63 Penn. St. 234; *Ritchey* v. *Davis*, 11 Iowa, 124; *Bauer* v. *Clay*, 8 Kan. 580; *Preston* v. *Cooper*, 1 Dill. (U. S. C. C.) 589; *Campbell* v. *Threkeld*, 2 Dana. (Ky.) 425; *Kitton* v. *Bevins*, Cooke (Tenn.) 90; *Olmstead* v. *Partridge*, 82 Mass. 38; *Strauss* v. *Young*, 36 Md. 246; *Young* v. *Gregorie*, 3 Call. (Va.) 446; *Doll* v. *Shoneberg*, 2 Dis. (Ohio) 54; *Murray* v. *Long*, 1 Werd. (N. Y.) 140; *Burnap* v. *Albert*, Taney's Dec. (U. S.) 244; *Turner* v. *Walker*, 3 G. & J. (Md.) 377); but the want of probable cause cannot be inferred from express malice: *Wheeler* v. *Nesbit*, 24 How. (U. S.) 544; *Murray* v. *McLean*, 10 N. J. L. 514; *Blunt* v. *Little*, 3 Mas. (U. S.) 102. The fact that the plaintiff was acquitted is *primâ facie*, but not conclusive, evidence of malice or want of probable cause, for there may have been probable cause, when, in fact, no crime had been committed (*Adams* v. *Lisher*, 3 Blackf. (Ind.) 445; *Ross* v. *Innis*, 26 Ill. 259), as the plaintiff may, by his own acts or folly, have put himself in a position where a reasonable suspicion of his guilt may be raised, and if this suspicion was general in the community, it may be shown to disprove malice: *Stone* v. *Stevens*, 12 Conn. 219; *Cecil* v. *Clarke*, 17 Md. 508; *Burlingame* v. *Burlingame*, 8 Cow. (N. Y.) 141.

As to what is probable cause, it may be said to be such facts and circumstances as would excite belief in the mind of a reasonable person, that the person charged was guilty of the crime for which he was prosecuted (*Hays* v. *Blizard*, 30 Ind. 457; *Wilmarth* v. *Mountford*, 4 Wash. (U. S.) 79; *Wheeler* v. *Nesbit*, 24 How. (U. S.) 544); and in all cases, although want of probable cause raises a presumption of malice, yet this presumption may be rebutted by proof tending to show that the defendant acted in good faith, and from honest motives (*Wheeler* v. *Nesbit*, *ante*; *Brigham* v. *Aldrich*, 105 Mass. 212; *Collins* v. *Hoyt*, 50 Ill. 337; *Hawley* v. *Butter*, 54 Barb. (N. Y.) 490; *Levi* v. *Brennan*, 39 Cal. 485), as that he, in good faith, acted under the advice of counsel after having fairly stated the case to him: *Cole* v. *Curtis*, 16 Minn. 182; *Davenport* v. *Lynch*, 6 Jones (N. C.) 545; *Ames* v. *Rathburn*, 55 Barb. (N. Y.) 194; *Cooper* v. *Utterback*, 37 Md. 282; *Soppington* v. *Watson*, 50 Md. 83.

That there were reasonable grounds of suspicion against the plaintiff: *McMahon* v. *Armstrong*, 2 S. & P. (Ala.) 151; *Wilmarth* v. *Mountford*, 4 Wash. (U. S.) 79. That he was notoriously a bad character, and regarded as dishonest, or that the grand jury found a bill against him: *Gerrard* v. *Willis*, 4 J. J. Mar. (Ky.) 628; or that he was generally suspected of the crime: *French* v. *Smith*, 4 Vt. 363; *Cecil* v. *Clarke*, 17 Md. 508; and special acts of his similar to the one charged against him may be shown as affording a ground for suspicion: *Barron* v. *Mason*, 31 Vt. 189; *Sherwood* v. *Reed*, 35 Conn. 155.

What facts and circumstances amount to probable cause is wholly a question for the court: *Driggs* v. *Barton*, 44 Vt. 124; *Cloon* v. *Gerry*, 13 Gray (Mass.) 201; *Berson* v. *Southard*, 10 N. Y. 236; but whether such facts exist as amount to probable cause is a question of fact for the jury, and so also is the question whether he acted maliciously: *Nye* v. *Otis*, 8 Mass. 122; *Closson* v. *Staples*, 42 Vt. 209. In all cases the plaintiff must

The prosecution.—There can be no malicious prosecution until the party charged is brought before a judicial officer. "The distinction between false imprisonment and malicious prosecution,"

220 says Willes, J., "is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated, the party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (*h*).

The prosecution—Indictment.—The fact of the defendant's name being on the back of the bill of indictment does not prove that he was the prosecutor of the indictment; for the name of any person who can give evidence respecting the subject-matter of the indictment may properly be put upon the back of the bill (*i*). The mere fact of a person having attended at the trial and given evidence as a witness, is no proof of his having instituted or instigated the prosecution (*k*).

The prosecution—Informations before magistrates.—The ordinary mode of commencing a prosecution is to lay an information before a magistrate. It has been held that, if a person goes and lays his complaint of the loss of his property before a magistrate, and tells him of its having been taken or appropriated by the plaintiff, the complaining party is not responsible for what the magistrate may think fit to do upon the strength of this information. If, therefore, the magistrate, acting upon the statement or deposition *bonâ fide* given, treats the matter as a felony, and issues his warrant for the apprehension of the plaintiff on the charge of felony, and in so doing forms an erroneous judgment, and conceives that to be a felony which is not a felony, but only matter for a civil action, the complaining person, who has thus set the magistrate in motion and caused the warrant to be issued, is not responsible for the erroneous

show that the prosecution is at an end (*Stewart* v. *Thompson*, 51 Penn. St. 158; *Brown* v. *Randall*, 36 Conn. 56; *Pratt* v. *Page*, 18 Wis. 337), and that he prevailed therein; *Murray* v. *Long*, 1 Wend. (N. Y.) 140; *Wiggin* v. *Coffin*, 3 Story (U. S.) 1. The declaration or complaint must, by proper averments, show that the prosecution is at an end, that the defendant acted maliciously and without probable cause, and the damages resulting to the plaintiff; as, unless damages are alleged and proved, the action cannot be maintained. An allegation that he was put to trouble, labour and expense in preparing for or conducting the trial, or that he was imprisoned, or sustained damages to his reputation by the scandal, is sufficient. A client who employs an attorney to collect a debt is responsible for the act of such attorney in causing the arrest of the debtor to compel payment: *Guillamme* v. *Rome*, 94 N. Y. 268.

(*h*) *Austin* v. *Dowling*, L. R., 5 C. P. 534; 39 L. J., C. P. 260.

(*i*) *Girlington* v. *Pitfield*, 1 Ventr. 47.

(*k*) *Eager* v. *Dyott*, 5 C. & P. 5.

judgment of the magistrate and the acts consequent thereupon (*l*). But, if there is no reasonable or probable cause for a charge of felony, and a charge of felony is made, the party preferring the charge will be responsible for it, though he acted under the advice of the magistrate, and preferred the charge at his suggestion.

It is not necessary, in order to maintain an action against a person for having made a false and unfounded charge of felony against another before a magistrate, to show that the charge was taken down in writing, and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to

221 the magistrate with a view of inducing him to entertain it as a charge of felony (*m*). If it appears that the defendant laid his case before a magistrate, that the magistrate issued a summons, which was served on the plaintiff, requiring him to appear and answer the complaint, and that the plaintiff chose to take no notice of the summons, whereupon the magistrate directed a warrant to issue, upon which the plaintiff was arrested, the defendant will not be responsible for the arrest, as it was caused by the plaintiff's own negligence and misconduct, rather than by the complaint made against him by the defendant (*n*).

(*l*) *Leigh* v. *Webb*, 3 Esp. 165. *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J., Ex. 193.

(*m*) *Clarke* v. *Postan*, 6 C. & P. 423. The 11 & 12 Vict. c. 42, s. 17, requires all magistrates before whom any person shall appear, or be brought, charged with any indictable offence, to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same into writing, and cause them to be read over to, and signed by, the witnesses, before they commit the accused person for trial, or admit him to bail. Where the charge or complaint, or the examination, is by law required to be taken down in writing, it is always to be presumed that this was done, although the party was discharged on the ground that no case was made out against him. Unless, therefore, positive evidence is given that the examinations were not taken down, oral evidence cannot be given of what took place before magistrates, *Parsons* v. *Brown*, 3 C. & K. 296; for, where matters are required by statute to be reduced into writing for the purpose of evidence, the writing is considered to be the best evidence, and must be produced, unless it can be shown to have been lost or destroyed. If it is proved that no depositions were taken, or that they were taken but not signed, then oral evidence of what took place before the magistrates is admissible, *Jeans* v. *Wheedon*, 2 M. & Rob. 486. See *R.* v. *Reed*, M. & M. 403. Oral evidence is admissible to add to or explain the examination of the defendant before a magistrate, although it was taken down in writing, *Venafra* v. *Johnson*, 1 M. & Rob. 316; for "what a party says is evidence against himself, whether another person took it down or not," Alderson, B., *Robinson* v. *Vaughton*, 8 C. & P. 255. In order, therefore, to prove the proceedings before magistrates, it is in general necessary to serve the magistrate's clerk with a *subpœna duces tecum*, if the proceedings are in his custody; but, if they have been returned to the clerk of the peace, or his deputy, or to the clerk of the arraigns, then the officer who has the custody of them is the proper person to be summoned to produce them. If the officer in whose custody they ought to be, if they exist, has searched for them and cannot find them, secondary evidence may be given of their contents, *Freeman* v. *Arkell*, 2 B. & C. 494; 3 D. & R. 671. The oath and handwriting of the defendant should be proved, and the issue of the warrant on the strength of the information. If the charge was dismissed and was not taken down in writing, or if it was of such a nature, or made under such circumstances, that there was no obligation imposed by law upon the justices to take it down in writing, the nature of it may be proved by any person who was present and heard the charge made, *Clarke* v. *Postan*, 6 C. & P. 423.

(*n*) *Phillips* v. *Naylor*, 4 H. & N. 615; 28 L. J., Ex. 225.

Malicious prosecution—Reasonable and probable cause.—In determining whether or not there is an absence of reasonable and probable cause, the judge has to ask himself, whether a reasonable man, in the position of the defendant, and having the knowledge which the defendant in fact had or could and ought to have had, would have supposed at the time of the prosecution that the prisoner was guilty? If this question is answered in the affirmative, there is no cause of action. If it is answered in the negative, there then arises another question, which is for the jury, viz., whether the defendant was actuated by some indirect motive, some motive other than an honest desire to bring the guilty to justice?

222 If this question is answered in the affirmative, the verdict should be for the plaintiff; if otherwise, it should be for the defendant.

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a question of fact; but whether, supposing them to be true, they amount to probable cause, is a question of law for the decision of the judge (*o*). The rule is that, however complicated the facts may be on which the question of reasonable and probable cause may depend, the judge must leave the facts to the jury, and on the facts found by them determine for himself whether there is reasonable or probable cause or not (*p*). "There have been some cases," observes Tindal, C. J., "which appear at first sight to have somewhat relaxed the application of the rule; but there has been no real departure from it. In some cases the reasonableness and probability of the ground for the prosecution have depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In other cases the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable and probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief, and the conduct, of the defendant, are so many additional facts for the consideration of the jury, so that, in effect, nothing is left to the jury but the truth of the facts proved and the justice of the inference to be drawn from such facts, the

(*o*) *Johnstone* v. *Sutton*, 1 T. R. 545. *Panton* v. *Williams*, 2 Q. B. 193. *James* v. *Phelps*, 11 Ad. & E. 488. *Clements* v. *Ohrly*, 2 C. & K. 689. *Mitchell* v. *Jenkins*, 5 B. & Ad. 594. *Busst* v. *Gibbons*, 30 L. J., Ex. 75.

(*p*) *Douglas* v. *Corbett*, 6 El. & Bl. 515.

judge determining, as matter of law, according as the jury find the facts proved or not proved, and the inferences warranted or not, whether there was reasonable and probable ground for the prosecution, or the reverse" (*q*).

In an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon the plaintiff; and although the plaintiff proves that he was innocent of the charge laid against him, and although the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of

223 proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff. The plaintiff, a surgeon, had attended one *M* for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. *M* brought an action against the defendants, which was compromised by the payment of a large sum by the defendants for damages and costs. Subsequently the defendants, having received certain information, caused the statement of certain persons to be taken by a solicitor; their statements tended to show that the injuries of which *M* complained were not caused at the collision, but were produced wilfully by the plaintiff, with the consent of *M*, for the purpose of defrauding the defendants. These statements were laid before counsel, who advised that there was good ground for prosecuting the plaintiff and *M* for conspiracy. The defendants accordingly prosecuted the plaintiff, but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury having answered these questions in the affirmative, the judge entered judgment for the defendants; and it was held that the direction to the jury was correct, that upon the facts and the findings of the jury, the defendants had reasonable and probable cause for prosecuting the plaintiff, and that the judge had rightly entered the judgment for the defendants (*r*).

If the defendant did not believe in the truth of the charge preferred by him against the plaintiff, and in the plaintiff's guilt, there is a want of reasonable and probable cause (*s*). In an action for a malicious prosecution of the plaintiff by the defendant

(*q*) *Panton* v. *Williams*, 2 Q. B. 194. *Taylor* v. *Willans*, 2 B. & Ad. 856. *Broad* v. *Ham*, 5 Bing. N. C. 722; 8 Sc. 48.

(*r*) *Abrath* v. *North Eastern Rail. Co.*, 11 Q. B. D. 440; 52 L. J., Q. B. 620; 11 App. Cas. 247.

(*s*) *Cohen* v. *Morgan*, 6 D. & R. 8. *Carratt* v. *Morley*, 1 Q. B. 18.

for obtaining goods from the defendant by false pretences, it appeared that the plaintiff, who had been insolvent, went to the shop of the defendant in his absence, and obtained five shillings' worth of marble hall-paper from his assistant, saying that it was for Mr. Hills, a neighbour, and that the bill was to be made out to Mr. Hills, which was done, and the bill was delivered to the plaintiff, who took it and the paper away with him; but Mr. Hills had not authorized the plaintiff to get the paper, and would not pay for it. The defendant was told this a few hours after the paper had been obtained, and knew who the plaintiff was, and where he resided, but made no complaint against him for three months, and, being asked the reason, said that the transaction

224 had slipped his memory until he was going through his books, when, seeing the entry of the paper against Mr. Hills, he went to him, and, finding that he still repudiated the transaction and refused to pay for the paper, he went before a magistrate, and charged the plaintiff with having obtained the paper by false pretences. Upon these facts Wightman, J., asked the jury, first, whether they thought the plaintiff obtained the paper by falsely pretending that it was for Mr. Hills; and, this question being answered in the affirmative, they were then asked whether they thought that the defendant, at the time he went before the magistrate, believed that the plaintiff intended to defraud him of the price of the paper: and, this question being answered in the negative, Wightman, J., held that there was no reasonable and probable cause for the prosecution (*t*).

If the circumstances show that the prosecutor believed that the person whom he proceeded against as a thief took the goods under an erroneous notion that he had a lien upon them, or had a right to take and detain them, there is an absence of reasonable and probable cause (*u*). It is often a doubtful question whether a particular offence amounts to a felony; and it often depends upon the fact of the prisoner's having acted with conscious dishonesty, or under a notion of right on his part. But "some persons suppose that no man can lay his hands on goods that do not belong to him without being guilty of felony. If you could get at the bottom of a man's mind, he might say he was justified, because the plaintiff had no right to do it, no matter how honest his intention; but, if that is his opinion, it is a blunder on his part, and one of those blunders," observes Bramwell, B., "for which a man who commits it should be punished, as it is very likely that the person charged with felony through the blunder

(*t*) *Williams* v. *Banks*, 1 F. & F. 557.

(*u*) *Huntley* v. *Simson*, 2 H. & N. 600; 27 L. J., Ex. 134.

will, as long as he lives, be sometimes asked, whether he has not been had up before the magistrate for felony" (*x*).

There is also an absence of reasonable and probable cause, if the defendant believed in the plaintiff's guilt, but came to that conclusion rashly and on insufficient grounds (*y*). "A man may prefer a charge either on the foundation of what he knows or of what he suspects. But there is a wide difference, as regards both the accuser and the party accused, whether the charge is made on the one ground or the other. That which is founded on the accuser's own knowledge will require proof to that extent to warrant such a charge, whereas that which rests on suspicion

225 only will be satisfied by circumstances sufficient to induce suspicion in the mind of a cautious person." "This distinction," observes Bayley, J., "between a direct charge and one upon suspicion only is well known. I may know that a person has stolen my property by having seen him commit the act, or by having heard him confess it; and in either of these cases the charge would proceed directly from my own knowledge. But information to a less extent might reasonably create in me a suspicion; and then the charge would proceed in a form less direct" (*z*). If circumstances of suspicion existed which might have been readily removed by proper inquiry, and no inquiry at all was made (*a*), there is evidence of a want of reasonable and probable cause.

General evidence of the plaintiff's bad character affords no proof of probable cause for a prosecution, and is not admissible for that purpose (*b*). From the most express malice, the want of probable cause cannot be implied (*c*). A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes proceed upon apparent guilt, and in neither case is he liable to an action. With whatever feelings of malice the defendant may have acted in instituting the prosecution, still, if there was reasonable and probable cause for it in the opinion of the judge, the defendant is entitled to a verdict (*d*). An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of the prosecution being unfounded and unjust (*e*).

Malicious prosecution—Malice.—If in the opinion of the judge

(*x*) *Huntley* v. *Simson*, *supra*.
(*y*) *Douglas* v. *Corbett*, 6 El. & Bl. 514. *Dawson* v. *Van Sandau*, 11 W. R. 516.
(*z*) *Davis* v. *Noake*, 6 M. & S. 32.
(*a*) *Lister* v. *Perryman*, L. R., 4 H. L. 521; 39 L. J., Ex. 177.
(*b*) *Newsam* v. *Carr*, 2 Stark. 70. *Thomas* v. *Russell*, 9 Exch. 764.
(*c*) *Anon.*, 6 Mod. 73.
(*d*) Patteson, J., *Turner* v. *Ambler*, 10 Q. B. 257. *Hailes* v. *Marks*, 7 H. & N. 56; 30 L. J., Ex. 389.
(*e*) *Purcell* v. *Macnamara*, 1 Campb. 202; 9 East, 363. *Ante*, p. 219.

there was no reasonable or probable cause for the prosecution, the jury may, from that fact alone, infer malice (*f*). If a person prefers an indictment, or sets the criminal law in motion, knowing at the time he does so that he has no reasonable ground for it, that alone is evidence of malice on his part. By the term "malice" is meant any indirect wrong motive. "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts under the influence of it." If a case is trumped up out of very weak and flimsy materials, "for the purpose of frightening other people, and thereby deterring them from committing depredations" upon private property, th is no legitimate founda-

226 tion for a criminal prosecut nd persons who put the criminal law in motion under such circumstances lay themselves open to a charge of being influenced by malice (*g*).

Proof of the absence of belief in the truth of the charge by the person making it and putting the criminal law in motion, is almost always involved in the proof of malice. Where the plaintiff complained of a prosecution for perjury, which the defendant had instituted against him for the purpose, as the plaintiff alleged, of suppressing evidence, and it was proved that the defendant, on being told that there was not sufficient ground for the indictment, declared that it was no matter, and that it would tie up the mouth of the plaintiff in a proceeding in which he would be likely to give evidence against the defendant, it was held that the judge was right in asking the jury whether the prosecutor believed at the time he preferred the indictment that the defendant had really been guilty of perjury, and whether he instituted the prosecution *bonâ fide* under such a belief or from an improper motive, and in telling them that, if the defendant had acted from an improper motive, they might infer malice (*h*). If a person has been assaulted and prefers an indictment, with a consciousness that, by his own misconduct, he provoked the assault and has no reasonable ground to complain of it, and the plaintiff is tried and acquitted, there is a total absence of reasonable and probable cause for it, and evidence from which malice may fairly be inferred (*i*). If the defendant appears to have put the criminal law in motion for the purpose of enforcing payment of a debt, or obtaining the restitution of goods unlawfully detained, without having any reasonable ground for preferring a criminal charge, there is evidence of

(*f*) *Busst* v. *Gibbons*, 30 L. J., Ex. 75.

(*g*) *Stevens* v. *Midland Rail. Co.*, 10 Exch. 356; 23 L. J., Ex. 328.

(*h*) *Haddrick* v. *Heslop*, 12 Q. B. 267. *Broad* v. *Ham*, 5 Bing. N. C. 722; 8 Sc. 50.

(*i*) *Hinton* v. *Heather*, 14 M. & W. 131.

malice, and of want of reasonable and probable cause for the prosecution (*k*).

Scandalous charges and accusations made by the defendant against the plaintiff in connexion with the prosecution are evidence of malice. Where the defendant put an advertisement in the newspapers of the finding of the indictment by the grand jury, the advertisement was held to be admissible in evidence to prove the malice of the defendant, although an information had been granted for it as a libel; but the jury were directed not to consider it in estimating the damages (*l*). Any statements or declarations made by the defendant tending to show that he was actuated by spite and ill-will in instituting the prosecution are, of course, evidence

227 of malice (*m*). "When a person says to the prosecutor of an indictment for perjury that there really is no case against the man he has indicted, and the prosecutor answers 'I indict him to stop his mouth,' there is reasonable evidence from which a jury may infer that the prosecutor knows that the man is not guilty, but only indicts him for the purpose he has mentioned" (*n*).

The fact that overseers of the poor have taken out a summons before justices, and have caused a warrant of distress and a warrant of arrest to issue against the plaintiff for the non-payment of poor-rates, they knowing at the time that the plaintiff was bankrupt and had obtained his protection, is no evidence of malice to support an action for a malicious prosecution against the overseers (*o*).

"A prosecution," observes Cockburn, C. J., "though in the outset not malicious, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction" (*p*).

In order to show *bona fides* on the part of the defendant, it is competent to him to prove any communication that may have been made to him prior to the commission of the grievance, to show the impression made on his mind, and the materials he had before him for forming an opinion. If the plaintiff had previously been guilty of felony, and the defendant was present at the trial, or had seen a record of the conviction, which induced him to act in the matter of the complaint, these facts are receivable as evidence of *bona fides* (*q*).

(*k*) *Brooks* v. *Warwick*, 2 Stark. 393. *M'Donald* v. *Rooke*, 2 Bing. N. C. 219.

(*l*) *Chambers* v. *Robinson*, 2 Str. 691.

(*m*) *Michell* v. *Williams*, 11 M. & W. 217.

(*n*) Maule, J., during the argument in *Heslop* v. *Chapman*, 23 L. J., Q. B. 49.

(*o*) *Phillips* v. *Naylor*, 4 H. & N. 565; 27 L. J., Ex. 222.

(*p*) *Fitz John* v. *Mackinder*, 9 C. B., N. S. 505; 30 L. J., C. P. 264.

(*q*) *Thomas* v. *Russell*, 9 Exch. 764.

Counsel's opinion is of no avail to a man who has instituted an unfounded and malicious prosecution. "It would be a most pernicious practice," observes Heath, J., "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, may shelter his malice in bringing an unfounded prosecution" (*r*).

It is no answer to an action for a malicious prosecution to show that the defendant was bound over by recognizance to prosecute and give evidence, if it appears that the prosecution originated in malice, and that the recognizance was the result of prior malicious proceedings instigated by the defendant. In an action for a malicious prosecution it appeared that the defendant had sued

228 the plaintiff in the county court, who pleaded a set-off, and the defendant, in order to get rid of the set-off, forged a receipt of the plaintiff for a sum of money, and swore before the county court judge that the handwriting to that receipt was the handwriting of the plaintiff. The plaintiff denied it; but the county court judge, believing the plaintiff to have been guilty of perjury, committed him for trial, and bound over the defendant to prosecute. The defendant proceeded to the assizes, went before the grand jury and procured a bill of indictment to be found against the plaintiff, and stuck to the charge at the trial, and endeavoured to maintain it by perjured evidence; but the plaintiff was acquitted. The plaintiff then brought an action against the defendant for a malicious prosecution, and, having satisfied a jury that the defendant preferred the charge with the knowledge of its falsehood, recovered 200*l.*; and it was held that the action was maintainable, because the defendant persisted to the last in the false charge, having no reasonable or probable cause for the charge, but preferring it with knowledge of its falsehood, and endeavouring at the trial to maintain it with further and perjured evidence (*s*). "But for the order of the county court judge," said Willes, J., "the action would, beyond all doubt, have been maintainable. But that order ought not to aid the defendant; first, because it was occasioned by his own contrivance and wrong; and, secondly, because, as a judicial act, it is void, having been obtained by fraud on the court" (*t*). Although the defendant was compelled to prosecute, there was no compulsion upon him to persist in a false charge. He might have discharged his recognizances by appearing and telling the truth. "It is supposed," observed Lord Denman, "that a charge cannot be

(*r*) *Hewlett* v. *Cruchley*, 5 Taunt. 283.
(*s*) *Fitz John* v. *Mackinder*, 9 C. B., N. S. 505; 30 L. J., C. P. 257.
(*t*) *Fitz John* v. *Mackinder*, 29 L. J., C. P. 170.

preferred before a grand jury maliciously, if the party be bound to prefer it, though the recognizance be obtained in consequence of his malicious proceeding. I have not the smallest doubt that a recognizance so obtained does not justify a party, or prevent his subsequent conduct from being malicious." "If an unwilling party," said Littledale, J., "were bound over by recognizance to prosecute, the recognizance would furnish an answer for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by a malicious motive" (*u*).

It is no answer to an action for a malicious prosecution to show that the indictment preferred against the plaintiff was not sustainable in point of law; "for a bad indictment serves all the **229** purposes of malice, by putting the party to expense and exposing him, but no purpose of justice, in bringing the party to punishment if he were guilty" (*x*).

Termination of the prosecution.—To establish a cause of action for a malicious prosecution it must be shown that the prosecution has terminated; otherwise the plaintiff might recover in the action, and yet be afterwards convicted on the original prosecution (*y*). It must also be shown that the proceedings terminated in favour of the plaintiff, if from their nature they are capable of such a termination; and it is not sufficient to show that the plaintiff was convicted, and that there was by law no appeal against such conviction (*z*). If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted (*a*). The question whether there was or was not probable cause for some parts of the charge will affect the amount of the damages recoverable, but not the plaintiff's right to a verdict (*b*). A conviction of the plaintiff by a magistrate, so long as it has not been reversed on appeal, affords a conclusive answer to the charge that the complaint or information which led to it was founded in malice, and was preferred without reasonable or probable cause (*c*).

(*u*) *Dubois* v. *Keats*, 11 Ad. & E. 332.
(*x*) *Wicks* v. *Fentham*, 4 T. R. 248. *Pippet* v. *Hearn*, 5 B. & A. 634; 1 D. & R. 271.
(*y*) *Fisher* v. *Bristow*, 1 Doug. 215. *Arundell* v *Tregono*, Yelv. 116.
(*z*) *Basébé* v. *Matthews*, L. R., 2 C. P. 684; 36 L. J., M. C. 93.
(*a*) *Reed* v. *Taylor*, 4 Taunt. 617.
(*b*) *Delisser* v. *Towne*, 1 Q. B. 343. *Ellis* v. *Abrahams*, 8 Q. B. 713.
(*c*) *Mellor* v. *Baddeley*, 2 Cr. & M. 678. The 14 & 15 Vict. c. 99, enacts (s. 13), that in order to prove the trial and acquittal of any person charged with any indictable offence, it shall not be necessary to produce the (original) record of the trial and acquittal, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court, where the acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment,

Malicious prosecution—Remedies—Action for damages.—The mere fact of a criminal information being pending against the defendant on the prosecution of the plaintiff, for the same subject-matter, is no ground for staying the proceedings in the action; but, if the plaintiff has resorted to his private remedy by way of action, the court will not in general allow him to proceed with the criminal information until the action has been discontinued (*d*).

230 *Malicious prosecution—Damages.*—In order to recover damages in an action for a malicious prosecution, the plaintiff must show that he has suffered either in person, reputation, or pocket. If, therefore, an indictment is prepared for a common assault, and is ignored by the grand jury, and the party indicted brings his action for a malicious prosecution, he must give some proof of actual damage (*e*), and must show that he was forced to expend his money in necessary charges to acquit himself of the misdemeanour of which he was accused; for, if *ignoramus* is returned where the indictment neither contains matter of scandal nor cause for imprisonment or loss of life or limb, no action will lie; but, if there is scandal, or loss of liberty, &c., an action will lie. "There are," observes Holt, C. J., "three sorts of damages resulting from a malicious and unfounded indictment, any of which would be sufficient to support an action: the damage to a man's fame, as if the matter whereof he is accused is scandalous: where a man is put in danger to lose his life, limb, or liberty: the damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused" (*f*).

In an action for a malicious prosecution, where the jury gave the plaintiff 10,000*l.* damages, the court refused a new trial, saying they would not interpose on account of the largeness of the damages, unless they were so flagrantly excessive as to afford internal evidence of prejudice and partiality on the part of the jury; that is, unless they were most outrageously disproportionate, either to the wrong received, or to the situation and circumstances of either the plaintiff or the defendant (*g*).

trial, and acquittal, omitting the formal parts thereof. *Hunter* v. *French*, Willes, 517. *Caddy* v. *Barlow*, 1 M. & Ry. 277. It has been declared by Willes, C. J., that "every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record of such acquittal, for any use he may think fit to make of it, and that, after a demand of it has been made, the proper officer may be punished for refusing to make it out. *R.* v. *Brangan*, 1 Leach, C. C. 27. And see the 46 Edw. 3, cited Taylor on Evidence, § 1340, p. 1265, n. 4, 4th ed., and printed in the appendix to the 9th vol. of the Statutes at Large, p. 45, 4to ed.

(*d*) *Caddy* v. *Barlow*, 1 M. & Ry. 278. *R.* v. *Sparrow*, 2 T. R. 198.

(*e*) *Freeman* v. *Arkell*, 2 B. & C. 494; 3 D. & R. 671. *Byne* v. *Moore*, 5 Taunt. 191.

(*f*) *Savile* v. *Roberts*, 1 Ld. Raym. 378.

(*g*) *Leith* v. *Pope*, 2 W. Bl. 1326.

Every expense that the plaintiff has necessarily incurred in order to defend himself from the false and malicious charge brought against him is recoverable as part of the damages (*h*). If two persons are indicted without reasonable and probable cause for a conspiracy, and one employs a solicitor to defend them, and pays him the costs of the defence, and both are acquitted, and an action is brought for a malicious prosecution, and a verdict is given for the plaintiff, he is entitled to recover the amount of the solicitor's bill as part of the damages, unless each had a distinct defence and the costs thereof were severable (*i*).

Malicious prosecution — Mitigation of damages. — Where the plaintiff avers that up to the time of the prosecution he had borne a good character, and claims damages for injury to his character, it

231 may be shown on cross-examination of the plaintiff's witnesses, that he was at the time a man of notoriously bad character (*k*). But, where the plaintiff does not expressly claim damages in respect of injury to reputation, general evidence as to his character is inadmissible (*l*).

Malicious prosecution — The tort-feasor — Prosecution by an agent. — It is immaterial whether the defendant alone makes the charge, or whether he stirs up and procures another to do it. In either case he is liable in damages (*m*). If, for the gratification of his malice, a man gives his agent a plenary authority to institute a prosecution against another, he is equally responsible for all that is done under it; and, if the agent has no cause for the proceeding, the principal is responsible; for it is his duty to inquire whether the proceeding is well founded or not. If, as against the agent, there was an absence of reasonable and probable cause for the prosecution, that is sufficient as against the principal, by whose authority and direction the agent acted (*n*). But, if the agent institutes the proceedings without the instigation or direction of the principal, the latter will not be responsible for the unauthorized proceedings of his agent, unless he adopts them, and continues them with knowledge of all the circumstances. When proceedings have been commenced by an agent without the knowledge of the principal, the responsibility of the latter commences at the point at which he becomes cognizant of the proceedings (*o*). But there is a material distinction between instituting a prosecution and merely attending the hearing upon a proceeding already com-

(*h*) *Foxall* v. *Barnett*, 2 El. & Bl. 298; 23 L. J., Q. B. 7.
(*i*) *Rowlands* v. *Samuel*, 11 Q. B. 41.
(*k*) *Rodriguez* v. *Tadmire*, 2 Esp. 721.
(*l*) *Downing* v. *Butcher*, 2 M. & Rob. 374. *Cornwall* v. *Richardson*, Ry. & M. 305.
(*m*) *Savile* v. *Roberts*, 1 Ld. Raym. 377; 12 Mod. 208; 1 Salk. 13.
(*n*) *Michell* v. *Williams*, 11 M. & W. 213.
(*o*) *Weston* v. *Beeman*, 27 L. J., Ex. 57.

menced. It does not at all follow that the defendant, by attending the hearing, adopts the proceeding, or renders himself responsible for the motives or actions of the person who instituted it, although that person may be an agent of the defendant (*p*). If, in an action for a malicious prosecution against *A* and *B*, supported by proof that both *A* and *B* entered into a joint recognizance to prosecute and give evidence, it appears that *A* only employed the solicitor, and that *B* attended before the magistrate and the grand jury at the request of the solicitor, *B* will be entitled to an acquittal (*q*).

Malicious prosecution—The tort-feasor—Corporations.—A railway company is not liable for a malicious prosecution instituted by its servant without the knowledge or direction of the company; and a doubt has been thrown out as to whether a corporation can be **232** actuated by that sort of malice which is essential to the maintenance of an action for a malicious prosecution(*r*). If a solicitor appears on behalf of a railway company to prosecute for an assault made upon one of the company's servants, and the prosecution fails, and an action for a malicious prosecution is subsequently brought, it will be assumed, until the contrary is shown, that the depositions of the witnesses were taken by or known to the solicitor, and therefore to the company, before the prosecution was undertaken; and, therefore, if the depositions disclose a reasonable and probable cause for the prosecution, the company will not be liable, the onus of proving that there was no reasonable or probable cause lying upon the plaintiff (*s*).

Maliciously causing a search warrant to issue.—If a person, without reasonable and probable cause, and from malicious or corrupt motives, causes a search warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant; but, if a person goes before a magistrate, and lays before him fair grounds of suspicion for the magistrate to exercise his judgment upon, and the magistrate thinks fit, in the exercise of the functions of his office, to issue the warrant, the person so attending before the magistrate is not then responsible for the issue of the warrant, unless he has knowingly or recklessly, and without due inquiry, sworn to what was false (*t*). If a defendant goes before a magistrate and states that he has just cause to suspect that the plaintiff has robbed him,

(*p*) *Weston* v. *Beeman*, *supra*.
(*q*) *Eager* v. *Dyott*, 5 C. & P. 4.
(*r*) *Stevens* v. *Midland Rail. Co.*, 10 Exch. 352; 23 L. J., Ex. 328. See also *per* Lord Bramwell in *Abrath* v. *N. E. Rail. Co.*, 11 App. Cas. 247.
(*s*) *Walker* v. *South Eastern Rail. Co.*, L. R., 5 C. P. 640; 39 L. J., C. P. 346.
(*t*) *Cooper* v. *Booth*, 3 Esp. 144; cited 1 T. R. 535. *Phillips* v. *Naylor*, 4 H. & N. 565; 27 L. J., Ex. 222; 28 L. J., Ex. 225. *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J., Ex. 193. *Hope* v. *Evered*, 17 Q. B. D. 338.

and upon that representation a warrant is granted, it does not lie in his mouth to say that the magistrate ought not to have granted the warrant (*u*).

Malicious exhibition of articles of the peace against another, supported by a false oath of threats having been used, may be made the foundation of an action for damages, notwithstanding that the accused person has been required to find sureties, and been imprisoned for default; for the truth of the articles cannot be controverted before the court, which has no discretion, and can pronounce no judgment on the truth of the facts, but is bound to act upon the statement sworn to before it. Where, therefore, the plaintiff's declaration of his cause of action set forth that the defendant falsely and maliciously, and without any reasonable or probable cause, made information on oath before a magistrate

233 that the plaintiff had used certain specified threatening language to him, whereby the defendant went in fear of bodily harm, and then caused the plaintiff to be arrested and brought before justices of the peace, and required to find sureties, and to be imprisoned, it was held that the declaration disclosed a good cause of action, although it appeared that the proceeding terminated against the accused, it being founded upon a statement on oath, which the person charged was not at liberty to controvert (*x*).

Malicious proceedings in bankruptcy.—An action will lie against persons who petition for an adjudication in bankruptcy, without reasonable or probable cause, and knowingly and wilfully, or recklessly, swear to depositions false in fact (*y*). In order, however, to prove a want of reasonable or probable cause, the proceedings must be superseded or set aside before the commencement of the action; for the very existence of a commission of bankruptcy has been held to be evidence of probable cause (*z*). The mere fact, however, of the proceedings having been superseded or set aside, does not of itself establish the fact of the want of probable cause for them; and the plaintiff must give some *primâ facie* evidence of want of probable cause, in order to put the defendant upon proof of the existence of probable cause (*a*).

(*u*) *Elsee* v. *Smith*, 1 D. & R. 105.

(*x*) *R.* v. *Doherty*, 13 East, 171. *Venafra* v. *Johnson*, 10 Bing. 301; 3 M. & Sc. 847. *Steward* v. *Gromett*, 7 C. B., N. S. 191, 29 L. J., C. P. 170. But by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 25, the power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour, is to be exercised by an order upon complaint; and the Summary Jurisdiction Acts are to apply; and the complainant and defendant and witnesses may be called and examined and cross-examined; and the complainant and defendant are to be subject to costs, as in the case of any other complaint.

(*y*) *Farley* v. *Danks*, 4 El. & Bl. 499; 24 L. J., Q. B. 244. *Brown* v. *Chapman*, 1 W. Bl. 427.

(*z*) *Whitworth* v. *Hall*, 2 B. & Ad. 698. *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

(*a*) *Hay* v. *Weakley*, 5 C. & P. 361. *Cotton* v. *James*, 1 B. & Ad. 134. *John-*

Malicious presentation of a winding-up petition.—An action for malicious prosecution will lie against a person for falsely and maliciously, and without reasonable or probable cause, presenting a petition to wind up a trading company under the Companies Acts, 1862 and 1867, even although no pecuniary loss or special damage to the company can be proved, as the presentation of the petition is calculated to injure the credit of the company (*b*).

son v. *Emerson*, L. R., 6 Ex. 329; 40 L. J., Ex. 201. *Quartz Hill Mining Co.* v. *Eyre*, *infra*.

(*b*) *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; 52 L. J., Q. B. 488.

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CHAPTER VIII.

INJURIES TO RIGHTS OF PROPERTY.

SECTION I.

OF RIGHTS OF PROPERTY GENERALLY.

Kinds of rights of property.—Rights of property belong to the class of private rights. They are in their nature capable of being transferred from one person to another, and possess a pecuniary value by reason of such capability. Of these rights some have a corporeal object, as in the instance of rights to land or chattels, which confer on their possessors the right to the use and enjoyment of the land or chattel to the exclusion of the world at large; while others have no corporeal object, but consist in the right to do a class of acts to the exclusion of other persons, such as the right to carry travellers over a ferry, or to take tolls from persons frequenting a market, or to vend a patented article, or to multiply copies of a book. Each of these rights will hereafter be dealt with separately; but it will be convenient here to consider certain modes of acquiring rights of property which are more or less common to all these different rights, or at any rate to two great divisions of them, the right of property in immovables, and the right of property in movables.

Transfer of rights of property.—Rights of property may be transferred by the act of the parties, or by death, marriage, bankruptcy, or other legal process. It will be convenient here to consider transfer by marriage or bankruptcy.

Transfer by marriage—Immovables—Marriages before January 1st, 1883.—The husband of a woman, married before January 1st, 1883, and seised in fee of certain lands and tenements, gained a freehold interest therein in right of his wife; and, if he is the actual occupier of them, he is, of course, entitled to sue for all damage done to his beneficial occupation and enjoyment of the property. If the wife, on her marriage, was possessed of chattels real, such as leasehold interests, estates by statute merchant, statute staple, &c.,

235 the husband is entitled to them as a gift in law, and may, during the marriage, deal with them as the absolute owner of them; but, if he fails to make any transfer or disposition of them in his lifetime, and his wife survives him, she will then take them by survivorship. The husband cannot devise them; but he may transfer them by deed (*a*). If the wife's estates have, prior to the marriage, been conveyed to trustees, the husband will then have no legal interest in the property, and no right to maintain an action for any damage that may be done to it. If the husband, having an interest in the wife's real estate, grants leases thereof during their joint lives, reserving rent to himself and making his wife no party to the lease, then, as the reversion is in the husband, he is the proper person to sue for damage done to his reversionary estate (*b*). If a *feme sole* had a right to have common for life, and she married, and the husband is hindered in his enjoyment of the right of common, he alone may have an action for damages (*c*).

A woman married before January 1st, 1883, is, however, entitled to the absolute disposal and possession (as her separate property) of all real property "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue" (*d*) after January 1st, 1883.

Transfer by marriage—Immovables—Marriages since January 1st, 1883.—But since January 1st, 1883, every woman who marries is entitled to hold as her separate property all real and personal property which belongs to her at the time of her marriage, or which is acquired by or devolves upon her after marriage (*e*), and to dispose of it absolutely, either by will or otherwise, without the intervention of any trustee (*f*).

The power to make settlements is, however, reserved (*g*).

Transfer by marriage—Movables—Marriages before January 1st, 1883.—In the case of marriages before 1883, the marriage operates as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife. The husband, therefore, after the marriage, may demand possession of the chattels of the wife in the hands of a stranger; and, if the latter has no lien upon them or right to detain them, and refuses or neglects to give them up to the husband, the husband may maintain an action for the detention or conversion of them without joining the wife, as the tort is to the husband: but, if the action is brought for the conversion of deeds and securities relating to property and *choses*

(*a*) Bac. Abr., BARON AND FEME, C.
(*b*) *Wallis* v. *Harrison*, 5 M. & W. 142.
(*c*) *Baker* v. ——, 2 Bulstr. 14.
(*d*) 45 & 46 Vict. c. 75, s. 5. As to the meaning of the words "shall accrue," see *Reid* v. *Reid*, 31 Ch. D. 402; 55 L. J., Ch. 294.
(*e*) 45 & 46 Vict. c. 75, s. 2.
(*f*) Sect. 1, sub-sect. 1.
(*g*) Sect. 19.

236 in action which would survive to the wife in case of the death of the husband, the wife would be properly joined with the husband for conformity (*h*). So absolute is the husband's right to all chattels and personal property which come to his wife's hands after marriage, and before 1883, that, if the wife bought wearing apparel out of money settled to her separate use, and received by her from her trustees, such wearing apparel vested by law in the husband as the legal owner thereof; and the same rule prevails with regard to money and all kinds of personalty, as soon as it is placed by the trustees in the hands of the wife in the execution of the trusts (*i*); and, although the courts, acting on the established doctrine of equity that the sprout savours of the root (*k*), will interfere to protect the savings from, or income of, the separate estate from the husband or his creditors (*l*), and, where the wife has the *jus disponendi* over her separate estate, will recognize the same power over the accumulations of it, yet, if the wife dies without having exercised her *jus disponendi*, the undisposed-of profits vest in the husband in his own right (*m*).

A woman married before January 1st, 1883, is entitled to the absolute disposal and possession as her separate property of all personal property, "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue" (*n*) after January 1st, 1883.

Transfer by marriage—Movables—Marriages since January 1st, 1883.—In the case, however, of marriages since January 1st, 1883, the wife is absolutely entitled, as has been said before, to all real and personal property which belongs to her at the time of marriage, or which is acquired by or devolves upon her after marriage (*o*).

Transfer by marriage—Fruits of the wife's labour.—Formerly the husband was entitled to the fruits of the wife's labour, unless he had agreed with her to the contrary (*p*); but by the Married Women's Property Act, 1870 (*q*), sect. 1, the fruits of her labour were reserved to her independently of her husband.

That Act was repealed by the Married Women's Property Act, 1882 (*r*) which provided that after the commencement of the Act (*s*), all wages, earnings, money, and property gained and acquired by

(*h*) *Angier* v. *Whicher*, 6 Ad. & E. 259.
(*i*) *Carne* v. *Brice*, 7 M. & W. 183. *Bird* v. *Peagrum*, 13 C. B. 649.
(*k*) *Fettiplan* v. *Gorges*, 1 Ves. jun. 46.
(*l*) *Denman* v. *Cashire*, L. R., 10 C. P. 554. As to enforcing judgment under s. 5 of the Debtors Act, see *Draycott* v. *Harrison*, 17 Q. B. D. 147.
(*m*) *Moloney* v. *Kennedy*, 10 Sim. 254.
(*n*) 45 & 46 Vict. c. 75, s. 5. As to the meaning of "shall accrue," see *Reid* v. *Reid*, *supra*.
(*o*) 45 & 46 Vict. c. 75, s. 2.
(*p*) *Ashworth* v. *Outram*, 5 Ch. D. 923.
(*q*) 33 & 34 Vict. c. 93.
(*r*) 45 & 46 Vict. c. 75.
(*s*) January 1st, 1883.

237 a wife in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill (*t*), should be the separate property of the wife, and at her absolute disposal.

The Act gives a married woman full powers of contracting and suing in respect of her separate property (*u*).

Transfer by marriage—Rights of wives after a judicial separation.—By the 20 & 21 Vict. c. 85, s. 25, in every case of a judicial separation the wife is, from the date of the sentence, and while the separation continues, to be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as if she were a *feme sole*, and on her decease, if she dies intestate, will go as it would have gone if her husband had then been dead. By the 21 & 22 Vict. c. 108, s. 8, where a wife has obtained a decree for judicial separation under the last-mentioned Act, the property of or to which the wife is possessed or entitled for an estate in remainder, or reversion, at the date of the decree is to be deemed to be included in the protection given by the decree.

Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterwards obtained a decree of judicial separation, and is living apart from her husband, on the property coming into possession she is entitled to it absolutely (*x*).

But the effect of the Married Women's Property Act, 1882, being to render a married woman as capable of holding or disposing of property, as though she were a *feme sole*, the disabilities of coverture in the case of a woman married since the commencement of that Act, or in the case of any married woman as to property acquired by her since that period are nil.

Transfer by marriage—Rights of wives after a dissolution of the marriage.—When a marriage has been dissolved by a decree of the Court of Divorce, the same consequences as to property follow, as if the marriage contract had been annihilated and the marriage tie broken (*y*).

Transfer by marriage—Rights of wives deserted by their husbands.—A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty

(*t*) Sect. 2.
(*u*) Sect. 12, sub-sects. 2, 3, 4.
(*x*) *In re Insole*, L. R., 1 Eq. 470; 35 L. J., Ch. 177.
(*y*) *Wilkinson* v. *Gibson*, L. R., 4 Eq. 162. *Fussell* v. *Dowding*, L. R., 14 Eq. 421; 41 L. J., Ch. 716. But see as to effect of Married Women's Property Act, 1882, *supra*.

238 sessions, or in either case to the Divorce Court, or the judge ordinary thereof, for an order to protect any money or property she may acquire by her own lawful industry (*z*), and property which she may become possessed of after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate, or justices, or court, if satisfied of the fact of the desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property, acquired since the commencement of the desertion (*a*), from her husband, and all creditors and persons claiming under him; and such earnings and property will belong to the wife as if she were a *feme sole;* but every such order, if made by a police-magistrate or justices at petty sessions, must, within ten days after the making thereof, be entered with the registrar of the county court within the jurisdiction of which the wife is resident; and the husband, and any creditor or other person claiming under him, may apply to the court, or to the magistrate, or justices, by whom such order was made (*b*), for the discharge thereof. If the husband, or any creditor of, or person claiming under, the husband, shall seize, or continue to hold, any property of the wife after notice of any such order, he may be compelled, at the suit of the wife, to restore the specific property, and also a sum equal to double the value of the property so seized or held after such notice as aforesaid (*c*).

When a married woman, entitled to a legacy charged on real estate, which had not been reduced into possession by her husband, obtained a protection order in consequence of her husband's desertion, it was held that the legacy was payable to her, and that her receipt was a good discharge (*d*).

When an order of protection has been made, the wife, during the continuance thereof, is in the like position in all respects with regard to property, and suing and being sued, as if she had obtained a decree of judicial separation (*e*). These provisions extend to property to which the wife becomes entitled as executrix, administratrix, or trustee (*f*). It has been held that a retrospective effect cannot be given to this order, so far as it affects

(*z*) As to the meaning of the term "lawful," see *Mason* v. *Mitchell*, 3 H. & C. 528; 34 L. J., Ex. 68. As to her maintenance, see 49 & 50 Vict. c. 52.

(*a*) *In the goods of Ann Elliott*, L. R., 2 P. & D. 274.

(*b*) It was held, in *Ex parte Sharp*, 5 B. & S. 322; 33 L. J., M. C. 152, that, where the magistrate who had made the order died, his successor had no jurisdiction to discharge it; but the 27 & 28 Vict. c. 44, now provides that his successor, or the justices at subsequent sessions, or the court, may discharge the order.

(*c*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 6.

(*d*) *In re Coward*, L. R., 20 Eq. 179; 44 L. J., Ch. 384.

(*e*) 20 & 21 Vict. c. 85, s. 21.

(*f*) 21 & 22 Vict. c. 108, s. 7.

239 the rights and liabilities of third parties; and, therefore, if a married woman commences an action after the desertion of her husband, but before she has obtained an order, the subsequent procurement of the order cannot make valid the invalid proceeding; for it would lead to incalculable mischief if the words of the statute were construed to have that effect as regards third parties (*g*). But in the case of a woman married since January 1st, 1883, or with respect to property acquired by any married woman since that date, such an order for the protection of her property would seem to be unnecessary, since she is freed by that Act from the common law disabilities of coverture.

Transfer by bankruptcy.—By the 46 & 47 Vict. c. 52, all the "property" (*h*) of a person who has been adjudged bankrupt, except property held by him in trust, and his tools, wearing apparel, and bedding, to the value of 20*l.*, vests in the trustee (*i*); and, where any conveyance or assignment of property is required to be registered, the certificate of the appointment of the trustee may be registered instead (sect. 54 (4)). The term property includes money, goods, things in action, land (*k*), and every description of property whether real or personal; also obligations, easements, and every description of estate, interest, or profit, present or future, vested or contingent, arising out of or incident to property as above defined (sect. 168). In the case of stocks, shares, or other property transferable in the books of any company, the right to transfer such property may be exercised by the trustee in bankruptcy to the same extent as the bankrupt himself might have exercised it (sect. 50). And *choses in action* are to be deemed duly assigned to the trustee (sect. 50 (5)) (*l*).

Transfer by bankruptcy—Leaseholds—Onerous property.—Under the Acts previous to the Act of 1869, it was held that the general assignment of a bankrupt's property did not vest leaseholds in the assignee until acceptance (*m*), although at common law such would be the effect of an assignment (*e. g.*, for the benefit of creditors), under which the assignee had acted, and he would, therefore, be liable under such a deed for the rent (*n*); but by the 46 & 47 Vict. c. 52, s. 55, it is now provided that, when the property of a bankrupt consists of land of any tenure burdened with onerous covenants of shares or stocks in companies, of unprofitable contracts or other property unsaleable, or not readily saleable, by reason of

(*g*) *Midland Rail. Co.* v. *Pye*, 10 C. B., N. S. 179; 30 L. J., C. P. 315.

(*h*) 46 & 47 Vict. c. 52, s. 44.

(*i*) Sect. 54.

(*k*) As to copyhold property, see sect. 50 (4); and as to estates in tail, sect. 56 (5).

(*l*) Money paid by mistake in law to trustee must be refunded by him. See *Ex parte Simmonds*, 16 Q. B. D. 308.

(*m*) *Copeland* v. *Stephens*, 1 B. & Ald. 583.

(*n*) *White* v. *Hunt*, L. R., 6 Ex. 32; 40 L. J., Ex. 23.

240 its binding the possessor to the performance of some onerous act, or to the payment of money, the trustee may by writing signed by him (*o*), disclaim such property (*p*), although he may have taken possession of it or endeavoured to sell it or exercised acts of ownership. Such disclaimer shall operate from the date of the disclaimer (*q*).

Under this Act the bankrupt's leaseholds vest absolutely in the trustee subject to the power to disclaim (*r*).

After the trustee had executed a disclaimer of a lease, he was not entitled, even though he was in possession of the premises, to remove the tenant's fixtures: for the effect of the disclaimer was to give the landlord an absolute title to the fixtures as from the date of the order of adjudication (*s*). The disclaimer, in fact, placed the trustee in the position of never having had any estate in the leasehold property; and any severance of the fixtures by him after the adjudication and before the disclaimer became by force of the disclaimer a wrongful act; and the lessor was upon the disclaimer entitled to recover the value of the fixtures from the trustee (*t*).

The effect of a disclaimer is, as regards the bankrupt and his property, that it determines his rights and liabilities as from the date of the disclaimer. As regards the trustee personally his rights and liabilities are determined by it as from the date when the property vested in him. As regards third persons their rights and liabilities are only affected so far as may be necessary in order to release the bankrupt and the trustee from liability (*u*). Application may be made to the trustee to decide whether he will disclaim or not, and he must do so within twenty-eight days, or such extended period as may be allowed (*x*), otherwise he cannot disclaim, and in case of a contract he will be deemed to have adopted it (*y*), and he will be liable for rent and breaches of

(*o*) A disclaimer in writing signed by the trustee's solicitor is not sufficient. *Wilson* v. *Wallani*, 5 Ex. D. 155; 49 L. J., Exch. 437; and see the words of the section of the new Act, *supra*. The disclaimer must be made within three months of the trustee's appointment, or within two months after the property came to his knowledge. (Sect. 55.)

(*p*) See *Ex parte Llynvi Coal & Iron Co.*, L. R., 7 Ch. 28; 41 L. J., Bk. 5. *In re Wilson*, L. R., 13 Eq. 186. A disclaimer was not inoperative, although the leave of the court had not been obtained. *Reed* v. *Harvey*, 5 Q. B. D. 184; 49 L. J., Q. B. 295; but see now Rule 320, *post*, p. 241.

(*q*) But this does not apply to rent due between the date of the adjudication and the disclaimer by the trustee in bankruptcy; and it seems that, as between the lessor and the lessee, the latter is still liable for the rent. *Smyth* v. *North*, L. R., 7 Ex. 242; 41 L. J., Ex. 103. *In re Clarke*, 17 Ch. D. 759. *East and West India Dock Co.* v. *Hill*, 22 Ch. D. 14; 9 App. Cas. 488. *Harding* v. *Preece*, 9 Q. B. D. 281. Provision is generally made for this in giving leave to disclaim under Rule 320, *post*, p. 241.

(*r*) *Wilson* v. *Wallani*, 5 Ex. D. 155; 49 L. J., Exch. 437.

(*s*) *Ex parte Stephens*, 7 Ch. D. 127; 47 L. J., Bk. 22.

(*t*) *Ex parte Brook*, 10 Ch. D. 100.

(*u*) *Smyth* v. *North*, and other cases in note (*q*), *supra*.

(*x*) See *In re Price*, 13 Q. B. D. 466.

(*y*) Sect. 55 (4), and in case of a contract it may be rescinded on terms (5).

241 covenants from the date of his appointment (*z*), unless he assign the lease to a pauper (*a*). He may disclaim a lease which has been determined between his appointment and his disclaimer (*b*), and in general the disclaimer puts an end to the lease, and deprives both landlord and tenant of the benefits of the covenants and clauses contained in it (*c*).

The landlord cannot upon disclaimer eject a sub-lessee of the bankrupt (*d*), but he is entitled to distrain for rent reserved and to re-enter for breach of covenants and non-payment of rent (*e*).

The trustee should not disclaim a lease without leave of the court, which may impose such conditions as it thinks fit (*f*).

The court may make an order for vesting any disclaimed property in any person applying on such terms as it thinks fit, and such property will vest accordingly without any conveyance or assignment (*g*).

Any person injured by disclaimer is a creditor to the extent of the injury, and may prove for it under the bankruptcy (*h*).

The right of disclaimer is not limited to property under sect. 44, but extends to any property under sect. 168, from which no benefit can accrue to the bankrupt's estate (*i*).

By the Bankruptcy Rules, 1886, r. 320, "A lease may be disclaimed without the leave of the court in any of the following cases, namely, where the bankrupt has not sub-let or assigned the lease, or created any mortgage or charge thereon; and

"(a) The rent reserved and real value of the property leased, as ascertained by the property tax assessment, are less than 20*l.* per annum; or

"(b) The estate is administered under the provisions of sect. 121 of the Act; or

"(c) The trustee serves the lessor with notice of his intention to disclaim, and the lessor does not within seven days after the receipt of such notice give notice to the trustee requiring the matter to be brought before the court.

(*z*) *Wilson* v. *Wallani*, *supra*. *Ex parte Dressler*, 9 Ch. D. 252. *Titterton* v. *Cooper*, 9 Q. B. D. 473; 51 L. J., Q. B. 472.

(*a*) *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; 52 L. J., Q. B. 391.

(*b*) *Ex parte Hart Dyke*, 22 Ch. D. 410; 52 L. J., Ch. 570.

(*c*) *Ex parte Hart Dyke*, *supra*. *Ex parte Glegg*, 19 Ch. D. 7; 51 L. J., Ch. 367. *Ex parte Allen*, 20 Ch. D. 341; 51 L. J., Ch. 724. *Lybbe* v. *Hart*, 29 Ch. D. 8; 54 L. J., Ch. 860.

(*d*) *Smalley* v. *Hardinge*, 7 Q. B. D. 524; 50 L. J., Q. B. 367.

(*e*) *Ex parte Walton*, 17 Ch. D. 746; 50 L. J., Ch. 657.

(*f*) Sect. 55 (3); see *Re Clarke*, 17 Ch. D. 759; 50 L. J., Ch. 789. *Ex parte Buxton*, 15 Ch. D. 289. *Ex parte Ladbury*, 17 Ch. D. 532. *Ex parte Isherwood*, 22 Ch. D. 384; 52 L. J., Ch. 370. *Ex parte Arnal*, 24 Ch. D. 26; 53 L. J., Ch. 134. *Ex parte Good*, 13 Q. B. D. 731; 54 L. J., Q. B. 96. *In re Page Brothers*, 14 Q. B. D. 401.

(*g*) Sect. 55 (6).

(*h*) Sect. 55 (7). *Ex parte Llynvi Coal Co.*, L. R. 7 Ch. 28; 41 L. J., Bank. 5. *Ex parte Blake*, 11 Ch. D. 572. *Ex parte Corbett*, 14 Ch. D. 122; 49 L. J., Bank. 74.

(*i*) *In re Maughan*, 14 Q. B. D. 956.

242 "Except as provided by this rule, the disclaimer of a lease without the leave of the court shall be void."

The court has no jurisdiction upon disclaimer, under Rule 320, without any application to give any compensation to the landlord out of the bankrupt's estate for the use and occupation by the trustee of the leasehold premises for the purposes of the bankruptcy, even though a benefit has resulted to the estate (*k*).

The trustee does not upon disclaiming become personally liable to the lessor, either upon an implied contract of tenancy, or as a trespasser, in respect of the period between the time when his actual occupation ceases, and the date when the disclaimer is executed (*l*).

The effect of sect. 55 (3), giving the court power to impose terms before allowing a disclaimer and making such orders as to fixtures, tenants' improvements, and other matters arising out of the tenancy as the court thinks just, is to do away with any hardship which the old law may have caused. Where the trustee applies for leave to disclaim the landlord will be required either to take over the fixtures at a valuation, or the trustee will be allowed a reasonable time before disclaiming in which to sever and remove them (*m*).

Transfer by bankruptcy—Contracts or dealings with the bankrupt without notice.—The title of the trustee to the property of the bankrupt has relation back to the act of bankruptcy, so that the property ceases to be his, and becomes the property of his trustee from the time of the commission of the act of bankruptcy (*n*).

A person having notice of any act of bankruptcy available (*o*) against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice (*p*). With some exceptions (*q*) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy (*r*).

By sect. 49, "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and

(*k*) *In re Sandwell*, 14 Q. B. D. 960; 54 L. J., Q. B. 323.
(*l*) *Lowry* v. *Barker*, 5 Ex. D. 170.
(*m*) *In re Moser*, 13 Q. B. D. 738.
(*n*) Sect. 43.
(*o*) Available act of bankruptcy means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made. (Sect. 168.)
(*p*) Sect. 37 (2).
(*q*) *I. e.*, save unliquidated damages (sect. 57 (1)), and cases within sect. 57 (2).
(*r*) Sect. 37 (3). "Debt provable in bankruptcy" or "provable debt" includes any debt or liability by this Act made provable in bankruptcy. (Sect. 168.)

243 preferences (*s*), nothing in this Act shall invalidate, in the case of a bankruptcy—

"(a) Any payment by the bankrupt to any of his creditors;

"(b) Any payment or delivery to the bankrupt;

"(c) Any conveyance or assignment by the bankrupt for valuable consideration;

"(d) Any contract, dealing, or transaction (*t*), by or with the bankrupt for valuable consideration;

"Provided that both the following conditions are complied with, namely,—

"(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

"(2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction, was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy (*u*) committed by the bankrupt before that time."

Where a guarantee society, in pursuance of an agreement between them and the bankrupt, entered into his house and seized his goods, without any knowledge of his having committed an act of bankruptcy, it was held that this was a "transaction" protected by the 133rd section of the repealed Act (*x*), and that the assignees could not maintain an action against the guarantee company for the entrance and seizure (*y*). So, where a building club, without any notice of an act of bankruptcy, and in pursuance of a stipulation with the contractor employed to build some houses for them, on his failing to proceed with the works, took possession of the materials, implements, and plant, he had brought on the ground, it was held that this was a protected transaction (*z*).

Subject to the provisions of the 87th section of the Act of 1869, giving to the trustee the proceeds of an execution for a sum exceeding 50*l.* levied on the goods of a trader, any execution against the bankrupt's land or goods, executed in good faith, by seizure in case of land, and by seizure and sale in case of goods, before the adjudication, and without notice of any previous act of

(*s*) See *post*, p. 256.

(*t*) As to the meaning of these words, see *Krehl* v. *Great Central Gas Co.*, L. R., 5 Ex. 289. *Ex parte Pillers*, 17 Ch. D. 653; 50 L. J., Ch. 691. See sect. 45 (1).

(*u*) See *supra*, as to these words, and see *Hood* v. *Newby*, 21 Ch. D. 605; 52 L. J., Ch. 204.

(*x*) 12 & 13 Vict. c. 106.

(*y*) *Krehl* v. *Great Central Gas Co.*, L. R., 5 Ex. 298; 39 L. J., Ex. 197. As to the sufficiency of a seizure in such a case, see *Brewin* v. *Short*, 5 El. & Bl. 237.

(*z*) *In re Waugh*, 4 Ch. D. 524; 46 L. J., Bk. 26.

244 bankruptcy, was valid (*l*). But these sections had no operation as regards a transaction void by the Bills of Sale Act (*m*).

Sects. 95 and 87 of the Act of 1869 are reproduced, with certain variations, by sects. 45 and 46 of the new Act (*n*).

By sect. 45 (1), "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2) For the purposes of this Act, an execution against goods is completed by seizure (*nn*) and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

"46. (1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.

"(2) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

"(3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy."

(*l*) See *post*, p. 483.
(*m*) *Post*, p. 461, note (*i*).
(*n*) 46 & 47 Vict. c. 52.
(*nn*) Delivery of land under an *elegit* is a seizure. *In re Hobson*, 33 Ch. D. 493.

245 If a man buys goods of a bankrupt, and pays over the price to the latter with knowledge of the act of bankruptcy, he will have no title to the goods as against the trustee; but, if he had no notice of the act of bankruptcy at the time he paid the money, the transaction will be protected by the above sections. A trustee in bankruptcy does not, by sending in a bill of parcels or invoice of goods purchased, necessarily ratify a dealing between the bankrupt and a third person as a sale. It may amount only to a qualified offer on his part to adopt the transaction as a sale, provided the defendant will pay for the goods, so as to leave it open to him to maintain an action for the conversion of the property, if the defendant will not pay the money demanded (*o*). But, if the trustee unreservedly adopts the transaction as a valid contract of sale, he cannot afterwards treat a refusal to re-deliver the goods as a conversion (*p*).

Transfer by bankruptcy—After-acquired property.—Property coming to the bankrupt after adjudication and before he has obtained his discharge passes to the trustee (*q*). But property coming to a liquidating debtor, after he has obtained his discharge, does not pass to the trustee, although the bankruptcy or liquidation may not have been closed (*r*). But damages in an action for a personal tort recovered by an undischarged bankrupt do not pass to his trustee, although, if the bankrupt accumulates the money and invests it, the trustee may be entitled to the fund (*s*).

Money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee, though the person to whom the money was paid had notice of the bankruptcy (*t*).

Where a bankrupt trades without the knowledge of his trustee, any property which he may acquire by so trading will pass to the trustee for the benefit of the creditors under the bankruptcy; but, if the trustee permits him to trade, and knowingly allows him to deal with new creditors, who, in ignorance of his circumstances, deal with him upon the faith of his ability to contract—especially where he has changed his trade or the place of carrying it on—the new creditors have a right to be paid out of the newly-acquired assets before the creditors under the first bankruptcy (*u*). The creditors of an undischarged bankrupt under the Act of 1869 have no rights against property acquired by him after the close of the

(*o*) *Valpy* v. *Sanders*, 5 C. B. 893; 17 L. J., C. P. 249.

(*p*) *Edwards* v. *Hooper*, 11 M. & W. 363.

(*q*) 46 & 47 Vict. c. 52, s. 44.

(*r*) *Ebbs* v. *Boulnois*, L. R., 10 Ch. 479; 44 L. J., Ch. 691. *In re Bennett's Trusts*, L. R., 10 Ch. 490; 44 L. J., Ch. 244.

(*s*) *Ex parte Vine*, 8 Ch. D. 364; 47 L. J., Bk. 116.

(*t*) *Ex parte Dewhurst*, L. R., 7 Ch. 185; 41 L. J., Bk. 18.

(*u*) *Troughton* v. *Gitley*, Amb. 629. *Engleback* v. *Nixon*, L. R., 10 C. P. 645; 44 L. J., C. P. 396.

246 bankruptcy except such rights as are given to them by sect. 54, and those rights cannot be enforced after the death of the bankrupt (*uu*).

After the close of a bankruptcy, property falling in to the bankrupt belongs to him, and not to the trustee in bankruptcy, although the bankrupt has not obtained an order of discharge (*x*).

Transfer by bankruptcy — Annulment of adjudication. — By sect. 35 (2) of the Bankruptcy Act of 1883, when an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done by the official receiver, the trustee or the court, will be valid; but the property of the debtor will vest in such person as the court may appoint, or in default of appointment will revert to the bankrupt for all his estate or interest therein, upon such terms as the court may order (*y*). The corresponding section of the Act of 1869 was held to apply to the case of a bankruptcy being annulled by whatever means, and to operate, not only on the goods and chattels of the bankrupt taken possession of by the trustee and remaining *in specie*, but also on cash taken possession of by him, and paid into a banking account, or which formed the proceeds of the sale of goods by the trustee (*z*). If the trustee permits a claim to be barred by the Statute of Limitations, the claim will continue to be barred after the bankruptcy is annulled (*a*).

Voidable transfers.—Transfers are not infrequently voidable as against one or more classes of persons. Thus, every transfer which constitutes an act of bankruptcy, or amounts to a fraudulent preference, is voidable as against the trustee in bankruptcy; a fraudulent transfer is voidable as against a creditor who is delayed by it; and a transfer without consideration is voidable as against a subsequent purchaser for valuable consideration. These transfers are, however, as a general rule, good as between the parties to them, and so far as regards all other persons, except those who are entitled to avoid them. Thus, if a transfer of property has been actually effected either by deed of transfer or by actual delivery, it is not competent to either of the parties to the transfer to set up or show that it was done for the purpose of effecting a fraud on third persons. Acts done may be valid as between the parties, though void as to others. Thus, an assignment made for the purpose of defeating one of several creditors is

(*uu*) *Green* v. *Smith*, *infra*.

(*x*) *In re Pettit's Estate*, 1 Ch. D. 478; 45 L. J., Bk. 63. *Green* v. *Smith*, 24 Ch. D. 672; 52 L. J., Ch. 411.

(*y*) As to the effect of this section upon the right of an execution creditor who has been restrained from selling under the bankruptcy, see *Crew* v. *Terry*, 2 C. P. D. 403; 46 L. J., C. P. 787. A copy of the order annulling the adjudication must be forthwith gazetted and published in a local paper.

(*z*) *Bailey* v. *Johnson*, L. R., 7 Ex. 263; 41 L. J., Ex. 211.

(*a*) *Markwick* v. *Hardingham*, 15 Ch. D. 339.

247 a good deed as between the parties, but void as against creditors; but, if there has been no actual transfer of the property, but only a deposit of chattels in the hands of a bailee, for the purpose of defeating a creditor, the depositary cannot set up the fraudulent character of the deposit in order to deprive the plaintiff of goods which are his property, and to which the depositary has no semblance of title (*b*). But, if goods are delivered or money is paid for an illegal purpose, as, for instance, to defraud creditors, the person who has so delivered the goods or paid the money may recover them back before the illegal purpose is carried out (*c*).

Voidable transfers—Fraudulent transfers.—By the 13th Eliz. c. 5 (*d*), for the avoiding of feigned and fraudulent grants and alienations, devised to delay or defraud creditors or others of their just and lawful actions, debts, &c., it is enacted (sect. 2), that every gift, grant, &c., of land, tenements, &c., goods and chattels, or of any profit or charge out of the same, shall be from thenceforth deemed and taken, as against the person whose actions, debts, &c., shall be in anywise disturbed, hindered or defrauded, to be void and of no effect. But nothing in the Act is to invalidate (sect. 6) a conveyance made *bonâ fide* for a valuable consideration by persons having no notice of the fraud, &c.

In considering whether an assignment is void under this statute, the question is, whether it was intended to have operation in favour of the claimant under it, and to confer upon him all the rights of ownership, or whether it was contrived and intended to be used for the benefit of the grantor (*e*). The mere intention to defeat an execution creditor does not in itself constitute a fraud; the question is, whether there was a *bonâ fide* intention on the part of both parties to transfer the property in reality, or whether the transaction was only colourable, and it was secretly intended that the grantor should preserve his dominion over the property, using the assignment as a mere pretext to keep off creditors (*f*).

An ante-nuptial settlement devised for the purpose of defeating the husband's creditors will not be supported when the wife is a party to the fraud (*g*).

If the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute, although it deals with the whole of the debtor's property,

(*b*) *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262.

(*c*) *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262. *Taylor* v. *Bowers*, 1 Q. B. D. 291; 46 L. J., Q. B. 39.

(*d*) Made perpetual by the 29 Eliz. c. 5.

(*e*) Rolfe, B., *Everleigh* v. *Purssord*, 2 Mood. & Rob. 542. *Martin* v. *Podger*, 2 W. Bl. 700.

(*f*) *Wood* v. *Dixie*, 7 Q. B. 896. *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 492; 23 L. J., Ch. 777.

(*g*) *Bulmer* v. *Hunter*, L. R., 8 Eq. 46.

248 and is for the benefit of some of the creditors to the exclusion of others (*h*).

Fraudulent transfers—Absence of a valuation or appraisement.—If there has been no proper valuation or appraisement of the property prior to the assignment, this is a circumstance from which it may be inferred that the transfer was not meant to be a real one (*i*).

Fraudulent transfers—Inadequacy of price.—If the purchase-money, or consideration for the transfer, appears to be wholly inadequate, this is a badge of fraud (*k*); but a sale at a low price is not on that account alone necessarily fraudulent (*l*). Where the defendant was indebted to Twyne in 400*l.*, and to the plaintiff in 200*l.*, and, pending the plaintiff's action, the defendant made a general deed of gift of all his goods and chattels to Twyne in satisfaction of his debt, but, nevertheless, continued in possession of the said goods and chattels, and dealt with them as his own, and the plaintiff afterwards recovered judgment against the defendant and issued execution, and the question was, whether the deed was fraudulent under the statute of 13 Eliz. c. 5, it was resolved that it had signs and marks of fraud:—1. Because it was a general grant of all his chattels without excepting wearing apparel or things of necessity; for it is commonly said *quod dolosus versatur in generalibus.* 2. The grantor continued in possession and used the goods as his own, and by reason thereof traded and trafficked with others (*m*). 3. It was made in secret; *et dona clandestina sunt semper suspiciosa.* 4. It was made pending the writ. 5. There was a trust between the parties; for the donor possessed all, and used them as his proper goods; and trust is the cover of fraud. Secondly, it was resolved that, notwithstanding there was a true debt due to Twyne, and a good consideration for the gift, yet it was not within the proviso of the Act of Elizabeth, saying that the Act shall not extend to any estate or interest in goods and chattels made on good consideration and *bonâ fide;* for, although it is on a true and good consideration, yet it is not *bonâ fide;* for no grant shall be deemed *bonâ fide* within the said proviso which is accompanied with a trust. As, if a man be indebted to five several persons in the several sums of 20*l.* and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the grantee shall deal favourably with him in regard of his poor estate, either to permit the grantor, or some other person for him or for his benefit, to use

(*h*) *Alton* v. *Harrison*, L. R., 4 Ch. 622. *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47.
(*i*) *Twyne's case, infra.*
(*k*) *Dewey* v. *Bayntun*, 6 Exch. 281.
(*l*) *Lee* v. *Hart*, 10 Exch. 560.
(*m*) *Paget* v. *Perchard*, 1 Esp. 204.

249 or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bonâ fide* within the said proviso; and so a good consideration does not suffice, if it be not also *bonâ fide*. And, therefore, when any grant of goods is made in satisfaction of a debt by one who is indebted to others, it should be made in the presence of witnesses, and the goods should be appraised to their full value, and possession taken of them after the execution of the deed of grant (*n*).

Fraudulent transfers—Transfer of possession.—Where there is no assignment in writing, the fact that the debtor remains in possession of the goods is a strong mark of fraud, unless the transfer of the property is so notorious as to rebut the presumption of fraud (*o*); for, where the transaction is perfectly notorious, so that the continuance of possession of the property does not create any false credit in the neighbourhood, the mere continuance of possession is not necessarily fraudulent (*p*).

Voluntary transfers — Transfers void against creditors. — A voluntary settlement is void as against creditors, if the settlor was largely indebted at the time when it was made (*q*), or made it with a view to a state of things in which he might become indebted, as, for instance, on the eve of engaging in trade of a hazardous character (*r*). But, if a voluntary settlement is impeached by a subsequent creditor, whose debt was not contracted at the date of the settlement, it must be shown that the necessary result of the settlement was to delay, hinder, and defraud the creditors, in which case it is a probable presumption of fact that the settlement was made with that intent (*s*); and, in the case of a post-nuptial settlement, although the husband may not be in debt at the time he makes the settlement, yet, if the settlement is made long after the marriage, and not in pursuance of any agreement to make a settlement prior to the marriage, nor in consequence of an accession to the wife's fortune, and the husband becomes indebted to any considerable extent immediately afterwards, the settlement will be considered fraudulent. But it will be otherwise, if the husband received property from the wife at the time of the marriage, and made the post-nuptial settlement as a fair and equitable provision

(*n*) *Twyne's case*, 3 Co. 80; 1 Smith's L. C. 1.

(*o*) *Latimer* v. *Batson*, 4 B. & C. 654; 1 Smith's Lead. Cas., 5th ed. 12, 13.

(*p*) *Leonard* v. *Baker*, 1 M. & S. 254. *Kidd* v. *Rawlinson*, 2 B. & P. 60. *Watkins* v. *Birch*, 4 Taunt. 822. *Jeeph* v. *Ingram*, 8 Ib. 843.

(*q*) *Took* v. *Tuck*, 12 Moore, 435. *Townsend* v. *Windham*, 2 Ves. sen. 11. *Young* v. *Fletcher*, 3 H. & C. 732; 34 L. J., Ex. 154. As to fraudulent settlement by persons who become bankrupts, see *post*, p. 252.

(*r*) *Mackay* v. *Douglas*, L. R., 14 Eq. 106; 41 L. J., Ch. 539.

(*s*) *Freeman* v. *Pope*, L. R., 5 Ch. 538; 39 L. J., Ch. 689. *Taylor* v. *Coenen*, 1 Ch. D. 636. See *Ex parte Mercer*, 17 Q. B. D. 290.

250 for her, he being at the time in solvent circumstances (*t*); or if the settlement contains a provision for the payment of the husband's debts out of the settled property (*u*). If the husband, after marriage, conveys his furniture, stock, and movables to trustees for the use of his wife and children, and remains, notwithstanding such conveyance, the apparent possessor and owner of the property, the conveyance so made is *primâ facie* a fraud as regards creditors (*x*). But the possession by the husband and wife of property, stock-in-trade, and furniture, limited to the separate use of the wife before marriage, is no badge of fraud, and does not render it liable to be seized for the husband's debts (*y*). A marriage settlement, so far as it is made in favour of collaterals, is voluntary (*z*). Where a solicitor, being in insolvent circumstances, assigned the good-will of his business in consideration of a sum of money paid down and an annuity, secured by bond, to be paid to his wife for life, with remainder to himself for life, it was held that the settlement of the annuity was void as against creditors. "This," observed Wood, V.-C., "is, in effect, a contract by which the debtor is making sale of his property by means of a covenant that he will abstain from carrying on business, and taking a settlement upon his wife for life for her separate use, with the immediate remainder to himself for life, the whole object plainly being to obtain the benefit of the entire property for his own use and advantage" (*a*). A creditor under a voluntary *post-obit* bond is as much entitled to the benefit of the statute as any other creditor (*b*).

Voluntary transfers — Avoidance by subsequent purchasers. — Voluntary conveyances, gifts, and transfers, defrauding subsequent purchasers, are made void by the 27 Eliz. c. 4, s. 2; and penalties are imposed (s. 3) upon all persons who are parties or privies to such conveyances, &c.; but any conveyance, lease, &c., made *bonâ fide* upon good consideration, is not invalidated. This statute is to a great extent declaratory only of the common law, which invalidates every voluntary conveyance or gift and voluntary settlement of property made without valuable consideration as against a subsequent purchaser for value of the same property, even though he had notice of the prior voluntary conveyance or settlement; for, whenever the question is between one who has paid a

(*t*) *Lush* v. *Wilkinson*, 5 Ves. 384. *Battersbee* v. *Farrington*, 1 Swanst. 106. *Holloway* v. *Millard*, 1 Mad. 419. *Nunn* v. *Wilsmore*, 8 T. R. 529.

(*u*) *Gorge* v. *Milbank*, 9 Ves. 194.

(*x*) *Arundel* v. *Phipps*, 10 Ves. 139.

(*y*) *Jarman* v. *Woolloton*, 3 T. R. 618. *Cadogan* v. *Kennett*, 2 Cowp. 436. *Haselinton* v. *Gill*, 3 T. R. 620, n.; 3 Doug. 415.

(*z*) *Smith* v. *Cherrill*, L. R., 4 Eq. 390.

(*a*) *Neale* v. *Day*, 28 L. J., Ch. 45. *French* v. *French*, 6 De G. M. & G. 102.

(*b*) *Adames* v. *Hallett*, L. R., 6 Eq. 468.

251 valuable consideration for an estate and another who has given nothing for it, it is a just presumption of law that such voluntary conveyance founded only on considerations of affection and regard, if coupled with a subsequent sale, was made to defraud those who should afterwards become purchasers for a valuable consideration; and it is more fit that a voluntary grantee should be disappointed than that a fair purchaser should be defrauded (*c*). If, therefore, after marriage, either the husband or wife make a conveyance of lands to the use of themselves or their children, such conveyance is absolutely null and void against a subsequent purchaser for value, although he bought with notice of the settlement (*d*), unless it was made pursuant to an agreement in writing entered into prior to the marriage (*e*); but, if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without valuable consideration (*f*). A deed cannot be set aside merely because it is a voluntary conveyance; and one voluntary conveyance cannot defeat another. It has also been held that, if there are two voluntary conveyances or gifts of land by deed, the first voluntary conveyance is not annulled by the second, and that a purchaser from the second voluntary grantee or donee cannot avoid the estate created by the first gift; so that, if a man makes a voluntary conveyance or gift of land to *A*, and then devises the same land to *B*, and *B* sells to *C* for value, *C* has no title to such land, and cannot defeat the gift to *A* (*g*). A husband acquiring an estate by marriage, or under a post-nuptial settlement not made in pursuance of articles entered into before marriage, is not a purchaser within the meaning of the statute, and is not entitled to avoid a previous voluntary conveyance (*h*). In considering the operation of the statute, the court only considers whether the transaction is one purely voluntary, or whether it is one of bargain; and the mere *quantum* of consideration is not material (*i*). Evidence is admissible to show valuable consideration beyond what appears on the face of the deed (*k*). A conveyance,

252 though voluntary upon the face of it, and at first void against

(*c*) *Doe* v. *Manning*, 9 East, 59. *Clarke* v. *Wright*, 6 H. & N. 849; 30 L. J., Ex. 113.

(*d*) *Gooch's case*, 5 Co. 60 a. *Evelyn* v. *Templar*, 2 Br. C. C. 148. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84. *Buckle* v. *Mitchell*, ib. 110. *Johnson* v. *Legard*, 6 M. & S. 60. *Peter* v. *Nicolls*, L. R., 11 Eq. 391.

(*e*) *Goldinett* v. *Townsend*, 28 Beav. 445.

(*f*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 85; 5 Ch. D. 630; 46 L. J., Ch. 725. *In re Foster and Lister*, 6 Ch. D. 87; 46 L. J., Ch. 480.

(*g*) *Doe* v. *Rusham*, 21 L. J., Q. B. 139; 16 Jur. 359.

(*h*) *Douglas* v. *Ward*, 1 Ch. C. 99. *Doe* v. *Lewis*, 20 L. J., C. P. 180.

(*i*) *Townend* v. *Toker*, L. R., 1 Ch. 446; 35 L. J., Ch. 608. *Bayspoole* v. *Collins*, L. R., 6 Ch. 228; 40 L. J., Ch. 289.

(*k*) *Townend* v. *Toker*, *supra*.

a purchase for value, may yet become valid by force of subsequent events (*l*).

If a general power of revocation is reserved in a settlement of realty, or if the exercise of such a power is made to depend upon the consent of persons under the influence and control of the settlor, the settlement cannot be supported against creditors, nor against subsequent purchasers. If the settlor reserves to himself the power of charging the land to "the full value," this reservation is tantamount to a general power of revocation, and defeats the settlement (*m*).

Voluntary transfers—Avoidance by trustees in bankruptcy.—By the Bankruptcy Act, 1883, sect. 47 (*n*), it is further provided that any settlement (conveyance, or transfer of property), shall be void against the trustee, if the settlor becomes bankrupt within two years from the date of the settlement, and shall also be void if the settlor becomes bankrupt within ten years, unless the parties claiming under the settlement can prove that at the date of the settlement the settlor was able to pay all his debts without the aid of the property comprised in it, and that the interest of the settlor had passed to the trustee on the execution of it. But this section does not apply to settlements made before, and in consideration of, marriage, nor to a purchaser (*o*) or incumbrancer in good faith and for valuable consideration, nor to settlements, &c., made on the settlor's wife or children, of property which has accrued to him in right of his wife after marriage. Any covenant or contract made in consideration of marriage for the future settlement of property in which he had not at the time of the marriage any interest vested or contingent, is also void against the trustee, if the property has not been transferred, or money, &c., paid, before the bankruptcy; but this does not apply to property to which the bankrupt becomes entitled in right of his wife (*p*). The similar section of the Act of 1869 was held to apply to settlements made before, as well as after, that Act came into operation (*q*). Under the same section it was held that the value of the implements of a man's trade, or the good-will of his business, if he was intending to carry it on, cannot be reckoned (except at a forced sale price) in ascertaining his state of solvency at the time of making the settlement (*r*). A gift of money to a son to start him in business is not
253 a settlement of property within the meaning of sect. 47 of the Act of 1883 (*s*).

(*l*) *Prodgers* v. *Langham*, 1 Sid. 133. *Clarke* v. *Willott*, L. R., 7 Ex. 313; 41 L. J., Ex. 197.

(*m*) *Tarback* v. *Marbary*, 2 Vern. 510.

(*n*) Sub-sect. (3).

(*o*) "Purchaser" means "buyer" in the ordinary sense. *Ex parte Hilman*, 10 Ch. D. 622; 48 L. J., Bk. 77.

(*p*) Sub-sect. (2).

(*q*) *Ex parte Dawson*, L. R., 19 Eq. 433; 44 L. J., Bk. 49.

(*r*) *Ex parte Russell*, 19 Ch. D. 588; 51 L. J., Ch. 521.

(*s*) *In re Player*, 15 Q. B. D. 682; 54 L. J., Q. B. 553.

Voidable transfers—Act of bankruptcy—Transfers to trustees for creditors.—The 4th section, sub-sect. (a) of the Bankruptcy Act (*t*) provides, that any conveyance or assignment by a debtor of his property to a trustee or trustees for the benefit of his creditors generally shall be an act of bankruptcy.

Voidable transfers—Act of bankruptcy—Fraudulent transfers.—The 4th section, sub-sect. (b) also enacts that any fraudulent conveyance, gift, delivery, or transfer by a debtor of his property, or of any part thereof, shall be an act of bankruptcy. A transfer is fraudulent within the meaning of this section when it is a fraudulent transfer at common law, or under the 13 Eliz. c. 5, or when it is a transfer of the whole of a debtor's property in favour of one or more creditors, to the exclusion of the others, or when it is a voluntary transfer of part of a debtor's property in contemplation of bankruptcy.

The 4th section, sub-sect. (c) also enacts that the debtor commits an act of bankruptcy, if in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt (*u*).

Voidable transfers—Act of bankruptcy—Transfers void as against creditors.—We have already seen that a transfer is void against creditors, either when it is fraudulently devised to delay or defraud them of their actions (*x*), or when it is a voluntary transfer by a person who is so largely indebted at the time that the necessary result of it is to delay or defraud the creditors (*y*).

Voidable transfers—Act of bankruptcy—Transfers of all the debtor's property.—A transfer need not necessarily be fraudulent in fact, or voluntary, to make it an act of bankruptcy. An assignment by a debtor of his property to a trustee for the benefit of some creditors to the exclusion of others, notwithstanding any amount of pressure, is an act of bankruptcy; for any scheme or arrangement made by a person on the eve of bankruptcy for the distribution of his assets otherwise than according to the provisions of the bankruptcy laws is a plain and palpable fraud on those laws (*z*). An assignment, even under pressure, of all a debtor's
254 property for a past debt is an act of bankruptcy (*a*), whether it is made by a trader or by a non-trader (*b*); and so is a mortgage by a trader of the whole of his property to secure an antecedent debt,

(*t*) 46 & 47 Vict. c. 52.

(*u*) This provision was not contained in the older statutes, and it was doubted whether a fraudulent preference was an act of bankruptcy. *Ex parte Halliday*, L. R., 8 Ch. 283. *Ex parte Stubbins*, 17 Ch. D. 58; 50 L. J., Ch. 547. As to what is a fraudulent preference, see *post*, p. 256.

(*x*) *Ante*, p. 247.

(*y*) *Ante*, p. 249.

(*z*) *Tomkins* v. *Saffery*, L. R., 3 App. Cas. 213; 47 L. J., Bk. 11.

(*a*) *Johnson* v. *Fesenmeyer*, 25 Beav. 88; 3 De G. & J. 13.

(*b*) *In re Wood*, L. R., 7 Ch. 302; 41 L. J., Bk. 21.

although it has not the effect of stopping his trade, and although, when the trusts of the mortgage-deed are carried out, there will be a substantial surplus which may prevent the deed from ultimately defeating the creditors (*c*); for it enables the trader to continue his trade under a false appearance of a possession of stock, property, and effects, and to gain a delusive credit, when he is in fact insolvent (*d*). "Creditors," observes Lord Mansfield, "dealing with traders whose apparent, available, personal property is thus mortgaged, are deceived by false appearances; and such mortgages are a fraud upon the whole bankrupt law, as they defeat the main object it has in view, viz., the equal distribution of the bankrupt's property and effects amongst his creditors, by securing to the mortgagee an unjust preference" (*e*). And it has been held that, although the mortgage-deed does not purport, upon the face of it, to convey all the trader's movables and effects, yet, if it does, in fact, substantially convey all, and puts it in the power of the mortgagee to take possession at any time and sell, in default of payment of the mortgage-debt on demand, the conveyance constitutes an act of bankruptcy (*f*). It matters not that the deed was obtained under pressure, and was an unw[illegible]ing act forced upon the bankrupt, or what were the circumstances under which it was obtained; it is enough that it enables the trader to carry on trade under the delusive appearance of being the owner of personal property, when he has not a single article unaffected by the mortgage-deed (*g*).

Where an advance of 55*l.* was made to a trader on the security of a bill of sale of all his goods and effects worth 600*l.*, and pursuant to an agreement between the lender and the trader the bill of sale was renewed at intervals of nineteen days so as to render it unnecessary to register it, and the trader became bankrupt, it was held that the subsequent bill of sale was given for a past debt, and, being a conveyance of the whole of the debtor's property, was an act of bankruptcy (*h*). A merely nominal **255** exception of part of the property will not prevent this (*i*); but an exception of a substantial part will prevent it (*k*). If the assignment includes all the property, and is made in considera-

(*c*) *Smith* v. *Cannan*, 2 El. & Bl. 35. *Ex parte Wensley*, 1 De G. J. & S. 273; 32 L. J., Bk. 23. *Young* v. *Fletcher*, 3 H. & C. 732; 34 L. J., Ex. 154.

(*d*) *In re Wood*, L. R., 7 Ch. 302; 41 L. J., Bk. 21.

(*e*) *Worseley* v. *De Mattos*, 1 Burr. 479. *Hale* v. *Abnutt*, 18 C. B. 505. *Reynolds* v. *Hall*, 4 H. & N. 519; 28 L. J., Ex. 257.

(*f*) *Lindon* v. *Sharpe*, 6 M. & G. 904; 7 Sc. N. R. 730. *Ex parte Foxley*, L. R., 3 Ch. 519.

(*g*) *Ex parte Bailey*, 3 De G. M. & G. 534; 22 L. J., Bk. 45. *Ex parte Chaplin*, 26 Ch. D. 319; 53 L. J., Ch. 732.

(*h*) *Ex parte Cohen*, L. R., 7 Ch. 20; 41 L. J., Bk. 17. *Ex parte Stevens*, L. R., 20 Eq. 786; 44 L. J., Bk. 136. *Ex parte Payne*, 11 Ch. D. 590.

(*i*) *Ex parte Hawker*, L. R., 7 Ch. 214; 41 L. J., Bk. 34. *Ex parte Dann*, *infra*.

(*k*) *Smith* v. *Timms*, 1 H. & C. 849; 32 L. J., Ex. 215. *Young* v. *Waud*, 8 Exch. 221.

tion of a past debt and of a further advance made at the time, the further advance, if substantial, has the same effect as a substantial exception out of the property, and the assignment is not an act of bankruptcy (*l*), although the advance is for the purpose of satisfying an existing debt (*m*), and although there is power to seize all after-acquired property (*n*). An assignment of substantially the whole of the debtor's property to secure a previously existing debt and further advances is not an act of bankruptcy, if there is a contemporaneous parol agreement on the part of the mortgagee to make further advances to a sufficient amount, and such advances are afterwards in fact made, even though the deed contains no covenant or obligation on the part of the mortgagee to make any further advances (*o*). In each case, looking at all the circumstances, the questions are—Does the assignment include all the property or is there a substantial exception? Is it wholly to secure a pre-existing debt? And, if there is a further advance, is it a substantial one, or only one intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt (*p*)? In order not to be an act of bankruptcy the assignment must contain an agreement binding the grantee to make further advances (*q*). To be substantial the advance need not necessarily consist of a sum of money paid down. Thus payment of bills by the drawer at the request of the acceptor, who in consideration thereof assigned to the drawer all his property to secure the amount, and also to secure certain past debts, has been held to be a substantial advance (*r*). But the withdrawal of an execution or the mere giving of time to a debtor by his creditor is not a sufficient equivalent for a conveyance of all the debtor's property (*s*). If a bill of sale is subsequently given in pursuance of an agreement entered into at the time of the further advance, it stands on the same footing as if it had been given at the time of the further advance, unless the giving of the bill of sale is

256 purposely postponed until the circumstances of the debtor become hopeless (*t*). It makes no difference that there was a previous agreement to sell or mortgage (*u*).

(*l*) *Allen* v. *Bonnett*, L. R., 5 Ch. 577. *Ex parte Foxley*, L. R., 3 Ch. 515.

(*m*) *Lomax* v. *Buxton*, L. R., 6 C. P. 107; 40 L. J., C. P. 150.

(*n*) *Hutton* v. *Cruttwell*, 1 El. & Bl. 15; 22 L. J., Q. B. 28.

(*o*) *Ex parte Winder*, 1 Ch. D. 290; S. C. on app., nom. *Ex parte Sheen*, *ib.*, 560; 45 L. J., Bk. 89.

(*p*) *Ex parte King*, 2 Ch. D. 256; 45 L. J., Bk. 109. *Ex parte Johnson*, 26 Ch. D. 338; 53 L. J., Ch. 762.

(*q*) *Ex parte Dann*, 17 Ch. D. 26. *Ex parte Wilkinson*, 22 Ch. D. 788; 52 L. J., Ch. 657.

(*r*) *Ex parte Reed*, L. R., 14 Eq. 586.

(*s*) *Woodhouse* v. *Murray*, L. R., 2 Q. B. 634; 4 Q. B. 27; 38 L. J., Q. B. 28. *Ex parte Cooper*, 10 Ch. D. 313; 48 L. J., Bk. 54, disapproving of *Philps* v. *Hornstedt*, 1 Ex. D. 62. *Ex parte Payne*, 11 Ch. D. 539.

(*t*) *Ex parte Fisher*, L. R., 7 Ch. 636; 41 L. J., Bk. 62. *Ex parte Burton*, 13 Ch. D. 102.

(*u*) *Ex parte Kilner*, 13 Ch. D. 245. *Ex parte Hauxwell*, 23 Ch. D. 626; 52 L. J. Ch. 737.

A sale by a debtor of the whole of his stock-in-trade to a *bonâ fide* purchaser for a fair price (*x*), or a mortgage of the whole for a present advance (*y*), does not necessarily constitute an act of bankruptcy, although the creditors may ultimately be delayed or defeated, and the misapplication of the proceeds was contemplated by the trader at the time of the sale or mortgage, because the trader gets a present equivalent. It would be otherwise, however, if the assignee had express or implied notice that the bankrupt was selling with a fraudulent intention (*z*). Where there is no intention at the time on the part of the debtor or his creditor to convey away all the property, although it afterwards turns out that that is the effect of what has been done, there is no fraudulent conveyance within the meaning of the Act (*a*).

Voidable transfers—Act of bankruptcy—Fraudulent preference.—It was doubtful whether a fraudulent preference would be void as an act of bankruptcy (*b*); but now by sect. 4, sub-sect. (c). a fraudulent preference is made an act of bankruptcy (*c*). Where it cannot be avoided as an act of bankruptcy, it may still be avoided under sect. 48, which enacts that every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, is (if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same) to be deemed fraudulent and void as against the trustee in the bankruptcy; but the section is not to affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. It was formerly held that the similar section of the Act of 1869 had not altered the law with respect to fraudulent preferences, and that it was still necessary, in order to

257 constitute a fraudulent preference, that the conveyance or transfer should be made voluntarily and in contemplation of bankruptcy, and that, if made upon pressure, the intention of the bankrupt to prefer one creditor to another was not material (*d*).

(*x*) *Baxter* v. *Pritchard*, 1 Ad. & E. 456. *Bell* v. *Simpson*, 2 H. & N. 410; 26 L. J., Ex. 363. *Whitmore* v. *Claridge*, 2 B. & S. 213; 33 L. J., Q. B. 87.

(*y*) *In re Colmore*, L. R., 1 Ch. 128; 35 L. J., Bk. 8.

(*z*) *Fraser* v. *Levy*, 6 H. & N. 16.

(*a*) *Philps* v. *Hornstedt*, L. R., 8 Ex. 26; 1 Ex. D. 72. But see *Ex parte Cooper*, 10 Ch. D. 313, *supra*.

(*b*) *Bacon* v. *Liffen*, 4 Giff. 75; 32 L. J., Ch. 25, 315. *Bills* v. *Smith*, 34 L. J., Q. B. 68. *Ex parte Halliday*, L. R., 8 Ch. 283. *Ex parte Stubbins*, 17 Ch. D. 58; 50 L. J., Ch. 547.

(*c*) *Ante*, p. 253.

(*d*) *Ex parte Tempest*, L. R., 10 Eq. 648; 6 Ch. 70; 40 L. J., Bk. 22. *Ex parte Topham*, L. R., 8 Ch. 614.

The more modern cases go to show that there may be a substantial fraudulent preference, although coupled with a *bonâ fide* pressure of the bankrupt, and that although the old cases may serve as a guide to the interpretation of the words of the statute, yet the decision will now turn on the construction of the statute and not on the consideration of the old cases (*e*).

If the payment is made without any view of preferring one creditor to another, it is not a fraudulent preference, although made by a person unable to pay his debts as they become due (*f*).

If goods have been delivered to a creditor by way of fraudulent preference, and have been sold by him before the bankruptcy, the trustee may, nevertheless, recover the proceeds from the creditor (*g*).

Payments in the ordinary course of trade, honouring bills of exchange presented at maturity, payments of debts which have become due in the usual and customary manner, and payments made in fulfilment of a contract or engagement to pay in a particular manner or at a particular time, although made without any express demand by the creditor are not voidable as fraudulent preferences (*h*).

By sect. 25 (2), no payment or composition made, or security given, after arrest under that section, is exempted from the provisions of the Act, relating to fraudulent preferences.

The creditor of an insolvent debtor, who dies without having been adjudicated bankrupt, is entitled to the benefit of any payment or security made or given by the debtor, although such payment or security would, in case of bankruptcy, have been set aside as a fraudulent preference (*i*).

Fictitious transfers.—By the 7 & 8 Wm. 3, c. 25, s. 7, it is enacted that all conveyances of any messuages, lands, tenements, &c., in order to multiply voices, or to split and divide the interest in any houses and lands among several persons to enable them to vote at elections, shall be "void and of none effect;" and the 10 Anne, c. 23, s. 1, enacts that all estates and conveyances made to any person in any fraudulent or collusive manner,
258 on purpose to qualify him to give his vote at elections (subject to conditions or agreements to defeat or determine such estate, or to re-convey the same), shall be deemed and taken, against those persons who executed the same, as free and absolute, and be holden and enjoyed by such persons, discharged from all manner

(*e*) *Ex parte Griffith*, 23 Ch. D. 69. *Ex parte Hill*, 23 Ch. D. 695; 52 L. J., Ch. 903. *Ex parte Hall*, 19 Ch. D. 580.

(*f*) *Ex parte Bolland*, L. R., 7 Ch. 24; 41 L. J., Bk. 60.

(*g*) *Marks* v. *Feldman*, L. R., 5 Q. B. 275; 39 L. J., Q. B. 101.

(*h*) *Ex parte Blackburn*, L. R., 12 Eq. 353; 40 L. J., Bk. 79.

(*i*) *Middleton* v. *Pollock*, 2 Ch. D. 104; 45 L. J., Ch. 293.

of trusts, conditions, clauses of re-entry, powers of revocation, provisoes of redemption, or other defeasances whatsoever for defeating such estates or for the re-conveying thereof. A deed may be void by statute, and yet it may not be competent to the parties thereto to set up its invalidity: and it has been held that the true construction of these two statutes is that, dealing only with the subject of parliamentary law, they prevent a man from acquiring a right to vote which it was contrary to the policy of the law he should acquire, but that they leave the conveyance to operate upon the land freely and absolutely in all other respects (*k*).

Injuries to rights of property by words spoken.—Where the injury to a right of property consists in an act done, the nature of the act depends so much on the nature of the property, that it is more convenient to consider the injuries of which different rights of property are susceptible after considering the respective rights; but, where the injury complained of consists in words spoken, the nature of the injury is so similar, and it is followed by such similar consequences, in the case of all kinds of property, that it will be more convenient to consider injuries of that nature in this place.

Injuries to rights of property—Slander of title.—If lands or chattels are about to be sold by auction, and a man declares in the auction-room, or elsewhere, that the vendor's title is defective, that the lands are mortgaged, or that the chattels are stolen property, and so deters people from buying, or causes the property to be sold for a less price than it would otherwise have realized, this is a slander upon the title of the owner, and gives him a *primâ facie* claim for compensation in damages (*l*). "An action for slander of title," observes Tindal, C. J., "is not properly an action for words spoken, or for a libel written and published, but an action on the case for special damage, sustained by reason of the speaking or publication of the slander of the plaintiff's title. It is ranged under that division of actions in the Digests, and by other writers on the text law." The plaintiff, in order to sustain the action, must prove special damage resulting from the slander. Where, therefore, a shareholder in a mining company complained of a

(*k*) *Philpotts* v. *Philpotts*, 10 C. B. 85. *Doe* v. *Roberts*, 2 B. & Ald. 367.

(*l*) *Gerard* v. *Dickenson*, 4 Rep. 18 a. Cro. Eliz. 196. *Gutsole* v. *Mathers*, 1 M. & W. 501. *Wren* v. *Weild*, L. R., 4 Q. B. 730; 38 L. J., Q. B. 327. *Bailey* v. *Dean*, 5 Barb. (N. Y.) 297; *In re Madison Ave. Baptist Church*, 26 How. Pr. (N. Y.) 72. Of course, in order to operate as a slander of title, the statement must be *false*, for if the title is affected with the infirmity suggested, there is no actionable slander, however malicious the motive may have been which actuated it: *Griffon* v. *La Blanc*, 12 La An 5; *Hill* v. *Ward*, *ante*. Therefore, the burden is upon the plaintiff to prove, not only the speaking of the words, but also their falsity, and the special damage resulting therefrom: *Kendall* v. *Stone*, *ante*; *Like* v. *McKinstry*, *ante*.

259 paragraph in a newspaper, asserting that a bill had been filed in Chancery invalidating his title to his shares, whereby he was injured in his rights and his shares were depreciated in the market, and he was prevented from selling them, it was held that this was not such an allegation of special damage as the law required in such actions, and that the necessity for an allegation of special damage does not in anywise depend upon the medium through which the slander is disseminated: that is, whether it is through words, or writing, or print (*m*). "To support the action," observes Parke, B., "it ought to be shown that the false statement was made *malâ fide*, and that the special damage ensues therefrom. If some portions of the statement are *bonâ fide*, the injured party cannot recover, unless he can distinctly trace the damage as resulting from that part which is *malâ fide*" (*n*).

To enable a party, moreover, to maintain an action for slander of title, the words spoken must go to defeat the plaintiff's title. If the words are spoken by a stranger who has no right or business to interfere, he is responsible in damages if he cannot show the truth of his assertion; but, if he is himself interested in the matter, and announces the defect of title *bonâ fide*, either for the purpose of protecting his own interest or preventing the commission of a fraud, the plaintiff must show that there was no reasonable or probable ground for the statement (*o*). If the alleged slanderer of title is himself interested, or has fair and reasonable ground for believing himself to be interested, in the sale or disposition of the property the title to which is alleged to be slandered, and has acted *bonâ fide*, though under the influence of prejudice or misconception, he is not responsible in damages, unless it is shown that he must have known that there was not the slightest pretence for his interference. "The *bona fides* of the communication," observes Lord Ellenborough, "and not whether a man of rational understanding would have made it, is the question to be canvassed" (*p*). In an action for slandering the plaintiff's title to a patent, therefore, it is not sufficient to show that the defendant wrote to persons in negotiation with the plaintiff for the purchase of patented articles from him, stating that such articles were an infringement of a patent of his, the

(*m*) *Malachy* v. *Soper*, 3 Bing. N. C. 371; 3 Sc. 737.

(*n*) *Brook* v. *Rawl*, 4 Exch. 524. The words must not only have been spoken maliciously, but must also have resulted in a direct pecuniary damage (*Like* v. *McKinstry*, 41 Barb. (N. Y.) 186; *Kendall* v. *Stone*, 5 N. Y. 14; *Paull* v. *Halferty*, 63 Penn. St. 46; *Ross* v. *Pines*, Wythe (Va.) 71; *Linden* v. *Graham*, 1 Duer (N. Y.) 670; *McDaniel* v. *Bacon*, 2 Cal. 326; *Hill* v. *Ward*, 13 Ala. 310), and must be of such a character as goes directly to defeat the plaintiff's title: *Ross* v. *Pines*, *ante*; and preventing a person from raising money upon a mortgage has been held sufficient special damage: *Linden* v. *Graham*, *ante*.

(*o*) *Hargrave* v. *Le Breton*, 4 Burr. 2423. *Smith* v. *Spooner*, 3 Taunt. 253. *Steward* v. *Young*, L. R., 5 C. P. 122; 39 L. J., C. P. 85.

(*p*) *Pitt* v. *Donovan*, 1 M. & S. 648.

defendant's, and that he should claim royalties from them, if the defendant really had an existing patent for somewhat similar articles, and no evidence of *mala fides* is given (*q*). But threats of

260 legal proceedings are not justifiable, where they are made *malâ fide*, and there is no *bonâ fide* intention of following up the threats by taking proceedings. Thus a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention of following up his threats by taking such proceedings (*r*).

"Slander of title," observes Maule, J., "ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false. It is essential also that it should be malicious; not, as Lord Ellenborough observes, malicious in the worst sense, but with intent to injure the plaintiff. If the statement is true—if there really is the infirmity of title that is suggested—no action will lie, however malicious the defendant's intention may be. The jury may infer malice from the absence of probable cause; but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action" (*s*). Where a defendant, knowing that there had been no agreement between him and the plaintiff for a lien on the plaintiff's goods, falsely pretended that he was entitled to a lien on them, and made the representation without any reasonable foundation for it, and from improper and malicious motives, and damage resulted therefrom to the plaintiff, it was held that the defendant was bound to make compensation to the plaintiff for the wrong done to him (*t*).

SECTION II.

INJURIES TO RIGHTS OF PROPERTY IN LAND.

Rights of property in land generally.—Rights to land form the most important branch of the rights of property, and differ in many respects from other rights of property having a corporeal object. "Land, which is immovable and indestructible, is evidently a different species of property from a cow or a sheep, which

(*q*) *Wren* v. *Weild*, L. R., 4 Q. B. 730; 38 L. J., Q. B. 327. *Halsey* v. *Brotherhood*, 15 Ch. D. 514; 49 L. J., Ch. 786.

(*r*) *Rollins* v. *Hinks*, L. R., 13 Eq. 355; 41 L. J., Ch. 353. *Axmann* v. *Lund*, L. R., 18 Eq. 330; 43 L. J., Ch. 655.

(*s*) *Pater* v. *Baker*, 3 C. B. 868.

(*t*) *Green* v. *Button*, 2 C. M. & R. 716.

261 may be stolen, killed, and eaten, or from a chair or a table, which may be broken up or burnt. No man, be he ever so feloniously disposed, can run away with an acre of land. The owner may be ejected; but the land remains where it was: and he who has been wrongfully turned out of possession may be reinstated in the identical portion of land from which he has been removed" (*u*).

The highest right to land known to the law is that of the tenant in fee simple in possession, who is entitled to use and enjoy the land in any way which is not inconsistent with the rights of the public generally or of adjoining landowners, as those rights are defined and recognised by the law. The tenant in fee simple may alienate his rights either wholly or partially during his lifetime, and at his death may by his will designate, within certain limits, the persons who are to succeed to the rights which he has not disposed of while living. The ownership of the land carries with it everything both above and below the surface, according to the maxim of our law, *cujus est solum, ejus est usque ad cœlum*.

Title and seisin may be proved by proof of the pernancy of the rents and profits of land, and of the exercise of acts of ownership over land; and the exercise of acts of ownership may be established by the production of expired and ancient leases, or counterparts of leases, executed by deceased persons or their deceased lessees (*x*): and declarations of deceased occupiers of land, as to the parties under whom they held, are admissible in evidence to show who was the owner of the inheritance in their time (*y*). Entries by a deceased agent of the plaintiff charging himself with the receipt of money as rent are admissible for the same purpose, although the defendant does not claim through the person so proved to have paid rent (*z*).

Rights of property in land—Acquisition of title by occupation.—Possession is *prima facie* evidence of a seisin in fee, and is good against all the world except the person who can show a better title. A person who has a title by occupation only may devise his interest; and the devisee will have a good title against every one but the true owner, and may maintain an ejectment against a person who has entered upon the land, and cannot show title or possession in any one prior to the testator (*a*). Occupation, if continued for a sufficiently long time, would formerly by prescription, and will now under the Statutes of Limitation, confer a good title even against the true owner. A title by prescription may be

(*u*) Williams's Principles of the Law of Real Property, p. 1.

(*x*) *Doe* v. *Palman*, 3 Q. B. 622. And see, as to land-tax assessments being evidence of seisin, *Doe* v. *Arkwright*, 2 Ad. & E. 182.

(*y*) *Peaceable* v. *Watson*, 4 Taunt. 16. *Doe* v. *Coulthred*, 7 Ad. & E. 235.

(*z*) *Doe* v. *Stacey*, 6 C. & P. 139.

(*a*) *Asher* v. *Whitlock*, L. R., 1 Q. B. 1; 35 L. J., Q. B. 17. See *Nagle* v. *Shea*, Ir. Rep., 8 C. L. 224.

262 acquired against the Crown; for, from long possession, a presumption is raised that the Crown has either granted an exclusive right to the person in possession, or has permitted him to have possession and employ his money and labour upon the land, so as to confer on him a title by occupation, the foundation of most of the rights to property in land (*b*).

Title by occupation—The Statutes of Limitation.—The right to land may be barred, and a new title conferred, by the Statutes of Limitation (*c*). By the Real Property Limitation Act, 1874 (*d*), it is enacted that after the commencement of that Act (*e*), no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within *twelve years* (*f*) next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twelve years (*f*) next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same (*g*). When the person claiming any land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, then the right is to be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any profit or rent was so received (*h*). The effect of these sections is to put an end to all questions whether the possession of the land has been adverse or not. If another person has been in actual possession, whether adversely or not, the claimant is barred when the right of entry on which he relies first accrued above twelve years before bringing the action (*i*).

Title by occupation—What is a loss of possession.—The words "discontinuance of possession" mean an abandonment of possession by one person followed by the actual possession of some other person; for, if no one succeeds to the possession vacated or abandoned, there is no one in whose favour or for whose protection the Act can operate. Therefore, where the owner of the fee simple of a close, with coal and other minerals under it, has conveyed the

(*b*) *Benest* v. *Pipon*, 1 Knapp, P. C. 60, 68. In this country a title cannot be acquired by adverse possession: see Wood on Limitation of Actions, p. 498.
(*c*) The 3 & 4 Wm. 4, c. 27, and the 37 & 38 Vict. c. 57.
(*d*) 37 & 38 Vict. c. 57, s. 1.
(*e*) 1st of Jan. 1879.
(*f*) Under the former Act (3 & 4 Wm. 4, c. 27), the time was twenty years.
(*g*) *Brassington* v. *Llewellyn*, 27 L. J., Ex. 297.
(*h*) 3 & 4 Wm. 4, c. 27, s. 3.
(*i*) *Culley* v. *Taylerson*, 11 Ad. & E. 1008.

263 surface to *A*, and the minerals and a right of entry to get them to *B*, the title and right of entry of *B* and those claiming under him are not barred by simple non-user for more than forty years, no other person having worked or been in possession of the mines (*k*).

Title by occupation—Poor relations or servants.—A landowner who accommodates a poor relation with a cottage and garden, does not necessarily part with the possession of the property occupied by such poor relation. The latter may have the mere custody of the property; his possession, such as it is, may be the possession of the landowner: and the latter may retain and continue to exercise his proprietary and possessory rights, so as to rebut the presumption that he has parted with the possession of the property, and prevent the operation of the Statute of Limitations (*l*). If a landowner allows his gardener, or servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman who occupies part of his master's coach-house, or sleeps over his master's stables; and no title can be gained by such an occupation and enjoyment of the master's property, however long it may be continued. A society, also, which allows its agent to live on its premises rent-free, does not confer any estate or interest in the land upon the latter, but the occupation is merely the occupation of a servant (*m*).

Title by occupation—Tenant-at-will.—When any person is in possession or receipt of the profits of land or rent as tenant-at-will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, is to be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement thereof, at which time such tenancy shall be deemed to have determined (*n*); so that at the end of twenty-one years from the commencement of the tenancy, the right of the landlord will be determined (*o*). But it is provided that no mortgagor or *cestui que trust* shall be deemed to be a tenant-at-will to his mortgagee or trustee within the meaning of that clause (*p*). This proviso is applicable only

(*k*) *Smith* v. *Lloyd*, 9 Exch. 571; 23 L. J., Ex. 194. And see *M'Donnell* v. *M'Kinly*, 10 Irish Law Rep. 516.

(*l*) *Bertie* v. *Beaumont*, 16 East, 33. *Hunt* v. *Colson*, 3 M. & Sc. 791. *Doe* v. *Stanton*, 2 B. & Ald. 371. *Mayhew* v. *Suttle*, 4 El. & Bl. 353. *Turner* v. *Doe*, 9 M. & W. 645.

(*m*) *White* v. *Bailey*, 10 C. B., N. S. 227; 30 L. J., C. P. 253.

(*n*) 3 & 4 Wm. 4, c. 27, s. 7. *Doe* v. *Moore*, 9 Q. B. 561.

(*o*) *Day* v. *Day*, L. R., 3 P. C. 751; 40 L. J., P. C. 35.

(*p*) *Thorp* v. *Facey*, 35 L. J., C. P. 349.

264 to cases of actual, direct trusts (*q*); so that a person let into possession of and holding lands under an agreement to purchase, is not a *cestui que trust* within this proviso (*r*). A *cestui que trust* may, in a certain sense, be tenant-at-will to his trustee, if he has been let into possession of the trust estate by the latter, although he is not a tenant-at-will capable of acquiring a title by reason of his possession, within the third section of the statute. The possession of the *cestui que trust* is, in fact, the possession of the trustee; and the time of limitation will not run against the latter, so long as the relationship of trustee and *cestui que trust* subsists (*s*). But this applies only to the case where the *cestui que trust* is the actual occupant. If he is merely allowed to receive the rents or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation only of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate; and, if the actual occupier is, under such circumstances, permitted to occupy for more than the twelve years prescribed by the statute, without paying rent, the trustees lose their title, and the actual occupier gains the title, exactly as in an ordinary case of landlord and tenant (*t*). But, if the *cestui que trust* has been let into possession by the trustees, the tenancy between him and his trustees will not be determined by his underletting the premises, unless the trustees have notice of such underletting; for, though the general rule is that a tenancy-at-will is not assignable, because the transfer determines the tenancy, yet the rule is subject to the qualification that a tenant-at-will cannot at common law determine his tenancy by transferring his interest to a third party, without notice to his landlord (*u*). Where there is an occupation under a voidable lease, the statute begins to run from the earliest time at which the lease can be avoided, and not from the time when the lessor actually elects to avoid it (*x*).

Title by occupation—Tenants from year to year.—When any person is in possession or receipt of the profits of any land or rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, is to be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent, payable in respect of

(*q*) *Drummond* v. *Sant*, L. R., 6 Q. B. 763; 41 L. J., Q. B. 21.

(*r*) *Doe* v. *Rock*, 4 M. & G. 31.

(*s*) *Garrard* v. *Tuck*, 8 C. B. 252; 18 L. J., C. P. 338. *Drummond* v. *Sant*, *supra*.

(*t*) *Melling* v. *Leak*, 16 C. B. 669; 24 L. J., C. P. 187. *Doe* v. *Phillips*, 10 Q. B. 134.

(*u*) *Carpenter* v. *Collins*, Yelv. 73. *Pinhorn* v. *Souster*, 8 Exch. 763. *Melling* v. *Leak*, *supra*.

(*x*) *Governors of Magdalen Hospital* v. *Knott*, 8 Ch. D. 709; 47 L. J., Ch. 726.

265 such tenancy, shall have been received (which shall last happen) (*y*). A tenant holding a house of parish officers upon the condition of sweeping the church, or ringing the church-bell, is a tenant from year to year within this section of the statute (*z*). The words "lease in writing" are construed to mean not merely a demise in writing, but such an instrument as passes an interest (*a*). Verbal declarations and admissions made by a tenant in possession of his having paid rent, and of the person to whom it was paid, are admissible in evidence to establish the fact of the receipt of rent within this section (*b*).

A landlord is entitled at the determination of the tenancy to recover from the tenant, not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to have been made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances which show an intention to hold it for his own benefit alone, and not as part of his holding under the landlord (*c*). This rule is not confined to cases where the encroachment is upon land to which the landlord is entitled, but applies to cases where the land encroached upon does not belong to the landlord. It is held in such cases that, as between the landlord and the tenant, the tenant must *primâ facie* be deemed to have taken in the additional land as part of his tenancy and for the benefit of his landlord (*d*). It is not necessary that the encroachment should be conterminous with the holding; it is enough, if it is so near that by nature of its nearness the tenant gained the opportunity of making it (*e*), nor is it material whether the encroachment was made with the consent of the landlord or not. In either case the Statute of Limitations does not begin to run until the termination of the tenancy (*d*). But one who occupies, as his own, land belonging to another, and, before he has acquired a title by the Statutes of Limitation, becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him (*f*).

Title by occupation—Wrongful receipt of rent.—It is also enacted

(*y*) 3 & 4 Wm. 4, c. 27, s. 8.
(*z*) *Doe* v. *Benham*, 7 Q. B. 982. *Doe* v. *Billett*, *ib.* 983. *Doe* v. *Hinde*, 2 M. & Rob. 441.
(*a*) *Doe* v. *Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57.
(*b*) *Doe* v. *Beckett*, 4 Q. B. 605; 12 L. J., Q. B. 236.
(*c*) *Whitmore* v. *Humphries*, L. R., 7 C. P. 1; 41 L. J., C. P. 43.
(*d*) *Whitmore* v. *Humphries*, L. R., 7 C. P. 1; 41 L. J., C. P. 43. *Attorney-General* v. *Tomline*, 5 Ch. D. 750; 46 L. J., Ch. 654.
(*e*) *Lisburne, Earl of* v. *Davies*, L. R., 1 C. P. 259; 35 L. J., C. P. 193.
(*f*) *Dixon* v. *Baty*, L. R., 1 Ex. 259.

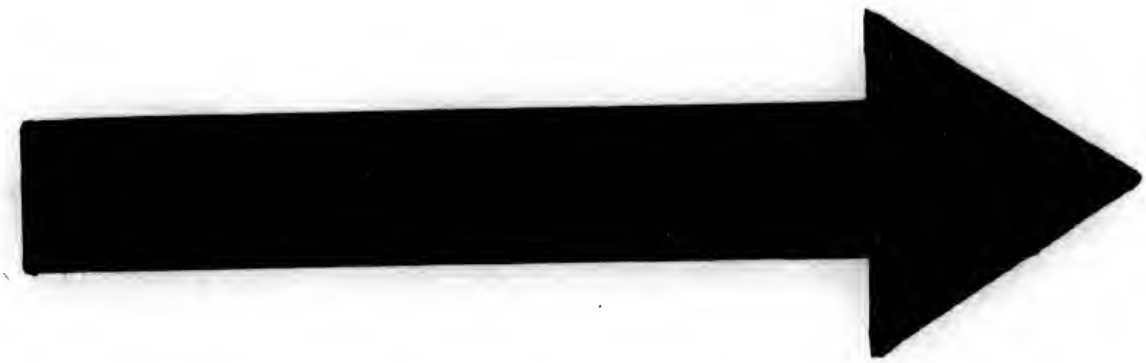
266 that, when any person shall be in possession or receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent of 20*s.* or upwards shall be reserved, and the rent shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or bring an action, after the determination of such lease, shall be deemed to have first accrued at the time at which the rent was first so received by the person wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled (*g*). The word "wrongfully" in this section means "without any title," not wrongfully in the sense of an improper intention to deprive others of their property. Where, therefore, the person really entitled to an estate is in possession but as agent for another, to whom he, under a mistake, accounts for the rents, he has no right of entry without giving up his agency; the person in receipt of the rents, therefore, may acquire a title by long possession as against him (*h*).

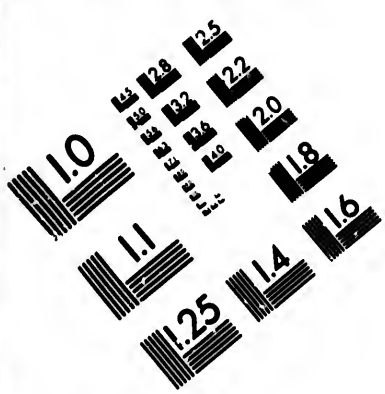
Title by occupation—Possession of a coparcener, joint-tenant, or tenant-in-common.—When any one or more of several persons entitled to any land or rent as co-parceners, joint-tenants, or tenants-in-common, shall have been in possession or receipt of the entirety, or more than his or their undivided share, for his or their own benefit, or for the benefit of any person other than the persons entitled to the other shares of the land or rent, such possession or receipt is not to be deemed to have been the possession or receipt of or by such last-mentioned persons, or any of them (*i*).

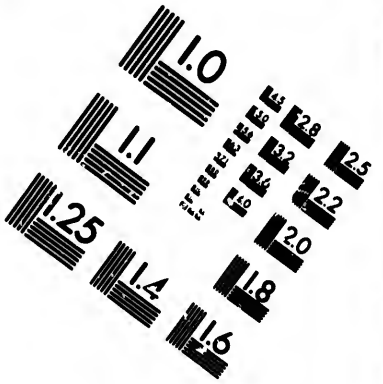
Title by occupation—Possession of a younger brother or relation.—When a younger brother or other relation of a person entitled as heir to the possession or receipt of the profits of land, or to the receipt of rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of the heir (*k*).

Title by occupation—Bonâ fide purchasers of trust estates.—When any land is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to

(*g*) 3 & 4 Wm. 4, c. 27, s. 9.
(*h*) *Williams* v. *Pott*, L. R., 12 Eq. 149; 40 L. J., Ch. 775.
(*i*) 3 & 4 Wm. 4, c. 27, s. 12.
(*k*) 3 & 4 Wm. 4, c. 27, s. 13.







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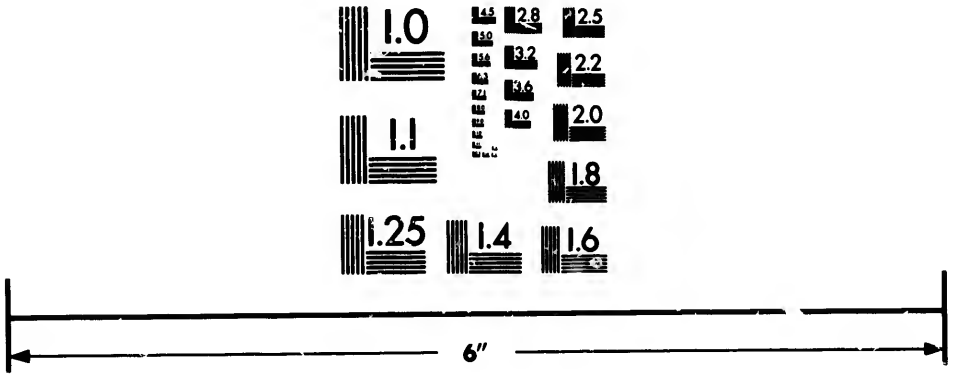

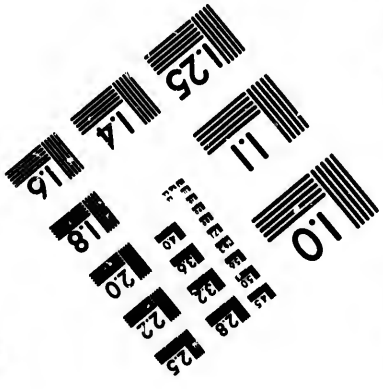

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267 recover such land, is to be deemed to have first accrued at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him (*l*).

Title by occupation — Acknowledgment of title.—When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt by the person by whom such acknowledgment shall have been given shall be deemed to be the possession or receipt of the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (*m*).

Title by occupation—Entry upon land and continual claim.—No person is to be deemed to have been in possession of any land within the meaning of the Act, merely by reason of his having made an entry thereon (*n*); and no continual or other claim upon or near any land will preserve any right of making an entry or distress, or of bringing an action (*o*). "The making an entry," observes Cresswell, J., "amounts to nothing, unless something is done to divest the possession out of the tenant and revest it in fact in the lord." Where, therefore, the defendant had inclosed a piece of land from the waste, and built a hut thereon, and the lord of the manor entered upon the premises, and said he took possession in his own right, and ordered a stone to be removed from the hut, and a portion of the fence to be thrown down, but did not turn the defendant and his family out of the cottage, it was held that this was no interruption of the possession of the defendant, and no vesting of the possession in himself, and that the lord had not done enough for the assertion of his rights, and for preventing the defendant from gaining a title under the statute (*p*). In another case the overseers of a parish put the plaintiff into possession of a parish cottage as a parish pauper; and, he having continued in possession for a long time without paying any rent, the overseers in

(*l*) 3 & 4 Wm. 4, c. 27, s. 25. *Walters* v. *Webb*, L. R., 9 Eq. 83; 5 Ch. 531; 39 L. J., Ch. 677.

(*m*) 3 & 4 Wm. 4, c. 27, s. 14. *Ley* v. *Peter*, 3 H. & N. 101; 27 L. J., Ex. 239. *Goode* v. *Job*, 1 El. & El. 6; 28 L. J., Q. B. 1. *Farsdon* v. *Clogg*, 10 M. & W. 576.

(*n*) 3 & 4 Wm. 4, c. 27, s. 10.

(*o*) 3 & 4 Wm. 4, c. 27, s. 11.

(*p*) *Doe* v. *Coombs*, 9 C. B. 718; 19 L. J., C. P. 906. *Brassington* v. *Llewellyn*, 27 L. J., Ex. 297.

268 1839 entered upon the cottage, to prevent him from gaining a title under the statute, and turned out both him and his family, and removed his furniture. On the same day the plaintiff resumed possession of the cottage, and continued in possession till July, 1852, when the overseers again entered; and, he refusing to deliver up the cottage, they destroyed it. The plaintiff then brought an action of trespass; and the defendants pleaded that the cottage was not the property of the plaintiff: it was held that the right of the defendants was not barred, as they had in 1839 actually dispossessed the plaintiff, and resumed possession of the cottage, and clothed themselves with their original rights. "Whether the plaintiff," observes Lord Campbell, "during the interval between 1839 and 1852 was tenant-at-will or tenant-at-sufferance, or a mere trespasser, seems to be wholly immaterial, so that the overseers had not in the interval done anything to prejudice the right of entry which vested in them in 1839. It is admitted that the plaintiff would have had no title had the jury found that his subsequent occupation was under a new tenancy-at-will; but how would this at all have affected the new right of entry which had accrued in April, 1839? An attempt was made to do away with the effect of what then happened, by resorting to section 10 of the statute, which enacts that 'no person shall be deemed to have been in possession of any land within the meaning of this Act, merely by reason of having made an entry thereon.' But this evidently applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night-time and pronouncing a few words, without any attempt, or intention, or wish to take possession. In the present case possession was actually taken by the overseers *animo possidendi;* and whether possession was retained by them an hour or a week must, for this purpose, be immaterial" (*q*). So, where a tenant-at-will refused to go out, and was served with a writ of ejectment, and an arrangement was then come to by which he gave up part of the land, and was allowed to remain in a cottage during his life, it was held that a new tenancy-at-will commenced on the making of this arrangement, and that the time of limitation began to run one year after the making thereof (*r*).

Title by occupation—Disabilities.—Six years are allowed in all cases for persons under disability from the time the disability ceases (*s*); but no action is to be brought after thirty years (*t*). The disabilities enumerated as having the effect of extending the

(*q*) *Randall* v. *Stevens*, 2 El. & Bl. 650; 23 L. J., Q. B. 71.

(*r*) *Locke* v. *Matthews*, 13 C. B., N. S. 753; 32 L. J., C. P. 98.

(*s*) 37 & 38 Vict. c. 57, s. 3. The period under the former Act was ten years.

(*t*) 37 & 38 Vict. c. 57, s. 5. The period under the former Act was forty years.

269 period of limitation, are infancy, coverture (*u*), idiocy, lunacy, and unsoundness of mind, at the time the right to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued (*x*). The extension of the period of limitation is granted also from the death of the person under disability. If a person before the first disability, *e. g.*, infancy, is removed, becomes subject to another, *e. g.*, by marriage, the time runs from the date of the removal of the last disability (*y*).

Title by occupation—Concealed fraud.—By section 26 it is enacted that, in case of concealed fraud, the right of a person to bring a suit in equity for the recovery of land or rent shall be deemed to have first accrued at the time at which such fraud shall, or with reasonable diligence might, have been first discovered (*z*). If a person is induced by a deception practised on him from his earliest knowledge to believe that he is only a younger son when he is the eldest, that is a case of fraud within the meaning of the Act (*a*). But where *A* occupied a cellar under the ground of *B* for sixty years, and *B* was ignorant of the occupation, it was held, that in the absence of fraud on *A*'s part *B*'s right was extinguished (*b*).

Title by occupation—Ecclesiastical and eleemosynary corporations are allowed (sect. 29) two incumbencies and six years, or sixty years, for the recovery of land (*c*).

Title by descent.—The acquisition of land by descent is a subject beyond the scope of this book. The title of the heir-at-law is perfected by entry; and without entry he cannot maintain trespass for an injury to lands descended to him; but, after entry, his right of possession relates back, so as to support an action against a wrong-doer for a trespass committed at an antecedent period (*d*).

Title by purchase.—The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by livery and seisin, or delivery of possession of the land to the purchaser, does not, since the passing of the Transfer of Property Act, transfer to him the legal estate or interest agreed to be sold. The written contract, if it amounted to a grant of the **270** fee, would be a feoffment, and would be avoided by the section of the Act which enacts that "a feoffment (other than a feoffment made under a custom by an infant) shall be void unless evidenced

(*u*) By sect. 1, sub-sect. 2, of the Married Women's Property Act, 1882, a married woman can sue in tort as if she were a *feme sole*, and therefore the Statutes of Limitations will now run against her, though the right to recover against her estate may be affected by the property being vested in trustees. See *Hodgson* v. *Williamson*, 15 Ch. D. 87, and *Lowe* v. *Fox*, *ante*, p. 62.

(*x*) Absence beyond seas was formerly a disability, but is so no longer; 37 & 38 Vict. c. 57, s. 4.

(*y*) *Borrows* v. *Ellison*, L. R., 6 Ex. 128; 40 L. J., Ex. 131.

(*z*) See *Chetham* v. *Hoare*, L. R., 9 Eq. 571; 39 L. J., Ch. 376.

(*a*) *Vane* v. *Vane*, L. R., 8 Ch. 383; 42 L. J., Ch. 299.

(*b*) *Rains* v. *Buxton*, 14 Ch. D. 537; 49 L. J., Ch. 473.

(*c*) *Ecclesiastical Commissioners* v. *Rowe*, 5 App. Cas. 736; 49 L. J., Q. B. 771.

(*d*) *Barnett* v. *Earl of Guildford*, 11 Exch. 19; 24 L. J., Ex. 281.

by deed." A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. It is not necessary, however, for the alienation of property that there should be a formal deed of conveyance; a contract for a valuable consideration, by which it is agreed to make a transfer of particular, specified property, passes the beneficial interest, provided the contract is one which would be specifically enforced (*e*). The estate, from the signing of the contract, becomes the real property of the vendee, who is said to have the equitable interest in the land, while the vendor has the legal estate, but is deemed to be a trustee for the purchaser, holding the land upon trust to convey it to the latter upon the terms and conditions of the contract of sale (*f*).

Servitudes.—The unrestricted ownership of property naturally carries with it a right to do whatever the owner pleases with his property, without regard to the question whether what he does tends to the injury of another or not; but the common interests of mankind require certain restrictions to be placed upon this freedom of ownership, to prevent one proprietor from so using and managing his property as to render it a source of injury and annoyance to another. Thus, it is impossible for landed property to be beneficially occupied and enjoyed, unless each landowner or occupier is prevented from damming up or diverting the natural streams and watercourses on his land, and thereby depriving his neighbour of water which would otherwise naturally flow to him. Neither could land be usefully and beneficially cultivated or enjoyed, if one man were allowed to dig pits, mines, or quarries, so near to the boundary of his estate, that his neighbour's land, being deprived of its natural support, would slide down and sink into the hollow (*g*). Every landed estate, therefore, is burthened with certain duties or services, which it is bound by law to render to the adjoining property (*h*).

(*e*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J., Ch. 193.

(*f*) *Davie* v. *Beardsham*, 1 Ch. C. 39.

(*g*) *Bonomi* v. *Backhouse*, El. Bl. & El. 659; 28 L. J.. Q. B. 378; 34 *ib.*, 181.

(*h*) In the Roman law this service was denominated a servitude—a term used to denote both the right and the obligation. *Item a jure imponitur servitus prædio vicinorum: scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur; item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte.* Bracton, lib. 4, fol. 221.

The Roman servitude was either affirmative or negative. The affirmative servitude bound the proprietor to suffer something to be done on his own land for the benefit of the adjoining estate. The passive servitude merely required him to refrain from doing something, which, if done, would be injurious to his neighbour. The land on which the burthen was imposed was called the servient tenement; and the estate or property which had the right to the servitude was called the dominant tenement. The existence of the benefit in favour of one property, and the burthen thereby imposed upon another, depended upon the lands being so situate as to render it a necessary adjunct to the beneficial use and enjoyment of the dominant tenement; and the exercise of the right of servitude was confined to what was reasonable and necessary for such enjoyment, and merely accessorial thereto.

Servitudes among the Romans were further divided into prædial and urban servitudes. The term "prædial servi-

271 *Divisions of servitudes.*—There are two principal classes of servitudes in our law; viz., natural servitudes, which are derived from the situation of places, and are a necessary and natural adjunct to the properties to which they are annexed: and conventional servitudes, which are established by grant or enjoyment. The right and burden of natural servitudes are contemporaneous with the right of property itself (*i*).

Natural servitudes—Rights of water in watercourses—Right to use the water.—Every landed proprietor has a right to the reasonable use of the water of natural streams and rivulets running through his land for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for other purposes connected with his tenement, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the use of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation, or abstract the water returning the same quantity unpolluted into the stream; but he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury (*k*).

If a man places a temporary bar or weir across a stream in order to turn it into his own land for purposes of irrigation, and by that means seriously diminishes the current to the prejudice of a riparian proprietor lower down the stream, it is no answer to an action by the latter for damages to set up that the water **272** was only temporarily arrested by the defendant for the pur-

tude" was used to denote the burthen imposed upon one field, or parcel of cultivated ground, in favour of the use and enjoyment of another adjoining piece of cultivated land; whilst the term "urban servitude" was applied to the burthens imposed upon houses and buildings, whether situate in town or country. In the Roman law, through the operation of urban servitudes, one neighbour might be permitted to place a beam upon the wall of another; or might be compelled to receive the droppings and currents from the gutter-pipes of another man's house upon his own house, area, or sewer; or might be exempted from receiving them; or restrained from raising his house in height, lest he should darken the habitation of his neighbour (Instit. lib. 2, tit. 3, s. 1). Our own law does not impose any such burthen *ex jure naturæ* upon adjoining proprietors; but the servitude may be established by express grant or undisputed enjoyment.

(*i*) Pardessus, Tr. des Serv. Introduction, p. 1.

(*k*) *Miner* v. *Gilmour*, 12 Moo. P. C. 156. *Nuttall* v. *Braxwell*, L. R., 2 Ex. 1; 36 L. J., Ex. 1. *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R., 7 H. L. 697; 45 L. J., Ch. 638. *Kensit* v. *Great Eastern Rail. Co.*, 27 Ch. D. 122. *Tyler* v. *Wilkinson*, 4 Mas. (U. S.) 397; *Twiss* v. *Baldwin*, 9 Conn. 291; *Farrell* v. *Richmonds*, 30 N. J. Eq. 511; *Platt* v. *Johnson*, 15 John. (N. Y.) 218; *Palmer* v. *Mulligan*, 3 Cai. (N. Y.) 312; *Blanchard* v. *Baker*, 8 Me. 253; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Shields* v. *Arndt*, 4 N. J. Eq. 234; *Thompson* v. *Moore*, 2 Allen (Mass.) 350; *Webb* v. *Portland Mfg. Co.*, 3 Sumner (U. S.) 189. See Wood on Nuisances, Chaps. VIII.—XII., where the law relating to watercourses, surface water, artificial watercourses, &c., as held in this country, is fully stated, and the authorities collected.

pose of enabling him to irrigate his land (*l*). The right of the possessor of land through which a natural stream flows to use the water of the stream for irrigation and for manufacturing purposes, depends upon the particular circumstances of each case, upon the volume of the stream, the extent of the loss of water from evaporation or absorption, and the amount of injury inflicted thereby upon other riparian proprietors. "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting on one part of the stream should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water; and, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden. It is entirely a question of degree; and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application" (*m*).

A landowner may put a pen stock on his own grounds, and pen the water there as he will, so long as he does no damage to his neighbour. "Until you prejudice your neighbour by penning back the water, you do that which you have a right to do: but, where you begin to injure your neighbour, there your right to pen back terminates" (*n*), unless you have penned back under a title acquired by grant or prescription. No action will lie for diverting or throwing back the water, except by a person who sustains actual injury therefrom (*o*). But the person by or over whose land the stream passes, must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the prejudice of his neighbour. The just and equitable principle is given in the Roman law: "*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*" (*p*). If the user by the defendant has been beyond his natural right, and is injurious to the natural rights of the plaintiff, an action is maintainable, unless the user is sanctioned by grant or prescription (*q*).

An artificial rivulet created by the drainage and pumping of a colliery may be diverted before it flows into the natural stream,

(*l*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 612; 26 L. J., C. P. 148.

(*m*) *Embrey* v. *Owen*, 6 Exch. 372; 20 L. J., Ex. 212. *Norbury* (*Lord*) v. *Kitchen*, 9 Jur., N. S. 132. *Earl of Sandwich* v. *Great Northern Rail. Co.*, 10 Ch. D. 706; 49 L. J., Ch. 225. The question is, whether the diversion and use of the water is reasonable, and this is a question for the jury: *Gillett* v. *Johnson*, 30 Conn. 183; *Wadsworth* v. *Tillotson*, 15 Conn. 369. The right of a riparian owner to divert the waters of a stream for the purposes of irrigation is subject to the restriction that he must not materially diminish the quantity of the water of the stream, or unreasonably detain it: *Elliott* v. *Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191. In some of the States, as Colorado and Nevada, the necessities of the people, arising from the peculiarities of soil and climate, have made it necessary for the Courts to adopt rules in this respect at variance with the common law.

(*n*) Lawrence, J., *Cooper* v. *Barber*, 3 Taunt. 108.

(*o*) *Wright* v. *Howard*, 1 Sim. & Stu. 203. *Williams* v. *Morland*, 2 B. & C. 910.

(*p*) Parke, B., *Embrey* v. *Owen*, 6 Exch. 371; 20 L. J., Ex. 212.

(*q*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 612; 26 L. J., C. P. 148. See *post*, p. 328.

273 and the proprietor on the banks of the natural stream will have no right of action for the diversion of that water (*r*). So, conversely, where a canal company has for many years diverted water from a stream above the plaintiff's land, and has subsequently restored it, the plaintiff cannot complain of damage resulting from a flood caused by such restoration (*s*).

In the case of casual and intermittent surface waters not running in any defined channel, but spreading themselves over the surface of the land, there is nothing to prevent the landowner from dealing with them as he pleases (*t*); but he must not divert the perennial supply of water from a spring-head, or prevent it from flowing by a natural channel to the lands below (*u*). He has no right by any system of artificial drainage to cut off the natural, visible supply of surface-water from ancient water-courses and rivulets; and he ought so to arrange his drains as to restore the water at the boundary of his estate to its ancient channels, that the lands situate on a lower level may not be deprived of their natural supply of the precious element; for a man has no right to make improvements on his land which produce injury to his neighbour (*x*).

Whenever a spring rises from the ground in one man's land, and flows therefrom into another's land, and the supply of water from the spring is constant, the court will prevent a landowner through whose land the water flows, from cutting off the supply of water to the land lower down, although the spring may flow through boggy land, and not follow any defined channel or water-course; but, if the supply is casual and intermittent, and dependent upon the rainfall, and is mere common surface-water, the court will not interfere (*y*).

(*r*) *Wood* v. *Waud*, 3 Exch. 779; 18 L. J., Ex. 314.

(*s*) *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R., 6 Q. B. 578; 40 L. J., Q. B. 293.

(*t*) *Broadbent* v. *Ramsbotham*, 11 Exch. 617; 25 L. J., Ex. 115.

(*u*) *Ennor* v. *Barwell*, 2 Giff. 424. *Brown* v. *Best*, 1 Wils. 174. *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J., Ex. 146.

(*x*) *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250. Hilliard on Torts, p. 105 *et seq.* By the French law, the proprietor of a field in which a spring rises or through which it flows, is not entitled to take and appropriate to his own use the whole of the water, or divert it from other proprietors of lower fields through which the water flows. He cannot change the course of the stream, or materially diminish the ancient supply of water; but every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and, when his estate is intersected by such water, he may divert it for purposes of irrigation, on condition that he restores it at the boundary of his property to its ordinary channel; and in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals. Cod. Nap. liv. 2, No. 640—645.

(*y*) *Ennor* v. *Barwell*, 2 Giff. 424. *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588. *Holker* v. *Poritt*, L. R., 8 Ex. 107; 10 Ex. 59; 44 L. J., Ex. 52. The rule may be said to be, that no prescriptive right can be acquired to water that squanders itself over the surface of the ground, even though in the natural course of things it would flow upon the land of another, or even though, during a considerable portion of the year each season, it flows thus, it having acquired no definite channel, and being subject to the ever varying fluctuations of the season, and arising only from falling

A right to the use and enjoyment of a natural water-course
274 and water is not affected by reason of the supply of water being uncertain and precarious, and dependent upon the dryness or humidity of the season. The intervention of a single dry season, or of a series of dry seasons, cutting off all the water for a shorter or a longer period, cannot deprive a person of his right to the water when it re-appears again in its ancient channel. Where a natural stream, which had its rise in land of the defendant, whence it flowed by an underground channel to a lane dividing the defendant's land from the plaintiff's, meandered a little way down the lane before it entered the plaintiff's land, and the plaintiff slightly varied the ancient channel, by making a straight cut across the lane from the spout under the defendant's hedge to his own premises, it was held that his right to the water was not affected by so slight an alteration of the natural channel (*z*).

Where a man is entitled to have a stream of water flowing through his land, he may maintain an action for the diversion or pollution of the water, although he has not used, and does not want to use, the water (*a*).

Natural servitudes — Water — Right of drainage (*b*).—Lands through which a natural stream flows are burthened with the servitude of receiving and transmitting the waters of the stream to the lower land (*c*). Land, moreover, cannot be cultivated or enjoyed, unless the springs which rise on the surface and the rains that fall thereon are allowed to make their escape through the adjoining and neighbouring lands. All lands, therefore, are of

rains or the melting of snow: *Ashley* v. *Wolcott*, 11 Cush. (Mass.) 192; *Goodale* v. *Tuttle*, 29 N. Y. 459. But where a natural stream of water that is not the result of spasmodic causes, runs in a definite channel for a distance so as to acquire the legal character and attributes of a watercourse, suddenly departs from all limits and spreads itself over a wide tract, and, after passing thus for a distance, again assumes a definite channel, this is such a watercourse as gives to all persons below the right to have the water go to them, and therefore a right of action for any unreasonable diversion thereof: *Macomber* v. *Godfrey*, 108 Mass. 219; *Gillett* v. *Johnson*, 30 Conn. 180. See Wood on Nuisances, Chap. X. on Surface Waters.

(*z*) *Hall* v. *Swift*, 4 Bing. N. C. 381; 1 Sc. 169. Dig. lib. 8, tit. 3, l. 35.

(*a*) *Embrey* v. *Owen*, 6 Exch. 353; 20 L. J., Ex. 212. *Rochdale Canal Co.* v. *King*, 14 Q. B. 135. *Webb* v. *Portland Manufacturing Co.*, 3 Sumner's Amer. Rep. 197. *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Scott, 535; *ante*, p. 39. *Crossley* v. *Lightowler*, *post*, p. 275.

(*b*) As to rights of drainage under Public Health Act, see 38 & 39 Vict. c. 55, ss. 13—26, and as to pollution of water, ss. 68—70.

(*c*) In the Roman law, we find that every proprietor of land is enjoined to refrain from doing anything on his land to impede the natural flow of water from the high land to the land below, whilst the proprietor of the higher land is prohibited from sending, by means of artificial contrivances, larger quantities of water on to the lower land than would naturally flow there, or altering the course of streams and giving a new direction to the surface water, to the prejudice of the proprietor of the lower land. Pardessus, part 2, ch. i. s. 1. *Obligations qui concernent lex eaux.* Dig. lib. 8, De Servitutibus. In the Code Napoléon, under the head of "*Servitudes derived from the Situation of Places*," we read, that "all lower lands are subjected, as regards those which are higher, to receive the waters which flow naturally therefrom, to which the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall prevent such flowing; nor can the superior proprietor of the higher lands do anything to increase the servitude of the lower lands." Cod. Nap. No. 640—642.

necessity burthoned with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level; and, if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the
275 higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher lands to the natural outfall and drainage of the soil, unless he has gained a right to pen back water by express grant, or undisputed enjoyment, in the manner presently pointed out (*d*). So, if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain-water together at the boundary of his estate, and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damage thereby caused to the possessor of the lower lands (*e*).

A riparian proprietor cannot deteriorate the quality of the water which would otherwise descend, if by so doing he deprives another riparian proprietor of the beneficial use of the water, unless he has gained a title by grant or prescription so to use the water (*f*). Every riparian proprietor has a right to the flow of the stream through his land in its natural purity; and, if a riparian proprietor higher up the stream throws dirt and ashes or gas refuse into it, so as to defile the water and render it unfit for use, to the damage of another riparian proprietor who has been in the habit of using the water, an action is maintainable for the injury (*g*), unless an adverse right has become vested in the other by grant or prescription. It would seem that an action may be maintained without proving actual damage; for such pollution would, if allowed to continue, become a right (*h*).

Natural servitudes—Water—Navigable rivers.—A riparian owner on a navigable river has, superadded to his riparian rights, the right of navigation over every part of the river; and, on the other hand, his riparian rights are limited in this respect, that, whereas in a non-navigable river all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river, the public right of navigation would intervene, and would prevent this being done. The soil of a navigable river may be the private property of the riparian owners; but, even where the soil is in the Crown, the riparian owner has the right to have the river come to

(*d*) *Shury* v. *Piggot*, 3 Bulstr. 340. *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J., Ex. 81. Dig. lib. 39, tit. 3. *Post*, p. 328.

(*e*) *Sharpe* v. *Hancock*, 7 M. & G. 354; 8 Sc. N. R. 46. See *Harrison* v. *Great Northern Rail. Co.*, 3 H. & C. 231; 33 L. J., Ex. 267. *Ante*, p. 44.

(*f*) *Embrey* v. *Owen*, 6 Exch. 370; 20 L. J., Ex. 212. *Mason* v. *Hill*, 5 B. & Ad. 13. *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J., Ex. 81. See Wood on Nuisances, Chap. XIII. on Pollution of Waters.

(*g*) *Murgatroyd* v. *Robinson*, 7 El. & Bl. 391; 26 L. J., Q. B. 233.

(*h*) *Crossley* v. *Lightowler*, L. R., 2 Ch. 478; 36 L. J., Ch. 584.

him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, just as he is entitled to the support of his neighbour's soil for his own in its natural state (*i*).

276 The owner of a wharf on a river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank; nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But, when this right of navigation is connected with an exclusive access to and from a particular wharf, it ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages, or restrained by an injunction (*k*).

Natural servitudes—Water—Of the right of landowners to well-water.—The right to the enjoyment of the water of a stream flowing in its natural course over the surface of land, and the right to underground water and springs beneath the surface, are not governed by the same rules of law. It has been held that a landowner has a right to sink a well in his own land, and get as much water as he pleases, although he thereby seriously diminishes the supply of water to the springs and wells in his vicinity, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land to enable him to get back the water (*l*). A landowner who has sunk a well on his own land, and thereby enjoyed the benefit of underground water, has no right of action against a neighbouring proprietor who, in sinking for and getting coals from his soil in the usual and proper manner, causes the well to become dry; and it makes no difference, whether the damage arises by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well, or whether, having found its way to the spring or well, it ceases to be retained there (*m*). The same rule prevails between the owner of the surface and the owner of the minerals (*n*).

(*i*) *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662; 46 L. J., Ch. 68. See Wood on Nuisances, Chap. XIV. on Navigable Streams.

(*k*) *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662; 46 L. J., Ch. 68.

(*l*) *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J., Ex. 81. *Reg.* v. *Metropolitan Board, &c.*, 3 B. & S. 710; 32 L. J., Q. B. 105.

(*m*) *Acton* v. *Blundell*, 12 M. & W. 324. So by the Pandects, "*Cum eo qui, in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo actionem et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*"—Lib. 39, tit. 3, l. 12. Domat, Liv. 2, tit. 8, s. 1. *Chatfield* v. *Wilson*, 28 Vt. 49; *Wheatly* v. *Bough*, 25 Penn. St. 528; *Bliss* v. *Greeley*, 45 N. Y. 671; *Frazier* v. *Brown*, 12 Ohio St. 294; *Roath* v. *Driscoll*, 20 Conn. 533; *Chase* v. *Silverstone*, 62 Me. 175. See Wood on Nuisances, p. 120, n. 1.

(*n*) *Ballacorkish Silver, Lead, and Copper Mining Co.* v. *Harrison*, L. R., 5 P. C. 49; 43 L. J., P. C. 19.

The right to use and consume the water from wells is not confined to the reasonable wants of the occupier of the lands in which the well is sunk, nor restrained by any consideration for the wants and necessities of others. Where the defendant sank a well
277 seventy-four feet in depth in his own land, adjoining the source of an important river, which supplied water to various mills and manufactories, and pumped water from this well for the supply of a neighbouring town, at the rate of half-a-million of gallons a-day and upwards, and by this means obviously interrupted a great deal of water which would have otherwise found its way into the river, and so diminished the volume of water in the river, and prevented the millowners from working their mills full time, it was held that the landowner had not exceeded his natural rights, and that the millowners had no remedy for the injury they had sustained (*o*). But a landowner will be restrained from drawing off the subterranean water in the adjoining land, if in so doing he draws off water which has once flowed in a defined surface channel through such land. "If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all" (*p*).

If a man, by sinking a pit, intercepts the percolations of underground water, which would have flowed to his neighbour's land, he may still discharge it on such land, provided that he does not affect that land in any way other than that in which it had been affected before (*q*).

Natural servitudes—Right of support from adjoining lands.—Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbour as is necessary to sustain his own land in its natural state, not weighted by walls or buildings (*r*). If the land has been weighted by superstructures, the landowner who has thus weighted his land is not entitled, *ex jure naturæ*, to the additional support from his neighbour's soil necessary for the maintenance of the buildings: for one landowner cannot, by altering the natural condition of his land by erecting buildings thereon, deprive his neighbour of the privilege of using his land as he might have done before (*s*). But, where the additional support required by the buildings has been enjoyed for twenty years, the owner will, in general, have

(*o*) *Chasemore* v. *Richards*, *ante*, p. 276. The doctrine on the subject of subterranean water is still unsettled in the United States. See Hilliard on Torts, 4th ed. p. 622.

(*p*) *Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. 483.

(*q*) *West Cumberland Iron & Steel Co.* v. *Kenyon*, 11 Ch. D. 782; 48 L. J., Ch. 793.

(*r*) *Humphries* v. *Brogden*, 12 Q. B. 744. *Solomon* v. *Vintners' Company*, 4 H. & N. 585; 28 L. J., Ex. 370. As to the power of a landowner to release this natural right of support, see *Murchie* v. *Black*, 19 C. B., N. S. 190; 34 L. J., C. P. 337. *Post*, p. 280. See Wood on Nuisances, Chap. V. on Lateral and Subjacent Support of Lands.

(*s*) *Wyatt* v. *Harrison*, 3 B. & Ad. 875. *Partridge* v. *Scott*, 3 M. & W. 220.

acquired the right to the continued enjoyment of such additional support (*t*).

278 The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (*u*); whilst the latter must be founded upon prescription or grant, express or implied; but the character of the right, when acquired, is in each case the same (*x*).

This right to lateral support is not an absolute right; and the infringement of it is not a cause of action without appreciable damage. Therefore, where *A* dug a well near *B*'s land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that, if the building had not been on *B*'s land, the land would still have sunk, but the damage to *B* would have been inappreciable, it was held that *B* had no right of action against *A* (*y*). A right of support from the adjoining land will be implied where land has been granted for the purposes of building (*z*).

In an old case in Rolle's "Abridgement," it is said that, "if *A* be seised in fee of copyhold land closely adjoining the land of *B*, and *A* erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of *B*, if *B* afterwards dig his land so near to the foundation of the house of *A*, but not in the land of *A*, that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by *A* against *B*, inasmuch as it was the fault of *A* himself that he built his house so near the land of *B*; for he cannot by his own act prevent *B* from making the best use of his land that he can. But it seems, that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie" (*a*).

The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural, undisturbed state is sufficient to afford the requisite support. Where between the land of the plaintiffs and that of the defendants there was such an extent of intermediate land as

(*t*) *Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J., Q. B. 689. In the Roman law, under the head of legal restrictions upon rights of property, we find that no proprietor of land was permitted to excavate on his own land so as to endanger his neighbour's building; but every man erecting a new building was bound to place the new structure a certain distance from his neighbour's boundary.

(*u*) See *Caledonian Rail. Co.* v. *Sprot*, 2 Macq. 449.

(*x*) Willes, J., *Bonomi* v. *Backhouse*, 1 E. B. & E. 655. The right to support of buildings by buildings arises from an implied grant or reservation. See *post*, p. 305.

(*y*) *Smith* v. *Thackerah*, L. R., 1 C. P. 564; 35 L. J., C. P. 276.

(*z*) *Rigby* v. *Bennett*, *post*, p. 305.

(*a*) *Wild* v. *Minsterley*, 2 Roll. Abr. 565.

would, if undisturbed, have sufficed to afford the requisite support
279 to the plaintiff's land, but the coal under such intermediate land had been worked out before by some third party, in consequence whereof, when the defendants worked the coal under their own land, subsidence was caused in the surface of the plaintiff's land, it was held that the plaintiffs had no right of action against the defendants (*b*). An owner of land has no right at common law to the support of subterranean water; and, therefore, one, who by draining his own land withdraws from an adjoining owner the support of water theretofore beneath the land of that owner, and thereby causes the surface of that land to subside, is not liable for the injury inflicted (*c*).

If a man digs a well on his own land so close to the soil of his neighbour as to require the support of a rib of clay or stone in his neighbour's land to retain the water in the well, no action will lie against the owner of the rib of clay or stone for digging it away, and thereby letting out the water, unless a right to the support has been gained by uninterrupted enjoyment for a sufficient period (*d*).

Transfer of natural servitudes.—Natural servitudes derived from the situation of places are regarded as appurtenant to the lands for whose benefit they exist, so that they cannot be alienated from the land, and cannot be transferred from one person to another as benefits and privileges in gross. Being annexed to the land itself, the right to exercise them passes with the land to every owner and possessor of the dominant tenement.

A riparian proprietor cannot grant his right to the flow of water to a person who is not a riparian proprietor, so as to give such grantee a right of action against a proprietor higher up the stream for the diversion or fouling of the water (*e*). And a riparian owner cannot, except as against himself, confer on any one who is not a riparian owner, any right to use the water of the stream; and any user by a non-riparian owner, even under such a grant, is wrongful, if it affects the flow of water by the lands of other riparian owners (*f*). But two adjoining riparian proprietors may clearly agree to divide the stream into two channels in the land of the higher owner by making an artificial cut, by which the water reaches a mill situate on the land of the lower owner, and after turning the mill is then returned into the original channel (*g*).

(*b*) *Mayor, &c., of Birmingham* v. *Allen*, 6 Ch. D. 284; 46 L. J., Ch. 673.
(*c*) *Popplewill* v. *Hodkinson*, L. R., 4 Ex. 248; 38 L. J., Ex. 126.
(*d*) Tindal, C. J., *Acton* v. *Blundell*, 12 M. & W. 353. *Reg.* v. *Metropolitan Board*, 3 B. & S. 710; 32 L. J., Q. B. 105. See *post*, p. 331.
(*e*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300. *Holker* v. *Poritt*, L. R., 10 Ex. 59; 44 L. J., Ex. 52. *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; 52 L. J., Q. B. 445.
(*f*) *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155; 52 L. J., Q. B. 445.
(*g*) *Nuttall* v. *Bracewell*, L. R., 2 Ex. 1; 36 L. J., Ex. 1.

280 *Extinction of natural servitudes.*—Natural servitudes may be extinguished by express contract. Thus, where a man sells a portion of his land or the whole of his land in several lots, he may by express stipulation deprive himself, or his vendee, as the case may be, of the right to lateral support from the adjoining land (*h*). But, where a man sold land adjoining his own, and the vendee covenanted by a separate deed that the vendor should not be liable for any subsidence of the land sold, created by the vendor working the mines under his own land adjoining, it was held that the vendor was, nevertheless, liable for such subsidence to persons who had purchased the land from the original vendee without any notice of the deed (*i*).

Conventional servitudes.—The servitudes naturally incident to the ownership and occupation of land, and the legal restrictions upon the proprietary rights of landowners, may, within certain limits, be enlarged or extinguished by grant, and in certain cases by custom or prescription (*k*). But "incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner. It is inconvenient to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what right the acquisition of any parcel of land conferred, or what obligations it imposed" (*l*).

A grant to a man and his heirs of woods, underwoods, corn,

(*h*) *Murchie* v. *Black*, 19 C. B., N. S. 190; 34 L. J., C. P. 337.

(*i*) *Richards* v. *Harper*, L. R., 1 Ex. 199; 35 L. J., Ex. 130. In this case the land was copyhold, and the deed of covenant was not entered on the court rolls; but the court would it seems (diss. Pollock, C. B.) have decided in the same way had the land been freehold.

(*k*) *Fitch* v. *Rawling*, 2 H. Bl. 394.

(*l*) Ld. Brougham, *Keppel* v. *Bailey*, 2 Myl. & K. 538. The Roman law discouraged the division or dilution, amongst a number of separate proprietors, of the rights of ownership of an estate. The Romans framed their laws with the view of preserving the freedom of the right of property for all times and all future persons. They provided that an estate should have, at one and the same time, only one *dominus* over it, and that his dominion should constantly remain as little circumscribed as possible, and not be diminished by dividing his powers and prerogatives amongst several persons. "The only true restrictions on property recognized by the Roman lawyers were the servitudes." Mackeldy's Civil Law, by Kaufman, bk. 1, ch. 4, § 293. By the French civil code, it is declared to be lawful for proprietors to establish over their estates, or in favour of their estates, such servitudes as seem good to them, provided the services established are not imposed either on a person, or in favour of a person, but only on an estate, and for the benefit of an estate. Cod. Civ. No. 686.

281 and produce, which may hereafter grow on the land of the grantor (*m*), conveys to the grantee and his heirs a profit *à prendre*, exerciseable against the grantor and his heirs, so long as the ownership of the soil remains in them (*n*); but no specific property in anything vests in the grantee, until it has been severed from the inheritance, and reduced into possession (*o*). A grant of this description amounts to a mere personal contract, operative only between the immediate parties to it and their heirs, and does not bind the land in the hands of persons to whom it may be subsequently conveyed, and who were no parties to the deed of grant (*p*).

There are cases, indeed, where the right to the future produce and profits of the soil exists as an assignable and inheritable interest, burthening the land in the hands of subsequent purchasers: but these are cases where the relationship of landlord and tenant existed between the grantor and the grantee of the right, and the grant constitutes, or is accompanied by, a covenant which runs with the land, and is binding upon both the assignee of the reversion and the assignee of the term (*q*). Thus, where a lessor granted and covenanted in a lease, that the lessee, his executors and assigns, should take and carry away such corn as should be growing upon the ground at the end of the term, and the lessor sold and conveyed away his reversion, and the executor of the lessee, having sown the corn, sold it, it was held that the property in the growing crop vested in the purchaser, who might enter upon the land and take it, for there was both a covenant and a grant, and the covenant ran with the land, and bound both the assignee of the reversion and the assignee of the term (*r*). Such an interest running with the land, and binding the assignee of the reversion and the assignee of the term, will pass under a general assignment of a lessee's "tenant-right" (*s*).

There are also, as we shall presently see, certain rights of common in gross, and certain customary rights of sole and several pasturage, which exist in various manors as inheritable and transferable estates; but these are rights vested in the customary tenants of the manor, of depasturing cattle upon open uninclosed downs and moors and waste places belonging to the lord of the manor, and depend upon the custom of the manor, and cannot be

(*m*) Described as "a fee simple in a profit *à prendre*,"—"an odd sort of estate." Erle, C. J., 12 C. B., N. S. 103.

(*n*) *Barrington's case*, 8 Co. 136b.

(*o*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; 33 L. J., Ch. 193. *Lunn* v. *Thornton*, 1 C. B. 379.

(*p*) *Keppel* v. *Bailey*, 2 Myl. & K. 535. Ld. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 L. J., Q. B. 965. *Malone* v. *Harris*, 11 Ir. Ch. R. 39.

(*q*) Addison on Contracts, bk. 5, ch. 4, sect. 1, sub-sect. 1, p. 1273, 8th ed.

(*r*) *Grantham* v. *Hawley*, Hob. 132. *Martyn* v. *Williams*, 1 H. & N. 827; 26 L. J., Ex. 121.

(*s*) *Petch* v. *Tutin*, 15 M. & W. 116.

282 relied upon as authorities for ascertaining the rights of persons in ordinary cases.

It is a principle of law that no man shall derogate from his own grant (*t*). If, therefore, a man has granted to another estovers, or a right to cut and carry away wood for burning, or a right to fish for his own use and consumption, and he destroys all the wood out of which the estovers were to be taken, or draws all the water away from the pond or stream, and destroys the fish, the party grieved shall have his remedy by action; for these are wilful acts of the grantor, and it is a misfeazance in him to annul or avoid his own grant (*u*). But a landowner who has demised for a term of years the right of shooting over his land is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting (*x*).

In accordance with the maxim, "*Quando aliquis aliquid concedit, concedere videtur et id, sine quo res concessa uti non potest*," it has been held that by the grant of the use of a pump the grantee has a right to enter upon the grantor's land to repair the pump, although neither the soil nor the pump is granted to him; and that, if a man grants me the right to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another, and not to me (*y*).

If one man grants to another the privilege or easement of making and maintaining a covered sewer or watercourse, of certain specified dimensions, through the land of the grantor, for the purpose of carrying off waste and refuse water from the land of the grantee, the grantor has no right to use the sewer, and pour water into it, without the licence and permission of the grantee (*z*).

Acquired or conventional servitudes are either annexed to some land for the more convenient enjoyment thereof, in which case they are said to be appurtenant (or, as in the case of certain rights of common, appendant), or they are independent of the enjoyment of any land, in which case they are said to be in gross.

(*t*) *Ellis* v. *Mayor of Bridgnorth*, 15 C. B., N. S. 52; 32 L. J., C. P. 273.

(*u*) Twysden, J., *Pomfret* v. *Ricroft*, 1 Saund. 322.

(*x*) *Gearns* v. *Baker*, L. R., 10 Ch. 355; 44 L. J., Ch. 334.

(*y*) *Pomfret* v. *Ricroft*, 1 Saund. 322 *e*, 323. *Liford's case*, 11 Co. 52 *a*. By the French law, "he to whom a servitude is due has a right to form all the works necessary to make use of and preserve the servitude. These works are at his own expense, and not at that of the proprietor of the estate subjected to the servitude, unless the deed establishing the servitude declares the contrary." Cod. Civ. liv. 2, tit. 4, art. 697, 698.

(*z*) *Lee* v. *Stevenson*, El. Bl. & El. 512; 27 L. J., Q. B. 266.

283 *Kinds of conventional servitudes.*—Bracton, in his book of the laws and customs of England, enumerates the different acquired or conventional servitudes with which the estate of one proprietor may be burthened for the benefit and convenience of another, such as rights of depasturing cattle; rights of common; rights of estover, or of cutting wood for burning in the dwelling-house, or for building, or repairs; of cutting and carrying away turf; of digging for and gathering minerals, stones or sand; rights of hunting; rights of way; rights of drawing water from a neighbouring well; rights of watercourse, or of a passage for water through another's land; all of which servitudes, he tells us, were originally imposed upon land by the will, or ordering, or consent of the lord, or have grown up, and have become appurtenant to property, without having been expressly constituted, through long-continued, peaceable, and uninterrupted enjoyment.

Acquired servitudes are divided into profits *à prendre* and easements.

Conventional servitudes—Profits à prendre.—A profit *à prendre* is a right vested in one man of entering upon the land of another, and taking therefrom a profit of the soil. Such is the right of depasturing cattle on another's land; the right to cut therefrom and carry away turf or wood for burning within the dwelling-house; the right to dig for and carry away stone, slate, coal, and minerals; the right to shoot and sport over another's land, and carry away and consume the game killed; or the right to fish in the waters of an estate or of a manor, and carry away and consume the fish taken.

Conventional servitudes—Commons—Rights of common.—A right of common is either appendant, appurtenant, or in gross. When it is appendant or appurtenant to a messuage or land, it passes, by a grant of the messuage or land, to the successive owners and occupiers thereof (*a*).

Conventional servitudes—Commons.—Common appendant is a right annexed to arable land of depasturing on the lord's waste beasts that serve the plough, such as horses and oxen, or which manure the land, such as kine and sheep. This right exists at common law independently of any grant, prescription or custom, and applies equally to both freehold and copyhold tenants of a manor (*b*). "The reason for common appendant," observes Willes, C. J., "appears to be this, that, as the tenant would necessarily have occasion for cattle, not only to plough, but likewise to manure

(*a*) *Sacheverell* v. *Porter*, 2 Roll. Abr. 60, pl. 4.

(*b*) *Warrick* v. *Queen's College, Oxford*, L. R., 6 Ch. 716; 40 L. J., Ch. 780.

284 his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land; and, therefore, of common right, if the lord had any waste, he might put his cattle there, when they could not go on his own arable land. This right is so necessarily incident to the land, that it cannot be severed therefrom; and, therefore, if the land is divided never so often, every little parcel is entitled to common appendant. But the tenant can only have the right of common for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land, in proportion to the quantity thereof; and it is plain that he cannot have the right for cattle which he borrows, unless he makes use of them all the year to plough or manure his land" (*c*). Although this kind of common is regularly appendant only to arable land, yet it may be claimed as appendant to a manor or farm containing pasture, meadow, and wood: for it shall be presumed to have been all originally arable land, though afterwards converted into meadow, pasture, &c. (*d*).

The lord has rights of his own reserved upon the waste, not subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil not inconsistent with the rights of the commoners (*e*). Thus the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoner's rights, his right to do so being quite independent of the right of approvement under the Statute of Merton or at common law, and existing by reason of his ownership of the soil, subject only to the interest of the commoners (*f*). Moreover, when there is more common than is necessary for the cattle of the commoners, the lord may take the excess for his own purposes (*g*).

The lord, by his grant of common, gives everything accessorial to the enjoyment of the right, such as ingress, egress, &c., and thereby authorizes the commoner to remove every obstruction to his cattle grazing there. But the lord still remains owner of the soil; and a commoner who has a mere right of common of pasture has no power to meddle with the soil, and cannot cut even a trench or a ditch to let the water off the common,

(*c*) *Bennett* v. *Reeve*, Willes, 231. Bac. Abr. COMMON A. 1.

(*d*) Bac. Abr. COMMON A. 1.

(*e*) Bayley, J., *Arlett* v. *Ellis*, 7 B. & C. 369.

(*f*) Lord Kenyon, C. J., *Bateson* v. *Green*, 5 T. R. 416. *Hall* v. *Byron*, 4 Ch. D. 667; 46 L. J., Ch. 297. The onus of proving that their rights are interfered with is on the tenants. *Ibid.* See also *Robinson* v. *Duleep Singh*, 11 Ch. D. 798; 48 L. J., Ch. 758.

(*g*) Bayley, J., *Arlett* v. *Ellis*, 7 B. & C. 369. The onus of proving this lies on the lord. *Betts* v. *Thompson*, L. R., 6 Ch. 732.

285 without first obtaining the licence of the lord (*h*). If the lord chooses to encourage the growth of beasts of warren, such as hares and rabbits, upon the common, and to make rabbit-burrows, the commoner has no right to destroy either the hares, the rabbits, or the burrows. If they increase so as to destroy the herbage and deprive the commoners of the pasture, this may be a surcharge of the common by the lord; but the commoner must pursue the appropriate remedy by action, and cannot lawfully kill the conies; for, as long as they are in the lord's own land, the lord has property in them; but, when they go out, he has no longer property in them (*i*).

Conventional servitudes—Commons.—Common appurtenant is a right, derived from the possession or occupation of land, of depasturing a limited number of beasts upon the lord's waste, or upon the unenclosed land of an adjoining proprietor, and is claimable by grant or prescription (*k*). The right is limited to beasts levant and couchant upon the land to which the right is appurtenant, so that a claim to a right of common appurtenant "*sans* number" is bad. The number of cattle which can be "levant and couchant" upon the estate is the number which the produce of the land is capable of maintaining throughout the winter, if cultivated for that purpose; it is not necessary that they should, in fact, have been actually so maintained, if the land, properly cultivated for that purpose, could have maintained them (*l*). "If my land, to which I claim common belonging can yield me stover to find a hundred cattle in winter, then shall I have common in summer for a hundred cattle in the land out of which I claim common; and so for more or fewer proportionably" (*m*). If the commoner has turned more cattle upon the common than the winter eatage of his ancient tenement, together with the hay and other produce obtained from it during the summer, is capable of maintaining, he has exceeded his legal rights, and is liable to an action (*n*).

Conventional servitudes—Commons.—"*Common of shack*," observes Bayley, J., "is a right of persons occupying arable land unenclosed to turn out their cattle at certain seasons to feed promiscuously over the whole open field. If there were no common right of this sort, every man would be bound to keep his

(*h*) *Cooper* v. *Marshall*, 1 Burr. 226; 1 Roll. Abr. 406.

(*i*) *Hadesden* v. *Gryssell*, Cro. Jac. 195. *Bellew* v. *Langdon*, Cro. Eliz. 876. *Carrill* v. *Pack*, 2 Bulstr. 115. *Hoddesdon* v. *Gresil*, Yelv. 104.

(*k*) *Cowlam* v. *Slack*, 15 East, 107.

(*l*) *Carr* v. *Lambert*, L. R., 1 Ex. 168; 34 L. J., Ex. 66; 35 *ib.*, 121. If the land had been built upon or turned into a reservoir, *quære*. *S. C.*, *Morley* v. *Clifford*, 20 Ch. D. 753; 51 L. J., Ch. 687. A copyholder can only claim according to the custom of the manor. *Ibid.*

(*m*) *Smith* v. *Bonsall*, Golds. 1.. *i*. *Cole* v. *Foxman*, Noy's R. 30. *Cheesman* v. *Hardham*, 1 B. & Ald. 711.

(*n*) *Whitelock* v. *Hutchinson*, 2 Mood. & Rob. 205.

286 cattle upon his own land, which would be productive of great inconvenience, and in many instances would be impossible. In order to obviate this, every man's cattle are allowed the full range of the whole field; but the number which each man is at liberty to turn out is limited to that which the land of each individual is capable of supporting" (*o*).

Conventional servitudes—Commons—Right of common pur cause de vicinage.—Common *pur cause de vicinage* is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another. The beasts of the one stray mutually into the other's fields without any molestation from either (*p*). If there are three vills, *A*, *B*, and *C*, each of which has a common, and vill *B* lies between *A* and *C*, vill *B* may intercommon either with *A* or *C*, but *A* cannot intercommon with *C*. Neither party can put on the common more beasts than his own common will maintain, so that, if there is a vill with a large common, and a vill with a small common, the owner of land in the vill with the small common cannot put on the entire common more beasts than the small common will maintain (*q*). This right is not a profit *à prendre*, nor strictly an easement, but rather an excuse for a trespass, and has its origin from a presumed mutual grant or covenant between the owners of each farm that neither of them or his tenants should sue the other or his tenants, or distrain, or perhaps even drive their cattle away, so long as the farms should respectively lie open to each other (*r*). It can be put an end to by enclosure.

To establish a right of common *pur cause de vicinage*, it must be proved that the inhabitants have usually intercommoned with one another: the beasts of the one straying into the other's fields without any molestation on either side. There must not only be absence of fence, but mutual acquiescence, and an immemorial allowance of the straying of the cattle (*s*).

Conventional servitudes—Commons.—Common in gross is a right of common of pasture not appertaining to any land, and is claimable by grant or prescription (*t*). In prescribing, therefore, for common in gross, "one does not lay seizin of any land, but says that he and his ancestors, whose heir he is, &c., from time whereof, &c., have had common in the place where, &c., for all their cattle, without relation to any land, and without saying levant and couchant, because there is no land on which they can

(*o*) *Cheesman* v. *Hardham*, 1 B. & Ald. 711. *Sir Miles Corbet's case*, 7 Rep. 57.
(*p*) Blackstone's Comm. p. 33.
(*q*) *Commissioners of Sewers* v. *Glasse*, L. R., 19 Eq. 134; 44 L. J., Ch. 129.
(*r*) *Jones* v. *Robin*, 10 Q. B. 635, per Ld. Wensleydale.
(*s*) *Clarke* v. *Tinker*, 10 Q. B. 618.
(*t*) Co. Litt. 122a.

287 be levant and couchant, or to which the common can be appurtenant, wherefore a prescription for common in gross without number is good" (*u*). Common in gross, being a personal privilege, and not a right appendant or appurtenant to land, cannot be granted over so as to burthen the land for all time in the hands of subsequent owners and occupiers of the land over which the right has been granted (*x*).

Conventional servitudes—Profits à prendre—Rights of sole and separate pasturage.—If a man claims by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law, to exclude the owner of the soil; for it is against the nature of this word "common." But a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ*, from such a day till such a day; and hereby the owner of the soil shall be excluded for the time to pasture or feed there. So, a man may prescribe to have *separalem piscariam* in such a water; and the owner of the soil shall not fish there (*y*). The customary tenants in whom these exclusive rights, exercisoable during certain portions of the year, are vested, have merely a profit *à prendre in alieno solo*, and no estate in the soil itself (*z*); but the interest is capable of transfer by deed of assignment. "Instances of sole pasturage are to be found on the South Downs, in Sussex; and they are frequently transferred in gross. It is the same with the cattle-gates in the north of England" (*a*). A "fold-course" is a common of pasture, and not a several right (*b*).

In some manors, the customary tenants of the customary tenements of the manor have a right to the sole and several pasturage for the whole year over the moors and downs and waste places of the manor, to the entire exclusion of the lord of the manor, and may by deed license strangers to put in their cattle (*c*), and sell and convey away their interest to another. These rights of sole and several pasturage are called cattle-gates and cow-grasses, and are customary estates of inheritance, transferable by deed. The owners of them have no right of property in the soil. They are held of the lord of the manor, according to the custom of the manor, as customary estates of inheritance, by payment of fine and customary rents, and under dues, duties, suits, and services, regulated by the custom. They are transferred by customary

(*u*) *Mellor* v. *Spateman*, 1 Wms. Saund. 346.
(*x*) Treby, C. J., *Weekly* v. *Wildman*, 1 Ld. Raym. 407.
(*y*) Co. Litt. 122b. *North* v. *Cox*, 1 Lev. 253.
(*z*) *R.* v. *Churchill*, 4 B. & C. 760.
(*a*) Ld. Abinger, *Welcome* v. *Upton*, 6 M. & W. 536.
(*b*) *Robinson* v. *Duleep Singh*, 11 Ch. D. 798; 48 L. J., Ch. 758.
(*c*) *Hoskins* v. *Robins*, 2 Wms. Saund. 323.

288 deeds, followed by admittance at the next lord's court, or out of court by the steward of the manor; and a fine is payable on admittance. These cattle-gates, therefore, are copyhold tenements (*d*).

Conventional servitudes—Profits à prendre.—Common of turbary, or the liberty or privilege of cutting and carrying away turf, is appendant to an ancient dwelling-house; and the right is limited to such a quantity as is sufficient to burn in the ancient chimneys and fire-places of the house (*e*). Consequently a claim to cut and carry away turf for sale (*f*), or to make grass-plots or paths, cannot be supported (*g*).

Conventional servitudes—Profits à prendre.—Common of estovers, or the liberty or privilege of cutting down and carrying away trees, or loppings of trees, shrubs, and underwood, in another man's woods, coppices, or forests, for burning, building, or enclosing, is also appendant to an ancient dwelling-house, and is claimable by grant or by prescription, except in the case of copyholders, who may, it seems, claim by custom (*h*). Consequently a claim to cut down and carry away trees for sale cannot be claimed as common appendant (*i*).

The nature and extent of the right, and the periods of the year for the exercise and enjoyment of it, are to a great extent defined and controlled by manorial or local custom and usage. According to Bracton, the right must be exercised with reason and moderation, according to the size of the wood or waste in which the right is to be exercised and the size of the tenement to which it is annexed (*k*). The estovers must be expended within or upon the house, and cannot lawfully be sold or exchanged; nor can the right be enlarged or extended. A tenant having a right to estovers for the repair of his dwelling-house and farm-buildings, cannot "enlarge his house with the timber, nor board the sides of a barn which had muddle walls or the like before" (*l*). If a man has estovers belonging to his house, and he builds new chimneys where there were no chimneys before, he cannot use the estovers in the new chimneys (*m*). But, if he sets up a new chimney where an old one was before, he shall have his estovers for the new chimney (*n*).

"If a man be seised of a house in right of his wife, and another grants to the husband and his heirs to have sufficient

(*d*) *Rigg* v. *Earl Lonsdale*, 1 H. & N. 935; 25 L. J., Ex. 81.
(*e*) 6 Co. 36b, 37a. *Dean, &c., of Ely* v. *Warren*, 2 Atk. 189.
(*f*) *Valentine* v. *Penny*, Noy's R. 145.
(*g*) *Wilson* v. *Willes*, 7 East, 121.
(*h*) Bract. fol. 231. *Selby* v. *Robinson*, 2 T. R. 758.
(*i*) *Bailey* v. *Stevens*, 12 C. B., N. S. 113; 31 L. J., C. P. 226.
(*k*) Bract. fol. 231.
(*l*) *Earl of Pembroke's case*, Clayt. 47.
(*m*) *Luttrell's case*, 4 Co. 87a.
(*n*) *Costard* v. *Wingfield*, 2 Leon. 44.

289 estovers to burn in the same house, in that case the estovers are appurtenant to the house, and shall descend to the issue of the husband and wife. So, if one have a house of the part of his mother, and one grants to him that he and his heirs shall have competent house-bote to be burnt in the same house, this is appurtenant to the house; and, although it be a new purchase, it shall go with the house to the heir of the part of the mother" (*o*).

If a man has granted to another estovers, and destroys all the wood out of which the estovers were to be taken, the party grieved shall have his remedy by action; for it is a misfeasance in the grantor to annul his own grant (*p*).

Conventional servitudes—Profits à prendre—Right to dig for and carry away minerals.—Where the grant is of a liberty, licence, power, or authority to dig, work, mine, and search for, raise and carry away, metals and minerals in certain land, and dispose of the ore that should be there found to the use of the grantee and his heirs, and is not a grant or demise of *all* the ores, metals, or minerals then existing on the land, or existing within certain limits, so as to exclude the grantor himself from searching for minerals in his own land, or within the limits specified, it is nothing more than a grant of a licence (irrevocable on account of its carrying an interest), to search for and get ore, with a grant of such of the ore only as can be found and got, the grantor parting with no estate or interest in the rest. In this case the grantee has no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals ungot therein; but he has a right of property only in such part thereof, as, upon the liberty granted to him, should be dug and got; *i. e.*, no more than a mere right to a personal chattel when obtained in pursuance of incorporeal privileges, granted for the purpose of obtaining it (*q*). A licence of this description, however, granted to a man and his heirs, conveys an inheritable and assignable interest (*r*), so that the grantee may sell and assign the right, and his assignee will have a right to enter and search for, raise and carry away, minerals as against the grantor and his heirs. But, whenever a profit *à prendre* merely is granted, there is only a licence or covenant so long as no specific chattel has been severed from the inheritance, and taken possession of under it; and such licence or covenant will not bind the land in the hands of subsequent purchasers without notice (*s*); for, "if a man grants a

(*o*) *Syms's case*, 8 Co. 54a.
(*p*) Twysden, J., *Pomfret* v. *Ricroft*, 1 Saund. 322.
(*q*) *Doe* v. *Wood*, 2 B. & Ald. 738. *Chetham* v. *Williamson*, 4 East, 475. *Mountjoy's case*, 4 Leon. 147; Godb. 18. *Newby* v. *Harrison*, 1 Johns. & Hem. 398. *Carr* v. *Benson*, L. R., 3 Ch. 524.
(*r*) *Muskett* v. *Hill*, 5 Bing. N. C. 694.
(*s*) Ld. Wensleydale, *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 L. J., Q. B. 965.

290 licence, and then parts with the property over which the privilege is to be exercised, the licence is gone (*t*); for it is an authority only with respect to the soil of the grantor; and, if the close ceases to be his soil, the authority is instantly at an end" (*u*).

If, however, the grant is not merely of a profit *à prendre in alieno solo*, but a conveyance of the land itself, such as a grant to a man, his heirs and assigns, of *all* the existing minerals (*x*), or a right to search for, raise, and carry away, *all* the minerals to be found within certain prescribed limits, the property in the minerals will then pass to the grantee, and the latter will be the sole owner of them, the grantor continuing the owner of the surface.

If a landowner has granted to another a right to dig coal-pits in his land, and to take and carry away coal, all things necessary for the exercise and enjoyment of the right pass therewith to the grantee. He has a right, therefore, to erect sheds and steam-engines, and to fix such machinery as may be necessary to drain the coal-pits, draw up the coals and iron, and work the coal-field, although the grant of the incorporeal right may be silent as to any such erections (*y*).

Conventional servitudes—Profits à prendre—Rights of sporting.—The right of taking the game is an ordinary incident of property; but it may be severed from the ownership of the soil, and granted as a separate tenement to another in fee (*z*). The right of shooting over the lands of another is a right to shoot over the lands as they may happen to be, the landlord not doing anything for the express purpose of injuring the right of shooting, nor being precluded from using his land in the ordinary and proper way. A landowner, therefore, who has demised for a term of years the right of shooting over his lands, is not thereby prevented from cutting timber as he thinks fit in the ordinary management of his land, although injurious to the shooting (*a*). Where land is let to a tenant reserving the right of shooting, the tenant may maintain an action for overstocking the land with game so as to cause damage to the tenant's crops (*b*).

Conventional servitudes—Profits à prendre—Free warren.—The term "warren" has not always the same precise and definite

(*t*) Pollock, C. B., *Coleman* v. *Foster*, 1 H. & N. 40. *Brown* v. *Metropolitan County Society*, 1 El. & El. 832; 28 L. J., Q. B. 236.

(*u*) Parke, B., *Wallis* v. *Harrison*, 4 M. & W. 544. *Malone* v. *Harris*, 11 Ir. Ch. R. 39.

(*x*) *Cardigan* (*Earl of*) v. *Armitage*, 2 B. & C. 197.

(*y*) *Dand* v. *Kingscote*, 6 M. & W. 196.

(*z*) *Wickham* v. *Hawker*, 7 M. & W. 63.

(*a*) *Gearns* v. *Baker*, L. R., 10 Ch. 355; 44 L. J., Ch. 334.

(*b*) *Farrer* v. *Nelson*, 15 Q. B. D. 258; 54 L. J., Q. B. 385. See *West* v. *Houghton*, 4 C. P. D. 197.

291 meaning. It may be the expression of a grant of a franchise only, or it may import a conveyance of the soil (*e*).

Conventional servitudes—Profits à prendre.—Rights of fishery are divided into several fishery and common of fishery (*d*).

Conventional servitudes—Profits à prendre.—A several fishery is a right to fish in certain water, to the exclusion of all other persons (*e*). A several fishery is sometimes called a free fishery, when the word "free" is used in the same sense in which it is used in the words "free warren" (*f*). It has been much debated whether the ownership of the soil is included in a several fishery (*g*).

Conventional servitudes—Profits à prendre.—Common of fishery is a right to fish in the water of another, but so that the owner of the soil is not excluded from fishing there (*h*). The name of free fishery is also not unfrequently given to the right more correctly described as common of fishery; and hence some confusion has arisen as to the meaning of a free fishery (*i*).

There may be a qualified right of fishery in a non-navigable river. Thus, the riparian owners on a stream may grant to one of them to have a weir for the purpose of taking fish, at such times as the whole volume of water is not wanted for the purpose of a mill; and such grant, of which enjoyment is evidence, will be good (*k*).

The right to have a weir in the channel of a navigable river for the purpose of catching fish, is a right founded on grant or prescription: and the right to ancient weirs has in some instances been legalised by statute, although they totally obstruct the navigation of the river (*l*).

The right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law. Hence, if the water permanently changes its channel, and flows over land of another, a several fishery in the new channel cannot be claimed by the grantee of a several fishery in the old, although the public right of navigation will continue (*m*).

(*e*) *Earl Beauchamp* v. *Winn*, L. R., 6 H. L. 223. *Robinson* v. *Duleep Singh*, 11 Ch. D. 798; 48 L. J., Ch. 758.

(*d*) See *post*, pp. 341, 616.

(*e*) Co. Litt. 122a. *Neil* v. *Duke of Devonshire*, 8 App. Cas. 135.

(*f*) Per Willes, J., *Malcolmson* v. *O'Dea*, 10 H. L. C. 593, 619.

(*g*) *Bloomfield* v. *Johnston*, Ir. Rep., 8 C. L. 68. *Marshall* v. *Ulleswater Navigation Co.*, 3 B. & S. 732; 32 L. J., Q. B. 139.

(*h*) Co. Litt. 122a.

(*i*) Per Willes, J., *Malcolmson* v. *O'Dea*, 10 H. L. C. 593, 619.

(*k*) *Rolle* v. *Whyte*, L. R., 3 Q. B. 286; 37 L. J., Q. B. 105. *Leconfield* v. *Lonsdale*, L. R., 5 C. P. 657; 39 L. J., C. P. 305.

(*l*) *Williams* v. *Wilcox*, 8 Ad. & E. 386.

(*m*) *Mayor, &c., of Carlisle* v. *Graham*, L. R., 4 Ex. 361; 38 L. J., Ex. 226. See *Duke of Northumberland* v. *Houghton*, (L. R., 5 Ex. 127; 39 L. J., Ex. 66), as to the merger of a several fishery, originally granted by the Crown previous to Magna Charta.

292 If a man has granted to another a right to fish for his own use and consumption, and draws all the water away from the pond or stream, and destroys the fish, the grantee shall have his remedy by action (*u*).

Conventional servitudes—Easements.—An easement is a privilege or benefit exercised or derived by one man over or from the soil of another, unaccompanied by any profit or interest in the soil itself. Thus, one proprietor may acquire by grant, or from long-continued and uninterrupted enjoyment, a right of way; or a right to take water from his neighbour's well, or to wash and water cattle at a neighbour's farm (*o*), or other rights of water; the right to hang and dry clothes on lines on a neighbour's land (*p*); to hang and dry nets thereon (*q*); to turn the plough thereon in ploughing (*r*); to discharge water thereon from the roofs and eaves of houses (*s*); to have the benefit of a neighbour's fence or hedge maintained and repaired at the expense of such neighbour (*t*); to have a hatch in a stream of water (*u*); to have a pile fixed in the bed of a river (*x*); to have a sign-board upon a common (*y*); or upon a neighbour's house (*z*). A privilege or benefit of this description, unaccompanied by any profit or interest in the soil itself, is called in our law an easement, and is claimable by custom, grant or prescription.

Conventional servitudes—Easements—Right of way.—When the right depends upon express grant, the nature and extent of the right are defined by the express terms of the grant (*a*): and *primâ facie*, the right of going to land, unrestricted as to purpose, is a right to go to it for any purpose whatever (*b*). When the right rests upon user and enjoyment, the extent of the right is defined and limited by the extent of the user and enjoyment; and it is then, in general, a question of fact in each particular case as to whether the evidence of user shows a general right of way, both for horses and carriages, and for all reasonable and necessary purposes, or only a restricted and limited right for a particular purpose (*c*). But the immemorial user of a right of way for all

(*n*) Twysden, J., *Pomfret* v. *Ricroft*, 1 Saund. 322.

(*o*) *Race* v. *Ward*, 4 El. & Bl. 702; 24 L. J., Q. B. 153. *Manning* v. *Wasdale*, 5 Ad. & E. 758.

(*p*) *Drewell* v. *Towler*, 3 B. & Ad. 735.

(*q*) 7 Vin. Abr. p. 183, CUSTOM, F. pl. 2.

(*r*) Vin. Abr. p. 174, CUSTOM, P. pl. 4, F. pl. 1.

(*s*) *Thomas* v. *Thomas*, 2 C. M. & R. 34.

(*t*) *Boyle* v. *Tamlyn*, 6 B. & C. 338; 9 D. & R. 437. *Barber* v. *Whiteley*, 34 L. J., Q. B. 212.

(*u*) *Wood* v. *Hewitt*, 8 Q. B. 913.

(*x*) *Lancaster* v. *Eve*, 5 C. B., N. S. 717.

(*y*) *Hoare* v. *Metropolitan Board*, L. R., 9 Q. B. 296; 43 L. J., M. C. 65.

(*z*) *Moody* v. *Stiggles*, 12 Ch. D. 261; 48 L. J., Ch. 639.

(*a*) *Cousens* v. *Hall*, L. R., 12 Eq. 366.

(*b*) *Henning* v. *Burnett*, 8 Exch. 187. *Williams* v. *James*, L. R., 2 C. P. 577; 36 L. J., C. P. 256.

(*c*) *Ballard* v. *Dyson*, 1 Taunt. 287. *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Sc. 535. *Brunton* v. *Hall*, 1 Q. B. 792; 1 G. & D. 207. See Wood on Nuisances, pp. 173—180.

293 purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property, where that would impose a greater burden on the servient tenement (*d*). Where, however, the right of way is given by an Inclosure award made under the authority of an Act of Parliament, the right is a general right of way for all purposes for which the land may at any future time be used (*e*).

Proof that a person has used a way for various purposes, whenever he required it, for twenty years, is *primâ facie* evidence of a right of way for all purposes, from which a jury may infer a general right; but proof of user for one purpose, or for particular purposes, will not raise an inference of a general right (*f*). Proof of the exercise of a right of way for twelve years for all purposes, and for twenty years for the only purposes for which the person using it required it, is sufficient to establish the existence of a general right (*g*). If the plaintiff has a right to go backwards and forwards with carts and carriages, and it is reasonable that he should have room to turn round, he will have a right to go on the adjoining land if the road is not wide enough for the purpose. What is a reasonable exercise of a right of way is a question of fact (*h*); and, therefore, where the jury found that the carting by *A* over another person's land of hay, grown partly on land, to which it was admitted there was a right of way over such other person's land, and also partly on land beyond, to which no such right was appurtenant, was a reasonable, *bonâ fide* exercise of his right by *A*, the court refused to interfere (*i*).

If a gate is erected across a private foot way by the owner of the soil, so as to afford no actual obstruction to the use of the way by the grantee, an action will not be maintainable against the landowner so erecting the gate; but in the case of the grant of a way for horses and carriages, and the use of the way by the grantee free from gates, a gate cannot afterwards be lawfully placed across the way (*k*).

A plea of a right of way in the occupiers of certain premises may be established by proof that the defendant is seised of a freehold or copyhold estate in such premises, and that they are

(*d*) *Wimbledon & Putney Commons Conservators* v. *Dixon*, 1 Ch. D. 362; 45 L. J., Ch. 353. *Corporation of London* v. *Riggs*, 13 Ch. D. 798; 49 L. J., Ch. 297.

(*e*) *Newcomen* v. *Coulson*, 5 Ch. D. 133; 46 L. J., Ch. 459. *Finch* v. *G. W. Rail. Co.*, 5 Ex. D. 254.

(*f*) *Cowling* v. *Higginson*, 4 M. & W. 255. *Hollins* v. *Verney*, 13 Q. B. D. 304; 53 L. J., Q. B. 430.

(*g*) *Dare* v. *Heathcote*, 25 L. J., Ex. 245.

(*h*) *Hawkins* v. *Carbines*, 24 L. J., Ex. 44.

(*i*) *Williams* v. *James*, L. R., 2 C. P. 577; 36 L. J., C. P. 256.

(*k*) *James* v. *Hayward*, W. Jones, 221; Cro. Car. 184.

294 in the occupation of a tenant to whom he has demised them; for a landlord may be constructively an occupier so as to give him a right to use a way appurtenant to his own premises, although those premises are in the possession of a tenant. The landlord of a tenement to which a right of way is appurtenant, may, while the tenement is in the occupation of a tenant, lawfully use the way to remove an obstruction and to assert the right of way, or to view waste, or to demand rent, or for any other purpose connected with the exercise of his rights or duties as a landlord (*l*).

Conventional servitudes—Easements—Right of way—Deviations extra viam.—When a way has once been assigned, or a prescriptive right to go in any particular direction established, the course or direction of the way cannot be altered by one party without the consent of the other. A grant of a right of way to and from a particular dwelling-house, coach-house, and stables, will not enable the defendant to go to and from an adjoining spot which he can reach from the same line of road. If there is a grant of a way to a particular corner of a field, the grantee can go to no other part (*m*). Where *T* had a way over the close of *H*, and *H* ploughed and sowed his close, leaving a way in an unploughed place in the same close, it was held that *T* was not bound to use the new, unploughed way, but was entitled to go where the ancient way was. *H* may, however, use the new way as long as it lies open; but, if the owner afterwards stops up the new way, he has no right to remove the obstruction and pass along it (*n*). In the case of a public highway out of repair, passengers have in general a right to go upon the adjoining land; but this is not the case with a private way; if the passenger deviates, he commits a trespass (*o*).

If a man has a right of way to a close called *A*, he cannot justify using the way to go to *A*, and thence to another close of his own adjoining *A* (*p*). The grantee of a right of way which has been obstructed by the grantor has a right to deviate over the grantor's land as long as the obstruction exists, and is not bound to proceed against the grantor for the removal of the obstruction (*q*).

Conventional servitudes—Easements—Right of way—Of the maintenance and repair of ways (*r*).—Every grantee of a right of way, to be exercised and enjoyed over or through the land of the grantor,

(*l*) *Proud* v. *Hollis*, 1 B. & C. 9; 2 D. & R. 31.

(*m*) *Henning* v. *Burnett*, 8 Exch. 193. *Skull* v. *Glennister*, 16 C. B., N. S. 81; 33 L. J., C. P. 185.

(*n*) *Horne* v. *Widlake*, Yelv. 141; Noy, 128. *Reignolds* v. *Edwards*, Willes, 283.

(*o*) *Taylor* v. *Whitehead*, 2 Doug. 747. *Bullard* v. *Harrison*, 4 M. & S. 393; see *post*, p. 612.

(*p*) 1 Roll. Abr. 391, *Chimin Private*, cited *Allan* v. *Gomme*, 11 Ad. & E. 770.

(*q*) *Selby* v. *Nettlefold*, L. R., 9 Ch. 111; 43 L. J., Ch. 359.

(*r*) The law is the same as to watercourses, *post*, p. 296.

295 must himself repair the way, if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement, unless the grantor himself has expressly undertaken the performance of that duty. "If I grant a way over my land, I shall not be bound to repair it. If I stop it, an action lies against me for the misfeasance; but for the bare nonfeasance, viz., in not repairing it when it is out of repair, no action at all lies" (*s*). Where a landowner is under an obligation to repair a road *ratione tenuræ*, it is doubtful whether an action can be maintained against him by a person who has sustained damage by reason of the road being out of repair; but an action has been held maintainable by a lord of a manor, who relied on a prescription that he and all who had his estate had a right to have a bridge kept in repair by the owner of a mill (*t*). The grantee of a right of way has a right to go upon the land over which the easement is enjoyed to do the necessary repairs (*u*). He has also a right to make an effective road for the purposes for which the right is granted. Thus, if the grant is of a carriage-way, he may enter the field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way (*x*); and a right of way for carrying coals from a colliery *primâ facie* gives the grantee a right to lay down a railway for the purpose (*y*). Under a general grant of a right of way, with liberty to make and lay causeways, and use the same with waggons and carriages, and carry coals, it was held that the grantee had a right to construct and use framed waggon-ways, if they were reasonably necessary for the profitable conveyance of coals, but that he was not entitled to make a transverse road across the land for purposes foreign to the conveyance of coals (*z*); and, where there was a grant of a right of way as a foot or carriage-way, with all liberties, powers, and authorities necessary to the enjoyment thereof, it was held that the grantee of the way might lay down a flagstone upon the land in front of his house, over which the way passed, if the flagstone was reasonably necessary for his enjoyment of the way, and the laying of it down did not in anywise obstruct the carriage-road, or cause any injury or inconvenience to the grantor (*a*).

(*s*) *Pomfret* v. *Ricroft*, 1 Wms. Saund. 322.

(*t*) 11 Hen. 4, c. 28, p. 33. *Young* v. *Davis*, 7 H. & N. 760; 2 H. & C. 197; 31 L. J., Ex. 254.

(*u*) *Taylor* v. *Whitehead*, 2 Doug. 745. *M'Swiney* v. *Haynes*, 1 Ir. Eq. R. 322. So the grantees of the right to use a towing path have a right to repair the towing path. *Winch* v. *The Conservators of the Thames*, L. R., 7 C. P. 458; 9 C. P. 378; 43 L. J., C. P. 167.

(*x*) Jessel, M. R., *Newcomen* v. *Coulson*, 5 Ch. D. 133, 143; 46 L. J., Ch. 459.

(*y*) *Dand* v. *Kingscote*, 6 M. & W. 174.

(*z*) *Senhouse* v. *Christian*, 1 T. R. 569.

(*a*) *Gerrard* v. *Cooke*, 2 B. & P., N. R. 115. By the civil law, every owner who

296 *Conventional servitudes—Easements—Rights of water* (*b*)*—Of the maintenance and repair of water-courses.*—If I grant a right to a water-course through my land, the grantee is bound to keep the water-course in proper order and repair; and, if it becomes ruinous and obstructed so that the water floods my land, the grantee will be responsible for the nuisance (*c*). The grantee has a right to go upon the land over which the easement is enjoyed to do the necessary repairs (*d*). So, where the owners of a house had an easement for a supply of water by pipes through the adjoining land, and the owners of the adjoining land erected a building upon it, an injunction was granted to restrain the erection of the building, as it materially interfered with the plaintiff's access to the pipes for the purpose of repair (*e*).

Conventional servitudes—Easements—Right to the benefit of a fence.—At common law the occupiers of adjoining closes are not bound to fence either against or for the benefit of each other; but each occupier is bound to prevent his cattle from trespassing on his neighbour's premises. Lands may, however, be burthened by grant or prescription with the servitude of maintaining a wall, fence, hedge, or gate for the benefit of the adjoining land, in which case the occupier of the servient tenement will be responsible to the occupier of the dominant tenement if he allows the wall, fence, &c., to be ruinous and defective, so that cattle and sheep break through the fence and stray from one tenement to the other. Where the liability to maintain a fence exists, the person liable is bound at his own risk, except in the case of *vis major* or the act of God, to have a sufficient fence always existing, and is liable notwithstanding that he has no notice that the fence is out of repair (*f*).

The occupier of the dominant tenement is entitled to the benefit of his field for turning in other people's cattle as well as his own

was entitled to a way, or the free passage of running water, from his dominant tenement through an adjoining servient tenement, was entitled to enter upon the servient lands to repair the way or water-course when necessary, and bring thereon the materials necessary for the purpose, making compensation to the owner of the servient tenement for all damage done in the progress of the repairs. (Gale on Easements, 5th ed., 555.)

(*b*) Local authorities have the same powers with respect to carrying water-mains as they have for carrying sewers by 38 & 39 Vict. c. 55, s. 54; but there is a saving of water rights generally by sect. 332.

(*c*) *Lord Egremont* v. *Pulman*, M. & M. 404, cited in *Bell* v. *Twentyman*, 1 Q. B. 775. *Hoare* v. *Dickenson*, 2 Ld. Raym. 1568. *M'Swiney* v. *Haynes*, 1 Ir. Eq. R. 322. So in the civil law: *In omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adscrit, non ad eum cujus res servit.* Gale on Easements, 5th ed., p. 529. As to the repair of ways, see *ante*, p. 294.

(*d*) *Taylor* v. *Whitehead*, 2 Doug. 745. *Goodhart* v. *Hyett*, 25 Ch. D. 182; 53 L. J., Ch. 219. The grantee of a drain may under certain circumstances deepen the drain. *Finlinson* v. *Porter*, L. R., 10 Q. B. 188; 44 L. J., Q. B. 56.

(*e*) *Goodhart* v. *Hyett*, 25 Ch. D. 182; 53 L. J., Ch. 219.

(*f*) *Lawrence* v. *Jenkins*, L. R., 8 Q. B. 274; 42 L. J., Q. B. 147.

297 stock; and, if he takes in another man's horse, and the horse gets through a ruinous fence which the adjoining occupier ought to have repaired, and falls into a pit on the adjoining land and is killed, the occupier who ought to have repaired the fence is responsible for the full value of the horse to the occupier of the field from which the horse strayed (*g*).

An action for the non-repair of fences cannot be supported against the landlord when the land is in the possession of a tenant; for it is the duty of the actual occupier to repair and maintain fences, and not the duty of the landlord (*h*).

If *A* is obliged to maintain a fence against *B*, and neglects his duty, whereby *B*'s cattle escape into *A*'s land, *A* cannot maintain an action against *B* for any injury the cattle may do; and, if *A*'s servant is on *A*'s land, and is injured by *B*'s cattle, he is in the same position as his master, and can maintain no action against *B*. Thus, where, from a defect in the fence, *A*'s cattle escaped on to the line of a railway company, and a servant of the company, who was returning from work along the line on a trolly propelled by his feet, ran over the cattle and was upset and injured, it was held that, even assuming there was negligence in *A* in permitting the cattle to remain in the field after notice of the defect in the fence, the servant could not recover, as he was identified with the company by whose neglect to maintain a sufficient fence the accident was caused (*i*).

Conventional servitudes—Easements—Sea-walls.—An owner of land adjoining the sea or a tidal river is not liable at common law to maintain a sea-wall on his land to keep out high tides for the benefit of adjoining owners. He may, indeed, be liable by prescription; but the mere fact that such a wall has existed, and that he and his predecessors have repaired it from time immemorial, is not sufficient evidence of such liability. The mere repair of a man's own sea-wall for his own benefit, however often done, and during however long a period of time, will not *per se*, although the neighbours may in fact benefit by such repair, impose on a man the duty of continuing such repairs for his neighbour's benefit, when he ceases to care to do it for his own (*k*). But an owner of the foreshore must not remove the shingle therefrom, if in so doing he exposes the land of others to the action of the sea by destroying the natural barrier; for it is the duty of the Crown to protect the realm from the inroads of the sea by main-

(*g*) *Rooth* v. *Wilson*, 1 B. & Ald. 59. *Lee* v. *Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212. See *post*, p. 389.

(*h*) *Cheetham* v. *Hampson*, 4 T. R. 318. Buller, J., *Rider* v. *Smith*, 3 T. R. 768. *Rooth* v. *Wilson*, 1 B. & Ald. 59.

(*i*) *Child* v. *Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100.

(*k*) *Hudson* v. *Tabor*, 1 Q. B. D. 225; 2 Q. B. D. 290; 46 L. J., Q. B. 463. See *Att.-Gen.* v. *Tomline*, 14 Ch. D. 58; 49 L. J., Ch. 377.

298 taining the natural barriers, or by raising artificial ones, and therefore no subject is entitled to destroy them (*l*). But where, either by tenure, prescription, or custom, a frontager is liable to repair a sea-wall, the extent of his liability can only be ascertained by usage. So that in the absence of evidence to show that the pres[illegible]ve liability extended to damage occasioned by an extraordinary storm, the frontager would not be liable in respect of such damage (*m*).

Conventional servitudes—Easements—Right to the access of light.—It makes no difference whatever whether a person has acquired the right to light by twenty years' user, or has acquired it by grant, express or implied. In either case the extent of the right is exactly the same; nor will the usual covenant for quiet enjoyment enlarge the right of the grantee (*n*). But a right to the free access of light from uninterrupted user and enjoyment does not extend to open spaces of ground and yards or gardens (*o*). Thus, where a saw-pit and timber-yard had been placed close to the edge of the adjoining property, it was held that the pit and yard might be darkened at any time, and the access of light thereto impeded, by the erection of buildings by the adjoining landowner (*p*).

Conventional servitudes—Easements—Right to the passage of air.—The owner or occupier of land or buildings has no natural right to the free passage of air over the adjoining land, nor can such a right be gained by prescription. It is not, therefore, actionable to impede the access of air to a mill or to the chimneys of a house by raising a building on the adjoining land (*q*).

Conventional servitudes—Easements—Right to freedom from noise.—A right to make a noise so as to annoy a neighbour cannot be supported by user, unless during the period of user the noise has amounted to an actionable nuisance (*r*).

Conventional servitudes—Acquisition—Express grants.—A grant of a profit *à prendre* or easement must, in order to pass the legal estate, be made by deed (*s*). But it is apprehended that a contract to grant a profit *à prendre* or an easement will pass the equitable estate, and that such equitable estate will be protected against tort-feasors. *Primâ facie* the grant of a profit *à prendre* or easement does not extend beyond the duration of the estate of the

(*l*) *Att.-Gen.* v. *Tomline*, 14 Ch. D. 58; 49 L. J., Ch. 377.

(*m*) *R.* v. *Commissioners of Sewers for Essex*, 14 Q. B. D. 561; 11 App. Cas. 449.

(*n*) *Leech* v. *Schweder*, L. R., 9 Ch. 463; 43 L. J., Ch. 487.

(*o*) *Potts* v. *Smith*, L. R., 6 Eq. 311; 38 L. J., Ch. 58.

(*p*) *Roberts* v. *Macord*, 1 M. & Rob. 230.

(*q*) *Webb* v. *Bird*, 10 C. B., N. S. 268; 13 *ib.*, 841; 31 L. J., C. P. 335. *Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J., C. P. 80. See, however, *post*, p. 306.

(*r*) *Sturges* v. *Bridgman*, 11 Ch. D. 852; 40 L. J., Ch. 785. As to when a noise is a nuisance, see *post*, p. 367.

(*s*) Bac. Abr. GRANTS, E. Co. Litt. 9 a, 42 a. 14 Vin. Abr. GRANT, G. (a). 2 Roll. Abr. GRANT (g). *Jones* v. *Robin*, 10 Q. B. 620.

299 grantor. Thus, if a termor by general words grants a profit *à prendre* or easement to be exercised over the land included in the term, and afterward acquires the reversion expectant on the determination of the term, the right to the profit *à prendre* or easement will be extinguished at the time when the term would have expired, unless a contract or bargain to the contrary can be collected from the terms of the grant (*t*).

The grant of a right of way in general terms is to be construed with regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both these circumstances may be legitimately called in aid in determining whether what is granted is a footway or a drift way or a carriage way (*u*).

A grant of a right of way will not fail in point of law because it does not point out the precise, definite track between the one terminus and the other in which the grantee is to go in using the right of way. If the owner of the servient tenement does not point out the line of way, the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine the grantee to a particular track, he must set out a reasonable way; and in that case the grantee is not entitled to go out of the way merely because it is rough or there are ruts in it (*x*).

Exclusive grants must be framed with words of an exclusive character, otherwise the grantor is not precluded from granting the same privilege to other persons (*y*). A mere licensee of a right of way, or of a right of passage with boats on a canal, who has no interests in the soil over which the privilege is exercised, has no right of action against a wrong-doer who exercises the same privilege, but does not obstruct the licensee in the enjoyment of his right (*z*).

Conventional servitudes—Acquisition—Reservation of profits and easements amounting to an express grant.—Reservations, properly so called, are only of rents and services; and a reservation of an easement or privilege, whether to a stranger or not, operates as a fresh grant. When, therefore, in a deed of conveyance or an indenture of lease, there are words of exception and reservation of an easement or profit *à prendre*, they will operate as an express grant, which may be made to enure either in favour of the conveying party, his heirs and assigns, or in favour of a stranger who

(*t*) *Booth* v. *Alcock*, L. R., 8 Ch. 663; 42 L. J., Ch. 557.

(*u*) *Cannon* v. *Villars*, 8 Ch. D. 415; 47 L. J., Ch. 597.

(*x*) Mellish, L. J., *Wimbledon and Putney Commons Conservators* v. *Dixon*, 1 Ch. D. 362, 369; 45 L. J., Ch. 353.

(*y*) *Newby* v. *Harrison*, 1 Johns. & Hem. 396. *Carr* v. *Benson*, L. R., 3 Ch. 524.

(*z*) *Hill* v. *Tupper*, 2 H. & C. 121.

300 was no party to the deed of conveyance. Thus, where a lord of a manor conveyed to one *N* and his heirs certain lands and premises, parcel of the demesne of the manor, excepting and reserving to himself, and another, who was not a conveying party to the deed, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the lands so conveyed, and there to hawk, hunt, fish, and fowl, at any time thereafter, at their will and pleasure, it was held that the words of reservation or exception so used operated as an express grant of an incorporeal hereditament, that the liberty of hawking, hunting, fowling, and fishing, granted to a person, his heirs, executors, and assigns, amounted to a profit *à prendre*, authorising the grantee to take and carry away the fowl and the fish, and not to a mere license of pleasure, and that it conferred upon the grantee a right to send his servants to hawk, hunt, fish, and fowl for him in his absence (*a*).

A right of way or of watercourse cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way, therefore, reserved to a lessor on the making of a lease, is in strictness of law an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or of fishing.

Conventional servitudes—Acquisition—Distinction between the reservation of part of the land and the reservation of an easement.—When the owner grants a property excepting a certain part of it, there is no grant of the part excepted. Thus minerals excepted remain in the grantor: the grantee takes no interest or right whatever in them. If, on the other hand, the grantor reserves certain rights and interests, the rights and interests reserved must come by way of re-grant from the grantee (*b*). If the grantor reserves an easement, he cannot use it for any other purpose than the particular purpose for which it was originally granted; but, if he reserves the land itself, he can use it in any way consistent with the rights of the public at large and of adjoining landowners. Thus, if *A*'s park adjoins *B*'s, and *A* has no access to his mansion-house except by a road through his neighbour *B*'s park, over which he has acquired by grant a right of way for the purpose of enabling him, and all other persons coming to his house, to enjoy the privilege of driving along it, and so reaching a road in his own park and proceeding to the house, *A* cannot use the portion of road

(*a*) *Wickham* v. *Hawker*, 7 M. & W. 63. *Doe* v. *Lock*, 2 Ad. & E. 743. *Pannell* v. *Mill*, 3 C. B. 636. Shep. Touch. 100—116. See, as to implied reservations, *post*, p. 301.

(*b*) *Proud* v. *Bates*, 34 L. J., Ch. 406.

301 over which he has only a right of way for any other purpose than that of obtaining access to his own house; but, as regards his own park, he may use the road there for any purpose he thinks fit. If *A* sells to *B* his own park, reserving only his house, and a right of way over the road through his park to the house, he will only be able to use the road as a means of access for himself and his friends to his house, of which he still retains possession. But, if, in order to have complete dominion over the road up to his house, instead of reserving a right of way over what he is selling, he reserves the road and the soil over which it passes, he may do whatever he pleases with the road; for instance, he may fence it off and prevent *B* from having any access to it, leaving *B* to make a new road for himself. *A* will still have the sole control and dominion over the property in the road, that property being his just as much after he has executed the conveyance as before (*e*).

Conventional servitudes—Acquisition—Implied grant or reservation of easements.—On the grant by the owner of an entire heritage of part of that heritage, in the absence of any indication of a contrary intention, there will pass to the grantee all those continuous and apparent easements which have been and are, at the time of the grant, used by the owners of the entirety for the benefit of the parcel granted (*d*), and it is immaterial whether the entirety or the parcel granted is then in the occupation of the owner or of a tenant (*e*). If, therefore, a landed proprietor has annexed peculiar qualities and incidents to different parts of his estate, so that one portion of his land becomes visibly dependent upon another for the supply or escape of water, or for means of access, or for beneficial use and occupation, the qualities or incidents thus manifestly imprinted upon the property pass with the lands to which they are annexed to the grantee, as accessorial to the beneficial use and enjoyment of such lands (*f*). By apparent easements must be understood, not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*g*). But the mere fact of there being windows in an adjoining house, which overlook a purchased property, is not constructive notice of any agreement giving a right to the access of light to them (*h*).

(*c*) *Duke of Hamilton* v. *Graham*, L. R., 2 Sc. App. 166.

(*d*) *Ewart* v. *Cochrane*, 4 Macq. 122. *Hall* v. *Lund*, 1 H. & C. 676; 32 L. J., Ex. 113. *Suffield* v. *Brown*, 4 De G. J. & S. 185; 33 L. J., Ch. 258. As a general rule there is no corresponding implication in favour of the grantor (*Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J., Ch. 853), but there may be. *Russell* v. *Watts*, 10 App. Cas. 590; 55 L. J., Ch. 158.

(*e*) *Barnes* v. *Loach*, 4 Q. B. D. 494; 48 L. J., Q. B. 756.

(*f*) *Suffield* v. *Brown*, *supra*.

(*g*) *Pyer* v. *Carter*, 1 H. & N. 922; 26 L. J., Ex. 258. As to this case, see *Wheeldon* v. *Burrows*, *supra*.

(*h*) *Allen* v. *Seckham*, 11 Ch. D. 790; 48 L. J., Ch. 611.

302 *Conventional servitudes—Acquisition—Implied grant—Rights of water.*—If a millowner sells a watermill which is supplied with water from an open sluice on the land of the vendor, the vendor cannot, after he has sold the mill, lawfully close the sluice, as he would, by so doing, derogate from his own grant. Both the vendor, and all persons claiming under him, are bound to keep the sluice open for the benefit of the grantee of the mill (*i*). If one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances without the land, or sells the land without the house to another, the conduit and pipes pass with the house, because they are necessary and appendant thereto; and the purchaser of the house shall have liberty by law to dig in the land for amending the pipes or making them new, as the case may require. So it is, if a lessee for years of a house and land erects a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them. "But," says Popham, C. J., "if the lessee erect such a conduit, and afterwards the lessor during the lease sell the house to one and the land wherein the conduit is to another, and after that the lease determines, he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is, if a disseisor of a house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re-entry sells it, the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit" (*k*).

On the other hand, where a man sells land on the banks of a stream he cannot, in derogation of his own grant, continue to foul the water in front of the land sold, unless he expressly reserves such right (*l*).

(*i*) *Miner* v. *Gilmour*, 12 Moo. P. C. 131.

(*k*) *Nicholas* v. *Chamberlain*, Cro. Jac. 121. *Brown* v. *Nicholls*, Moore, 682. *Archer* v. *Bennett*, 1 Lev. 131. *Hinchliffe* v. *Earl Kinnoul*, 5 Bing. N. C. 23. *Canham* v. *Fiske*, 2 Cr. & J. 126. *Wardle* v. *Brocklehurst*, 1 El. & El. 1058; 29 L. J., Q. B. 145. *Watts* v. *Kelson*, L. R., 6 Ch. 166; 40 L. J., Ch. 126. It was at one time held that where the owner of two or more adjoining houses sells or conveys one of the houses, the purchaser of the house is entitled to the benefit of all the drains from his house, and is subject to all the drains necessary to be used for the enjoyment of the adjoining house, and that without any express reservation or grant. *Pyer* v. *Carter*, 1 H. & N. 916; 26 L. J., Ex. 258. But this cannot now be considered good law. See *ante*, p. 301.

(*l*) *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; 2 Ch. 478; 36 L. J., Ch. 584.

303 If adjoining houses, held under the same landlord, are sold subject to all subsisting rights of water, a mere permissive user by one tenant of water from a well in the adjoining house, will not thereby be converted into a legal right (*m*).

A right to go to a well and take water is not a continuous easement, nor is it an easement of necessity; and, consequently, there is no implied grant or reservation of such a right upon the conveyance or devise of the dominant tenement (*n*).

Conventional servitudes—Acquisition—Implied grant—Right of way.—If a man is possessed of a house, and there is a way necessary for the useful and convenient occupation of the house (*o*) manifestly used by the occupiers of the house, a grant or lease of the house with its appurtenances will carry with it the right to use the way (*p*). But, if the way is not necessary for the beneficial use and occupation of the tenement, and there are other convenient means of access, a right of way will not pass under the word "appurtenances" (*q*). Nor will the use of the words "therewith used and enjoyed" operate to pass a way which was previously only used by the grantor for the more convenient occupation of two tenements, and which therefore never became attached to either (*r*); but it will be otherwise, if the way was only used for the more convenient occupation of the tenement granted, so that it can be said to have been enjoyed as if it were appurtenant thereto (*s*). If adjoining houses, held under the same landlord, are sold subject to all subsisting *rights* of way, a mere permissive user of a way will not thereby be converted into a legal right (*t*). If, in the conveyance of a plot of land, it is described as abutting on a new road or a new street, there is an implied grant of a right of way over the road or street (*u*).

Conventional servitudes—Acquisition—Implied grant—Ways of necessity.—Whenever one man grants land to another to which there is no access but over the land of the grantor, or over the land

(*m*) *Russell* v. *Harford*, L. R., 2 Eq. 507.

(*n*) *Polden* v. *Bastard*, L. R., 1 Q. B. 156; 32 L. J., Q. B. 372.

(*o*) Mansfield, C. J., *Morris* v. *Edgington*, 3 Taunt. 28. *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761.

(*p*) Pollock, C. B., *Glave* v. *Harding*, 27 L. J., Ex. 292. See Wood on Nuisances, p. 174.

(*q*) *Pheysey* v. *Vicary*, 16 M. & W. 484. *Dodd* v. *Burchall*, 1 H. & C. 113; 31 L. J., Ex. 364. *Wardle* v. *Brocklehurst*, 1 El. & El. 1058; 29 L. J., Q. B. 145. *Bolton* v. *Bolton*, 11 Ch. D. 968; 48 L. J., Ch. 467. In all conveyances executed after the 31st December, 1881, the distinction between easements "appertaining" to and easements "used and enjoyed with" the land conveyed, has by virtue of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 6, become of no consequence.

(*r*) *Langley* v. *Hammond*, L. R., 3 Ex. 161; 37 L. J., Ex. 118. See, however, remarks of Fry, J., in *Barkshire* v. *Grubb*, *infra*.

(*s*) *Kay* v. *Oxley*, L. R., 10 Q. B. 360; 44 L. J., Q. B. 210. *Bayley* v. *Great Western Rail. Co.*, 26 Ch. D. 435. *Barkshire* v. *Grubb*, 18 Ch. D. 616; 50 L. J., Ch. 731.

(*t*) *Daniel* v. *Anderson*, 31 L. J., Ch. 610.

(*u*) *Espley* v. *Wilkes*, L. R., 7 Ex. 298; 41 L. J., Ex. 241.

304 of a stranger which cannot lawfully be traversed, the grantee has a right of way over the grantor's land, as a way by necessity, and the grantor shall assign the way where he can best spare it; and, if the owner of two closes, having no way to one of them but over the other, parts with the latter without reserving the way, it will be reserved to him by law as a way of necessity (*x*). Where one sold land, and afterwards the vendee, by reason thereof, claimed a way to it over part of the plaintiff's land, there being no convenient way adjoining, it was held that he might well justify the using thereof, for otherwise he could not have any profit of his land; and, if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law (*y*). A person is not, however, entitled to have two ways of necessity, but the vendor may select the way, provided that it is a convenient way (*z*). A way of necessity, when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from a grant; for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant. In both cases the grant is the foundation of the title (*a*). Where an owner of a close and surrounding land grants the land, and reserves the close, the right to a way of necessity operates as if by a re-grant from the grantee of the land, and is limited in the nature of its user by the necessity which created it (*b*). According to some cases, it would seem that that may be called a necessary way, without which the most convenient and reasonable mode of enjoying the premises cannot be had (*c*); but it may be doubted whether such a way is strictly a way of necessity.

Conventional servitudes—Acquisition—Implied grant—Right of support.—If the landowner sells a portion of his land avowedly and expressly for building, or for the construction of a road or railway, he impliedly grants to the purchaser, in the absence of statutory provisions to the contrary, an easement of lateral support

(*x*) 2 Roll. Abr. GRANT, Z., pl. 17, 18. *Staple* v. *Heydon*, 6 Mod. 4. *Howton* v. *Frearson*, 8 T. R. 50. *Morris* v. *Edgington*, 3 Taunt. 30. *Pinnington* v. *Galland*, 9 Exch. 12; 22 L. J., Ex. 349. *Eastern Counties Rail. Co.* v. *Dorling*, 5 C. B. N. S. 821; 28 L. J., C. P. 202. *Gayford* v. *Moffatt*, L. R., 4 Ch. 133. *Serff* v. *Acton Local Board*, *infra*.

(*y*) *Clarke* v. *Cogge*, Cro. Jac. 170. See *Davies* v. *Sear*, L. R., 7 Eq. 427; 38 L. J., Ch. 545, *nom. Davies* v. *Stear*, *S. C.*

(*z*) *Bolton* v. *Bolton*, 11 Ch. D. 968; 48 L. J., Ch. 467.

(*a*) 1 Wms. Saund. 323 a, 323 b. *Proctor* v. *Hodgson*, 10 Exch. 824; 24 L. J., Ex. 195.

(*b*) *Corporation of London* v. *Riggs*, 13 Ch. D. 798; 49 L. J., Ch. 297. See *Serff* v. *Acton Local Board*, 31 Ch. D. 679.

(*c*) *Morris* v. *Edgington*, 3 Taunt. 30. *Hinchliffe* v. *Lord Kinnoul*, 5 Bing. N. C. 1. *Geraghty* v. *M'Cann*, 6 Ir. Rep. C. L. 411.

305 from his adjoining land; and neither the vendor, nor those who claim under him, can afterwards excavate so as to endanger the support and derogate from the grant (*d*), unless it appears from express words in the deed or by necessary intendment therefrom that it was not the intention of the parties that there should be any right to support (*e*).

How far this support must extend is a question which in each particular case will depend on its own special circumstances. If the surface of the land granted is merely a common meadow or a ploughed field, the necessity for support will be much less than if it were covered with buildings. All that a grantor of the surface can be reasonably considered to grant or warrant, by implication of law, is such a measure of support as is necessary for the land in its condition at the time of the grant, or to enable the grantee to use it for purposes for which it was known to be required.

Where a landowner has sold his land to a railway company under the compulsory powers of an Act of Parliament, the court will interfere by injunction to prevent him from working mines in his adjoining land, so as to endanger the stability of the railway, unless the legislature has given the company the power of purchasing such adjoining land, and has provided that they shall protect themselves by purchasing so much of it as may be required to give their railway and works the requisite amount of lateral support (*f*).

Conventional servitudes—Acquisition—Implied grant—Support of buildings—Adjoining houses.—A right of support from the adjoining land may be implied where land has been granted for the purpose of building. Thus, where a corporation sold a piece of land for building purposes, and the plaintiff, to the knowledge of the corporation, dug his foundation a depth of eight feet and built his house up to the ground floor, and eleven months afterwards the defendants purchased from the corporation the adjoining lot, and carried their foundations lower than those of the plaintiff, it was held that he was entitled to restrain the defendants from excavating so as to let down his house (*g*). Where a number of houses have been built together by one owner, so as to require

(*d*) *North-Eastern Rail. Co.* v. *Crosland*, 2 Johns. & H. 565; 32 L. J., Ch. 358. *Siddons* v. *Short*, 2 C. P. D. 572; 46 L. J., C. P. 795. This rule, however, does not necessarily apply where lands are taken under the provisions of an Act of Parliament, *e. g.*, for constructing a sewer. *Metropolitan Board of Works* v. *Metropolitan Rail. Co.*, L. R., 3 C. P. 612; 4 *ibid.* 192; 38 L. J., C. P. 172.

(*e*) *Aspden* v. *Seddon*, L. R., 10 Ch. 394; 44 L. J., Ch. 359. *Dixon* v. *White*, 8 App. Cas. 833.

(*f*) *North-Eastern Rail. Co.* v. *Elliott*, 1 Johns. & H. 145; 10 H. L. C. 333; 32 L. J., Ch. 402.

(*g*) *Rigby* v. *Bennett*, 21 Ch. D. 559; 48 L. T. 47. It is, however, doubtful whether the claim to the right of support would be carried to such an extent as to interfere with the reasonable exercise of the rights of the adjoining owner. See Wood on Nuisances, p. 209.

306 and receive mutual support, there is, either by a presumed grant, or by a presumed reservation, a right to mutual support for their common protection or security, if the houses are afterwards sold and conveyed to different individuals; and, if several adjoining landowners, by common consent and agreement, build their houses together, so that the house of one of them rests upon and requires the support of the adjoining house, there will be an implied grant of a right to mutual support; and this right will continue, notwithstanding alterations in the ownership of the houses by sale, mortgage, devise, &c. (*h*). But, if two houses are built against each other, with separate and independent walls resting upon separate and independent foundations, so as to stand independently of each other, one house has no right to an easement of support from the other (*i*).

Conventional servitudes—Acquisition—Implied grant—Right to light and air.—If the owner of a house and the surrounding land sells the house without the land, a free passage for so much light and air as may be reasonably necessary for the beneficial occupation and enjoyment of the house is impliedly granted by the vendor across his own adjoining unsold land, unless the privilege is excluded by the express terms of the conveyance. The vendor, therefore, cannot build on his own adjoining land so as to obstruct the access of light and air to the windows of the house; having granted the house, he can do no act in derogation of his own grant. If he sells and conveys the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building-land, and the intention to build thereon may have been known to the purchaser at the time he purchased it (*k*). But, where the owner in fee of an ancient house, and of the land surrounding the house, sold such surrounding land without the house, and the purchaser built thereon,

(*h*) *Richards* v. *Rose*, 9 Exch. 221; and see per Cockburn, C. J., in *Angus* v. *Dalton*, 3 Q. B. D. at p. 116. *S. C.* on appeal, 4 Q. B. D. 162; 6 App. Cas. 740. Goddard on Easements, 2nd ed., p. 187. See also *Walters* v. *Pfeil*, 1 M. & M. 362. *Dodd* v. *Holme*, 1 A. & E. 493. *Massey* v. *Goyder*, 4 C. & P. 161. *Chadwick* v. *Trower*, 6 Bing. N. C. 1. *Le Maitre* v. *Davis*, 19 Ch. D. 281; 51 L. J., Ch. 173. *Tone* v. *Preston*, 24 Ch. D. 739; 53 L. J., Ch. 40, *post*, p. 331.

(*i*) *Solomon* v. *Vintners Co.*, 4 H. & N. 598; 28 L. J., Ex. 370. *Peyton* v. *Mayor of London*, 9 B. & C. 730. *Kempston* v. *Butler*, 12 Ir. C. L. R. 516. See Wood on Nuisances, Chap. V.

(*k*) *Palmer* v. *Fletcher*, 1 Lev. 122. Bayley P. *Cranham* v. *Fisk*, 2 Cr. & J. 128. *Compton* v. *Coventry*, 9 Bing. 305. In some of the States this right is recognized, while in others it is expressly denied: *Mullen* v. *Stricker*, 19 Ohio St. 135; *Randall* v. *Sanderson*, 111 Mass. 114; *Keats* v. *Hugo*, 115 *id.* 204; *Morrison* v. *Marquardt*, 24 Iowa, 35; *Keiper* v. *Kline*, 51 Ind. 316; while in others it depends upon the question of necessity: *Doyle* v. *Lord*, 64 N. Y. 432; *Turner* v. *Thompson*, 58 Ga. 268; *White* v. *Bradley*, 66 Me. 254; *Lampman* v. *Milks*, 21 N. Y. 505; *Story* v. *Odin*, 12 Mass. 157; *Collier* v. *Pierce*, 7 Gray (Mass.) 18; *Myers* v. *Gemmel*, 10 Barb. (N. Y.) 537; *Royce* v. *Greggenheim*, 106 Mass. 201; *Maynard* v. *Esbler*, 17 Penn. St. 222; *W. Jones* v. *Jenkins*, 34 Md. 1; *Thurston* v. *Minke*, 32 *id.* 487. Such an easement is held to be raised by implication. See also *Powell* v. *Sims*, 5 W. Va. 1; *Turner* v. *Thompson*, 58 Ga. 268.

so as to obstruct the access of light and air to the windows of the ancient house, it was held that the owner had no remedy for the injury, and that there was no implied restriction on the right
307 of the purchaser to build as he pleased on his own land (*l*). But such a restriction may be implied under some circumstances (*m*). Where the owner of a dwelling-house and adjoining land sells the house to one person and the land to another at the same time, either purchaser having notice, the purchaser of the land cannot obstruct the lights of the house (*n*).

Where the shell of an unfinished house was sold, with openings in the walls for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land, so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right of way to the apertures intended for doors; and, when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy, so that they cannot subsequently interfere with each other's enjoyment of the windows and doors as marked out and impliedly agreed upon at the time of the sale (*o*). So, if two lessees of houses derive title from the same lessor, the one cannot, by buildings or erections, encroach upon the light and air coming to the windows of the house occupied by the other (*p*).

In these cases the right to the free passage of a reasonable quantity of light and air across the adjoining land becomes appurtenant to the house, and passes therewith to all successive owners of the property.

Upon the same principle, it has been held that a landlord, after he has demised his house, cannot obstruct the lights existing at the time of the demise (*q*); nor can a lessee darken or obstruct windows of his own landlord which existed at the time of the demise, whether such windows were ancient or of recent construction (*r*). But the right of uninterrupted enjoyment is confined to the windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened (*s*).

(*l*) *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093; 6 Mod. 314. *White* v. *Bass*, 7 H. & N. 722; 31 L. J., Ex. 283. *Curriers Co.* v. *Corbett*, 2 Dr. & Sm. 355; 1 De G. J. & S. 764. *Ellis* v. *Manchester Carriage Co.*, 2 C. P. D. 13. *Wheeldon* v. *Burrows*, 12 Ch. D. 31; 48 L. J., Ch. 853.

(*m*) *Russell* v. *Watts*, 10 App. Cas. 590; 55 L. J., Ch. 158.

(*n*) *Allen* v. *Taylor*, 16 Ch. D. 355; 50 L. J., Ch. 178.

(*o*) *Compton* v. *Richards*, 1 Price, 27. *Glave* v. *Harding*, 27 L. J., Ex. 286.

(*p*) *Coutts* v. *Gorham*, 1 M. & M. 396. *Jacomb* v. *Knight*, 32 L. J., Ch. 501.

(*q*) *Cox* v. *Matthews*, 1 Ventr. 237, 239. *Rosewell* v. *Pryor*, 6 Mod. 116.

(*r*) *Riviere* v. *Bower*, R. & M. 24.

(*s*) *Blanchard* v. *Bridges*, 4 Ad. & E. 190. See, however, *Scott* v. *Pape*, and other cases, *post*, p. 359.

308 *Conventional servitudes—Acquisition—Revival and re-creation of easements and servitudes which have been extinguished or suspended by unity of ownership.*—When an easement or servitude has become extinct by reason of the ownership of the dominant and servient estates having become centred in the same person, and he again conveys away that estate to which the easement or servitude has belonged, the general rule is that, if he merely grants such estate with the appurtenances, the easement is not revived, unless it is a visible, apparent easement, manifestly necessary for the commodious occupation and enjoyment of the property which is conveyed (*t*); but, if he grants it with all easements, &c., therewith used and enjoyed, that operates as a revival; and any other words clearly intended to have such an effect will operate in the same manner (*u*). If a right of way has become extinguished by unity of ownership of the dominant and servient tenements, and the messuage for which the right of way was anciently used is subsequently severed from the land over which the way passed, and is conveyed "with all ways, roads, rights of road, paths, and passages thereto belonging, or in anywise appertaining," the extinct right of way is not revived, and does not pass by the conveyance of the house, unless it is a way of necessity (*x*); "for nothing is more clear than that, under the word 'appurtenances,' according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of unity of ownership, does not pass. If the grantor wishes to revive or re-create such a right, he must do it by express words, or introduce the terms 'therewith used and enjoyed,' in which case easements existing in point of fact, though not existing in point of law, will be transferred to the grantee" (*y*). If, therefore, the occupiers of farm *A* have a right of way, not being a way of necessity, over farm *B*, and both farms come into the hands of one and the same owner, and afterwards the two farms are again severed and granted to two different grantees, the extinct right of way will not be revived and re-created, unless the grantor uses language to show that he intended to create the easement *de novo* (*z*).

But there is a distinction between what are termed discontinuous easements, such as rights of way, and continuous ease-

309 ments, such as drains and watercourses: for, if the owner of a mill, who has a right of passage for water to his mill through the

(*t*) *Suffield* v. *Brown*, 4 De G. J. & S. 185; 33 L. J., Ch. 249. And see *ante*, p. 302.

(*u*) See per Kelly, C. B., *Langley* v. *Hammond*, L. R., 3 Ex. 168; 37 L. J., Ex. 118. See *ante*, note (*r*), p. 303.

(*x*) *Barlow* v. *Rhodes*, 1 Cr. & M. 448. *Wardle* v. *Brocklehurst*, 1 El. & El. 1058; 29 L. J., Q. B. 145. But see *Watts* v. *Kelson*, L. R., 6 Ch. 166; 40 L. J., Ch. 126.

(*y*) *Plant* v. *James*, 5 B. & Ad. 794. *James* v. *Plant*, 4 Ad. & E. 764. *Bradshaw* v. *Eyre*, Cro. Eliz. 570. *Baird* v. *Fortune*, 4 Macq. 127.

(*z*) *Worthington* v. *Gimson*, 2 El. & Bl. 618; 29 L. J., Q. B. 117. *Daniel* v. *Anderson*, 31 L. J., Ch. 610. *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761.

land of the adjoining landowner, purchases such adjoining land, and becomes the owner both of the mill and of the land over which his watercourse extends, and afterwards alienes the mill, the watercourse and incorporeal right to the free passage of the water to the mill are not extinguished, but pass with the mill as appendant and appurtenant thereto. So, if a man has a dye-house, and there is water running thereto, and afterwards he purchases the land upon which the stream runs, and subsequently re-sells such land, his original right to the watercourse remains (*a*). But, if a man has a stream of water which runs in a leaden pipe through the adjoining land, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is thenceforth extinct, because he thereby declares his intention that the watercourse and the land shall no longer be enjoyed together (*b*).

Where a way has been extinguished by the unity of seisin of two estates, by the partition of the two the way is revived. Thus it has been laid down as law, "that a way extinguished by unity of possession is revivable afterwards upon a descent to two daughters, where the land through which the way passed is allotted to one, and the other land to which the way belonged is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it" (*c*).

Conventional servitudes—Acquisition—Licence.—"A dispensation or licence," observes Vaughan, C. J., "properly passes no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. Thus, a licence to hunt in a man's park and carry away the deer killed to his own use, or to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the act of hunting and cutting down the tree; but, as to the carrying away of the deer killed and tree cut down, they are grants" (*d*).

A mere licence of pleasure, such as a licence to hunt over a man's land, whether made by deed or simple contract, is revocable; but a licence to hunt and carry away the game killed

310 amounts, if under seal, to a grant, and cannot be revoked (*e*). Care, however, must be taken to distinguish between a licence

(*a*) *Sury* v. *Pigot*, Poph. 172; Palm. 444.

(*b*) Popham, C. J., *Lady Brown's case*, cited Palm. 446.

(*c*) 1 Jenk. Cent. Ca. 37; Bro. Abr. EXTINGUISHMENT, 15. In the Roman law, when the servitude was a non-apparent servitude, it was merged and extinguished by unity of ownership of the dominant and servient tenements; but, when it was an apparent, continuing servitude, such as a window enjoying light and air, or lands having drains or watercourses or manifest ways running through them, the servitude was not extinguished; so that, if the tenements were subsequently severed, they would be respectively benefited and burdened with their ancient, manifest, and continuing privileges and obligations. Dig. lib. 8, tit. 2, 3.

(*d*) *Thomas* v. *Sorrell*, Vaughan, 351.

(*e*) Bro. Abr. LICENCES. As to a licence to fish, see *Mills* v. *Mayor of Colchester*, L. R., 2 C. P. 476; 3 *ib.* 575; 37 L. J., C. P. 278.

amounting to a grant of an easement to be exercised and enjoyed by the grantee of such licence upon the grantor's land, and a licence to the grantee to use his own land in a way in which, but for an easement claimed thereon by the grantor, he would have an undoubted right to use it.

A right to go upon the land of another to shoot and sport there, or to fish in the waters thereof, authorising the licensee both to take and carry off the game or the fish, is an incorporeal right lying in grant, and can only be created by deed (*f*). A parol licence or permission will, so long as it has not been countermanded, justify an entry upon the land (*g*); but it confers no indefeasible right, and may be recalled at the pleasure of the grantor, unless it is accompanied by a grant (*h*). Thus, a mere licence for the enjoyment of a right of way over the land of the licensor may at any time be put an end to by the latter. The locking of a gate across the way is a manifest revocation of the licence, and a plain statement to everybody that the way is no longer to be used. So a mere parol permission to cut a drain, or make a watercourse, and use it for the passage of water, may be revoked at law, and the drain or watercourse stopped up by the proprietor who has given the permission, and through whose land the water runs (*i*). "In the case of a parol licence," observes Alderson, B., "to come on my land, and there to make a watercourse for water to flow through my land, there is no valid grant of the watercourse. The licence remains a mere licence, capable of being revoked; but, if the licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and, if it did, then the licence would be irrevocable" (*k*). But, if a landowner has granted to his neighbour by parol an easement to be enjoyed over his land, and the neighbour incurs expense, with the sanction of the landowner, in constructing permanent works for the enjoy-

(*f*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; 8 D. & R. 747. *Bird* v. *Higgivson*, 2 Ad. & E. 696. *Thomas* v. *Fredericks*, 16 L. J., Q. B. 393. *Ewart* v. *Graham*, 7 H. L. C. 331; 29 L. J., Ex. 88.

(*g*) *Feltham* v. *Cartwright*, 7 Sc. 695.

(*h*) *Wood* v. *Leadbitter*, 13 M. & W. 845.

(*i*) *Cocker* v. *Cowper*, 1 Cr. M. & R. 421. *Fentiman* v. *Smith*, 4 East, 108.

(*k*) *Wood* v. *Leadbitter*, 13 M. & W. 845. *Lee* v. *Stevenson*, El. Bl. & El. 512; 27 L. J., Q. B. 263. *Bridges* v. *Blanchard*, 1 Ad. & E. 549. A licence by parol may be revoked at any time by the licensor: *Brown* v. *Bowen*, 30 N. Y. 519; *Smith* v. *Scott*, 1 Kerr (New Brunswick) 1; *Allen* v. *Fisk*, 42 Vt. 462; *Druse* v. *Wheeler*, 22 Mich. 439; *Dempsey* v. *Kipp*, 62 Barb. (N. Y.) 311; *Freeman* v. *Headley*, 33 N. J. L. 523; *Estes* v. *Winne*, 20 Mich. 156; *Duineen* v. *Rich*, 22 Wis. 550; *Hamilton* v. *Windolf*, 33 N. J. L. 523; *Estes* v. *China*, 56 Me. 407; *Giles* v. *Simonds*, 15 Gray (Mass.) 441; *Doe* v. *McClintock*, 47 N. H. 383; *Rhodes* v. *Otis*, 33 Ala. 578; *Miller* v. *State*, 39 Ind. 267; *Maye* v. *Tappan*, 23 Cal. 306; *Hunston* v. *Laffee*, 46 N. H. 506. But in some instances, where heavy expenditures have been made upon the faith of the licence, equity will enjoin a revocation of the licence: *Cook* v. *Prigden*, 45 Ga. 331; *R. R. Co.* v. *McLanahan*, 59 Penn. St. 23; *Pierson* v. *Canal Co.*, 2 Dis. (Ohio.) 100; *Veghte* v. *Raritan W. P. Co.*, 19 N. J. Eq. 142; *Hetfield* v. *N. J. Central R. R. Co.*, 29 N. J. Eq. 571.

ment of the privilege, the landowner will not be allowed to withdraw his consent and prevent the enjoyment of the privilege, without making compensation to the licensee (*l*); for, whenever
311 a person has been induced to lay out money upon the land of another, upon the faith of a verbal agreement, that in consideration of the expenditure the person laying out his money shall enjoy an easement, privilege, or profit upon the land, the privilege cannot be withdrawn by the landlord, without tendering full compensation for the expenditure (*m*). Thus, where persons desirous of supplying a town with water applied to the defendant for permission to make a watercourse through his land, and permission was granted by word of mouth, and the watercourse was made at considerable expense, and was enjoyed for nine years, when disputes arose, and the defendant cut off the water, the Court of Chancery restrained the defendant by injunction from obstructing the flow of water, on compensation being made to him for the use of his land (*n*).

If a landowner verbally agrees to allow an adjoining proprietor a right of way, or a right to the passage of water through his land, and the enjoyment of the privilege involves the outlay of money, and the consenting landowner allows the licensee or person to whom the privilege has been granted to expend money in making a road, or laying down a railway, or constructing a watercourse, or erecting buildings, the court will interfere by injunction to prevent such consenting landowner from disturbing the enjoyment of the way, or watercourse, or easement, so verbally granted (*o*). Where works involving expense are made on land belonging to an incorporated company, on a spot where the company may be considered personally present, where their premises are situated, and their operations carried on, the company, though an incorporated body, must be considered for all purposes of knowledge and acquiescence, to be in the same position as a private individual, and will be bound in the same way (*p*). In cases of this sort, where a person has obtained an equitable right to the enjoyment of an easement or privilege by reason of the expenditure of his money on the faith of a verbal promise or understanding, but has no legal title to any incorporeal right over the land of another, his equitable claim may, in general, be got rid of

(*l*) *Beaufort* (*Duke of*) v. *Patrick*, 17 Beav. 60. *Moreland* v. *Richardson*, 22 Beav. 596; 24 Beav. 33; 26 L. J., Ch. 690. *Powell* v. *Thomas*, 6 Hare, 300.

(*m*) *Laird* v. *Birkenhead Rail. Co.*, 1 Johns. 500; 29 L. J., Ch. 218. *Unity Joint Stock Banking Assoc.* v. *King*, 25 Beav. 79; 27 L. J., Ch. 585. *Ramsden* v. *Dyson*, L. R., 1 H. L. 170. *Clavering's case*, 5 Ves. 690.

(*n*) *Devonshire* (*Duke of*) v. *Elgin*, 14 Beav. 530; 20 L. J., Ch. 495.

(*o*) 2 Eq. Cas. Abr. 522, pl. 3. *Jackson* v. *Cator*, 5 Ves. 689. *Powell* v. *Thomas*, 6 Hare, 300. *Mold* v. *Wheatcroft*, 27 Beav. 510. *East India Co.* v. *Vincent*, 2 Atk. 82. *Davies* v. *Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61. See *Bankart* v. *Tennant*, L. R., 10 Eq. 141; 39 L. J., Ch. 809.

(*p*) *Laird* v. *Birkenhead Rail. Co.*, 1 Johns. 500; 29 L. J., Ch. 218.

by tendering him the amount of his expenditure, before the privilege is withdrawn or the enjoyment of it has been interrupted. If a tramway is made across land with the consent of the owner of
312 the fee, and is used for a number of years on payment of rent, the court will interfere to prevent an arbitrary increase of the rent, and prevent the licensee from being deprived of the use of the tramway, on proper compensation being paid to the owner of the soil for the enjoyment of the way (*q*).

If the owner in fee of land stands by and allows another person to erect a building upon his land, and afterwards agrees with him as to the rent to be paid for it, neither he nor any person claiming under him can deprive the person who has so laid out his money of the use of the building (*r*); and, if an adjoining landowner assents to the rebuilding of a house upon a certain plan, with an increased elevation, or with an enlargement of ancient windows, or the opening of new windows, and the house is accordingly re-built on the approved plan, the landowner cannot afterwards object to the alterations (*s*).

Where an easement has been bargained for and sold by parol, and has been enjoyed for years by the purchaser thereof, the court will restrain the vendor and any person claiming under him (not being a purchaser of the land for value without notice) from disturbing the enjoyment of the privilege. Thus, where *A* sold to his neighbour *B* the right of using two chimneys in *A*'s wall for a certain consideration, which was paid, and the chimneys were used for several years, and *C* purchased *A*'s house without actual notice of the right, the court held that, there being fourteen chimney-pots on the wall, and only twelve flues in *A*'s house, *C* had constructive notice of the right (*t*). But the mere fact of there being windows in an adjoining house which overlook a purchased property, is not constructive notice of any agreement giving a right to the access of light to them (*u*).

Where the owners and occupiers of land authorized to be taken for public works have licensed the entry of a public board or company for the purpose of commencing the construction of the works, they cannot revoke the consent once given, and treat their licensees as trespassers, but must resort to the statutory remedy for compensation (*x*).

"By the grant of trees by tenant in fee simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators, being, in

(*q*) *Mold* v. *Wheatcroft*, 27 Beav. 510.
(*r*) *Dann* v. *Spurrier*, 7 Ves. 236.
(*s*) *Cotching* v. *Basset*, 32 Beav. 101; 32 L. J., Ch. 286.
(*t*) *Hervey* v. *Smith*, 22 Beav. 299; 1 K. & J. 392.
(*u*) *Allen* v. *Seckham*, 11 Ch. D. 790; 48 L. J., Ch. 611.
(*x*) *Doe* v. *Leeds and Bradford Rail. Co.*, 16 Q. B. 796; 20 L. J., Q. B. 486. *Knapp* v. *London, Chatham, &c., Rail. Co.*, 2 H. & C. 212; 32 L. J., Ex. 236.

understanding of law, divided as chattels from the freehold, and the grantee hath power incident and implied from the grant to fell
313 them when he will, without any other special licence (*y*); and the law gives him power, as incident to the grant, to enter upon the land, and show the trees to those who would have them, for without sight none would buy, and without entry none could see them (*z*); and he may assign over the property in the trees, and his assigns may enter upon the land, so long as it remains the property of the grantor, and fell the trees and carry them away" (*a*). If a growing crop of grass is sold to be cut down and made into hay when it arrives at maturity, the purchaser has a right by implication of law to make the grass into hay on the land (*b*).

A licence to put goods on the licensor's land cannot be revoked without allowing the licensee a reasonable time for the removal of his goods (*c*).

A parol licence to enjoy an easement over or upon the soil and freehold of another is at once determined by a transfer of the property; and the grantee of the licence is, consequently, a trespasser, if he afterward enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer (*d*).

Conventional servitudes—Acquisition—Licences—Liabilities of the licensor.—The extent of the liability of the occupier of land to the person whom he has licensed to come upon that land depends on whether the licensee comes on the land for a purpose in which he and the licensor have a joint interest, or from which the licensor derives a profit, and upon his invitation, express or implied, or whether he comes for his own purposes only, in which last case he is called a bare licensee (*e*). In the former case there is an obligation on the part of the occupier of the land to take, by himself and his servants, reasonable care that the person so coming shall not be exposed to unusual danger, of which the occupier knows or ought to know; and that obligation extends to a workman sent by a tradesman to repair machinery on the land (*f*), and to a person who by the invitation of the defendant or his servant goes on to the defendant's premises for the purpose of making a complaint to the defendant (*g*), and to a workman in the employ of a ship-

(*y*) *Stukely* v. *Butler*, Hob. 168. *Cardigan* (*Earl of*) v. *Armitage*, 2 B. & C. 210.

(*z*) *Liford's case*, 11 Co. 51 b, 52 a.

(*a*) *Palmer's case*, 5 Co. 24 b. *Basset* v. *Maynard*, Cro. Eliz. 819.

(*b*) 1 Roll. Abr. DISMES, X., pl. 23.

(*c*) *Cornish* v. *Stubbs*, L. R., 5 C. P. 334; 39 L. J., C. P. 202. *Mellor* v. *Watkins*, L. R., 9 Q. B. 400.

(*d*) *Wallis* v. *Harrison*, 4 M. & W. 539. *Russell* v. *Harford*, L. R., 2 Eq. 507.

(*e*) *John* v. *Bacon*, L. R., 5 C. P. 437; 39 L. J., C. P. 365.

(*f*) *Indermaur* v. *Dames*, L. R., 1 C. P. 274; 2 *ib.* 311; 36 L. J., C. P. 181.

(*g*) *White* v. *France*, 2 C. P. D. 308; 46 L. J., C. P. 823.

painter, who had contracted with a shipowner to paint a ship, and
314 who went on to a staging supplied by a dock owner (*h*); and to the servants of the buyers of coal to whom the defendants consigned coals in trucks of a waggon company rented by the defendants, and who were employed in unloading such trucks (*i*).

If the landowner takes toll for the use of the way, and invites people to use it, it is his duty to keep it in a safe state, and fit for use; and, if he is cognizant of some hidden danger, he ought to remove it, or close the way to the public (*k*). Every occupier of a house who makes or permits the continuance or use of a pathway to the house, may fairly be deemed to hold out an invitation to all persons, who have any reasonable ground for coming to the house, to pass along his pathway; and he is responsible for neglecting to fence off dangerous places, in the same way that a shopkeeper, who invites the public to his shop, is liable for leaving a trap-door open without any protection, by which his customers suffer injury (*l*); and as the owners themselves are not justified in placing any unknown dangers in the way of persons using the private way, so neither can they authorize anybody else to do so (*m*). Where, in the exercise of statutory rights, a highway is diverted, care must be taken to protect, by fencing or otherwise, reasonably careful persons using it from going astray at the point of diversion (*n*).

A person who strays from the ordinary approaches to a house, and trespasses upon the adjoining land, where there is no path, has no remedy for any injury he may sustain from falling into unguarded wells or pits, as the injury is the result of his own carelessness and misconduct (*o*). So, where the landlord of a house, which was let out in apartments, allowed a flat roof to be used as a drying-ground, and, the railing round it being out of repair, one of his tenants fell and was injured; it was held that the mere licence to use the roof imposed no duty on the landlord to fence it (*p*). If a man gets upon strange premises when it is dark, so that he cannot see, he should keep a good look-out, and has only himself to blame if he sustains injuries from running against objects, or falling down places, which might have been avoided by the exercise of ordinary care and caution (*q*). Where a person is on the premises of others with their assent, engaged in

(*h*) *Heaven* v. *Pender*, 11 Q. B. D. 503; 52 L. J., Q. B. 702. See this case also *ante*, p. 20.

(*i*) *Elliott* v. *Hall*, 15 Q. B. D. 315; 54 L. J., Q. B. 518.

(*k*) *Gibbs* v. *Mersey Docks Trustees*, L. R., 1 H. L. 93; 35 L. J., Ex. 225.

(*l*) Tindal, C. J., *Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & E. 243. *Barnes* v. *Ward*, 9 C. B. 420; 19 L. J., C. P. 200. *Jarvis* v. *Dean*, 11 Moore, 354. *Indermaur* v. *Dames*, *supra*.

(*m*) *Corby* v. *Hill*, 4 C. B., N. S. 556; 27 L. J., C. P. 318.

(*n*) *Hurst* v. *Taylor*, 14 Q. B. D. 918; 54 L. J., Q. B. 310.

(*o*) Wilde, B., *Bolch* v. *Smith*, 7 H. & N. 736; 31 L. J., Ex. 203.

(*p*) *Ivay* v. *Hedges*, 9 Q. B. D. 80.

(*q*) *Wilkinson* v. *Fairrie*, 32 L. J., Ex. 273.

315 a transaction of common interest to both parties, the owners of the premises are liable for the negligence of their servants in the course of the transaction (*r*). Thus, where the plaintiff, who had sent a heifer by the defendant's railway, in order to save delay, was allowed by the station-master at the station of delivery to come on the premises to assist in delivering the heifer, and while so engaged was run against and injured by a train which was negligently allowed to come out of a siding, it was held that the defendants were liable (*s*). This rule extends to the case of a ship; and a pilot whom the owners are compelled to employ may maintain an action against the shipowners for injuries caused to him while acting as such pilot by the negligence of their servants on board the ship (*t*). But, if the person so invited is fully aware of the danger and chooses voluntarily to expose himself to it, the occupier of the premises is not responsible. Thus, where the plaintiff, a workman in the employ of a contractor engaged by a railway company, had to work in a dark tunnel rendered dangerous by the passing of trains, and after working a fortnight was injured by a passing train, it was held that the company were not responsible (*u*).

Where, on the other hand, the person coming on the land does so for his own purposes he is a bare licensee, and he must take the premises in the condition in which they are; and the only liability imposed on the occupier is that he shall not do any act altering the state of the premises, whereby injury may arise to persons using the way, without giving them timely notice of what has been done, or revoking the licence or permission to come upon the land (*x*). If *A* gives *B* permission to cross his yard, across which there are a dozen different routes, and *A* has dug a hole in the yard which he usually keeps covered, but one night he uncovers it, and *B*, crossing as usual, and not expecting any danger, falls in and is injured, *A* is liable for the injury. But, if the hole has always been uncovered, and *B* walks into it, he has no cause of action against *A* (*y*). So, where the deceased was employed on adjoining premises, and came to look on at workmen excavating the earth by means of a crane and bucket, and allowed the bucket to pass just over his head, and the chain broke and he was killed; it was held that he was at most a bare licensee, and was subject to

(*r*) *Holmes* v. *North-Eastern Rail. Co.*, L. R., 4 Ex. 254; 38 L. J., Ex. 161.

(*s*) *Wright* v. *London and North-Western Rail. Co.*, L. R., 10 Q. B. 298; 1 Q. B. D. 252; 45 L. J., Q. B. 570.

(*t*) *Smith* v. *Steele*, L. R., 10 Q. B. 125; 44 L. J., Q. B. 60.

(*u*) *Woodley* v. *Metropolitan District Rail. Co.*, 2 Ex. D. 384; 46 L. J., Ex. 521.

(*x*) *Southcote* v. *Stanley*, 1 H. & N. 247; 25 L. J., Ex. 329.

(*y*) *Blythe* v. *Topham*, 1 Roll. Abr. 88; Cro. Jac. 158. *Stone* v. *Jackson*, 16 C. B. 204. *Hardcastle* v. *South Yorkshire Rail. Co.*, 4 H. & N. 74; 28 L. J., Ex. 139. *Gautret* v. *Egerton*, L. R., 2 C. P. 371; 36 L. J., C. P. 191.

316 all the risks incident to the position in which he had placed himself (*z*).

If a person driving his own carriage takes another person into it as a gratuitous passenger, the latter, in the case of an accident happening, has no right of action against the proprietor, except in the case of gross negligence (*a*).

Conventional servitudes—Acquisition—Licences—Liabilities of licensor—Negligent management of docks and wharfs.—A duty is cast upon trustees and commissioners and other persons who have the receipt of the tolls and the possession and management of a dock or wharf vested in them, to take reasonable care to keep the entrance to the dock or wharf free from dangerous shoals and obstructions, and to forbear from having the dock or wharf open for public use when they know it cannot be navigated or used without danger, whether the tolls are received by them for their own use or in a fiduciary character, or are not received at all (*b*); and if they keep the dock or wharf open, and allow the danger to continue, and invite vessels into peril, they will be personally responsible for any damage that may be sustained (*c*). So, if a person who has lawful business on board a ship lying in dock is injured by the insufficiency of a gangway provided by and under the control of the dock company for the purpose of affording access to the ships lying in the dock, the company will be liable for such injury (*d*). Reasonable care is not shown when, after notice of danger at a particular spot, no enquiry is made and no warning given (*e*).

Conventional servitudes—Acquisition—Licences—Liabilities of licensor—Negligence—Dangerous canals.—Every canal company, so long as it keeps its canal open for the public use of all who may choose to navigate it, is bound to take reasonable care that they may navigate it without danger to their lives or property (*f*).

Conventional servitudes—Acquisition—Licences—Liabilities of licensor—Negligence—Negligent management of gates placed across tramways.—Where a railway company were the owners of a tramway which crossed their railway on a level, and which tramway they allowed the public to use on payment of toll, it was held that the law imposed upon the railway company the duty of taking all reasonable precautions for the protection of the public using the tram-

(*z*) *Batchelor* v. *Fortescue*, 11 Q. B. D. 474.

(*a*) *Moffat* v. *Bateman*, L. R., 3 P. C. 115.

(*b*) *The Queen* v. *Williams*, 9 App. Cas. 418; 53 L. J., P. C. 64.

(*c*) *Gibbs* v. *Mersey Docks Trustees*, L. R., 1 H. L. 93; 35 L. J., Ex. 225. And see *Thompson* v. *North Eastern Rail. Co.*, 2 B. & S. 106; 31 L. J., Q. B. 194.

(*d*) *Smith* v. *London Dock Co.*, L. R., 3 C. P. 326; 37 L. J., C. P. 217.

(*e*) *The Queen* v. *Williams*, 9 App. Cas. 418; 53 L. J., P. C. 64.

(*f*) *Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & E. 243. *Gibbs* v. *Mersey Docks Trustees*, L. R., 1 H. L. 93; 35 L. J., Ex. 225.

317 way; and, where fences and gates are put up for the protection of the public, the company are responsible for the consequences resulting from their negligently leaving the gates open (*g*).

Conventional servitudes — Acquisition — Licences — Liabilities of licensor—Negligence—Negligent use and management of railway stations—Insufficient lights and guards.—It is not sufficient for the lights at the station of a railway company to be quite sufficient for the company and their own servants, who know the premises, and are perfectly conversant with the approaches. They must be enough to guide and direct strangers who are wholly unacquainted with the locality. A degree of light which will enable a person who is familiar with a place to see all about him, and understand where he is, may not be sufficient to enable a person who is unacquainted with, or has an imperfect knowledge of, the locality, to find his way or to guard against danger. "Railway companies are to light their railway," observes Maule, J., "not for their own servants alone, but for persons who have never been there before, and who may be in a great hurry to reach the train; and they are to light it so as to enable them to see their way. . . . If they choose to allow people to cross the line at the last moment, they should have a person to point out to passengers who are in a hurry the right course for them to take; or, if they have not a man, they might have a board pointing to the direction: for they are bound to do what is needful for the safety of their passengers." Where, therefore, the plaintiff, being on his return-journey with a return-ticket, and having got to the wrong side of the railway, crossed the line to get to the train at a place where there was no proper crossing, there being no person to point out to him the proper crossing, and fell over a switch-handle, which he could not see for want of light, it was held that the company were responsible for the injury he sustained (*h*). And they were also held responsible where the plaintiff, not being able to cross to the exit side of the station, by reason of the train by which he had just arrived blocking up the proper crossing for ten minutes or a quarter of an hour, crossed behind the train, and fell over a hamper (*i*).

But, in order to make out a case of negligence or of neglect of duty on the part of the company, it must be shown that they used or managed their property in such a way as to render it likely to be a source of danger to their passengers, and persons lawfully

(*g*) *Marfell* v. *South Wales Rail. Co.*, 8 C. B., N. S. 535; 29 L. J., C. P. 315.

(*h*) *Martin* v. *Great Northern Rail. Co.*, 16 C. B. 180; 24 L. J., C. P. 209. *Birkett* v. *Whitehaven Junction Rail. Co.*, 4 H. & N. 730; 28 L. J., Ex. 348.

(*i*) *Nicholson* v. *Lancashire and Yorkshire Rail. Co.*, 3 H. & C. 534; 34 L. J., Ex. 84. And see *Holmes* v. *North Eastern Rail. Co.*, L. R., 4 Ex. 254; 6 Ex. 123; 38 L. J., Ex. 161.

318 using the station (*k*). It is not enough to show that they have doors opening upon the platform, and steps leading from those doors, and that the plaintiff tumbled down the steps, without showing that the steps are more than ordinarily dangerous (*l*). There is no obligation on them, for instance, to provide hand-rails; and the steps may be tipped with brass, though possibly a different metal might be safer (*m*). Nor is it enough to show that the company had a weighing-machine on the platform, and that the plaintiff tumbled over it. In these cases it is always a question whether the mischief could reasonably have been foreseen, and whether precautions ought not to have been taken to guard against it (*n*). Where rules are promulgated by a railway company for the management of a station, and injuries are caused by the servants of the company endeavouring to carry these rules into effect, the company are responsible in damages, unless the injured party brought the mischief upon himself by his own negligence (*o*).

No duty is imposed upon railway companies to watch and keep closed gates put up for the accommodation of an adjoining landed proprietor, whose land extends along both sides of a railway; and, where a railway company provides the adjoining landowners with keys for the gates, the company is not responsible for the destruction of cattle straying upon the line in consequence of the gates being left open (*p*) or insecurely fastened. If the plaintiff had the means of making the gate secure, and neglected them, his own neglect in the matter will be a bar to the maintenance of an action against the railway company for the injury he has thereby sustained (*q*). Thus, where a railway crossed an occupation-way for horses and cattle, along which there was also a public footpath, and the company, not being aware of the public footpath, neglected to apply for the consent of justices for crossing the cattle-way on a level, but made their railway, and erected lofty gates on each side of the railway where it crossed the occupation-way, and gave keys of the gates to each of the adjoining occupiers who were entitled to use the occupation-road, and the servant of the plaintiff, one of the occupiers, who was in the habit of driving the plaintiff's cows daily backwards and forwards across the line, received a key from the company, and

(*k*) *Burgess* v. *Great Western Rail. Co.*, 32 L. T. (N. S.) 76.

(*l*) *Toomey* v. *London and Brighton Rail. Co.*, 3 C. B., N. S. 146; 27 L. J., C. P. 39.

(*m*) *Crafter* v. *Metropolitan Rail. Co.*, L. R., 1 C. P. 300; 35 L. J., C. P. 132.

(*n*) *Cornman* v. *Eastern Counties Rail. Co.*, 4 H. & N. 785; 29 L. J., Ex. 94.

(*o*) *Vose* v. *Lancashire and Yorkshire Rail. Co.*, 2 H. & N. 728; 27 L. J., Ex. 249.

(*p*) *Ellis* v. *London and South Western Rail. Co.*, 2 H. & N. 429; 26 L. J., Ex. 349.

(*q*) *Haigh* v. *London and North Western Rail. Co.*, 8 W. R. 6.

319 lost it, and after that fastened the gate by thrusting a piece of wood through the staple, and, the gate being left open, two colts of the plaintiff's strayed from his field along the occupation-way, through the open gate, upon the line of railway, and were killed by a passing train, it was held to be a question for the jury whether the negligence of the plaintiff had contributed to the accident; and, they being of opinion that it had, it was held that the defendant was entitled to a verdict (*r*).

Conventional servitudes—Acquisition by prescription.—Title by prescription is a title acquired by use and time, and allowed by law; as when a man claims to have a thing because he and his ancestors, or they whose estate h' ath, have had or used it from time immemorial (*s*); and im rial enjoyment is presumed from proof going back to the extent of living memory (*t*). All prescription must be either in a man and his ancestors, or in a man and those whose estate he has, which last is called prescribing in a *que* estate. If a man prescribes in a *que* estate (that is, in himself and those whose estate he holds), nothing is claimable by this prescription but such things as are incident, appendant, or appurtenant to lands; but, if he prescribes in himself and his ancestors, he may prescribe for things in gross.

A prescription must always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the insufficiency of his estate; for, as prescription is usage beyond time of memory, those whose estates commenced within the remembrance of man cannot prescribe; and therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee simple.

Estates gained by prescription are not descendible to the heirs-general, but only to the blood of that line of ancestors in whom the party prescribes. But, if he prescribes in a *que* estate, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase (*u*).

Nothing but incorporeal hereditaments can be claimed by prescription, such as rights of way, rights of common, &c. No prescription can give a title to lands and other corporeal substances, of which more certain evidence may be had. A grant of

(*r*) *Ellis* v. *London and South Western Rail. Co.*, 2 H. & N. 429; 26 L. J., Ex. 349.

(*s*) *Præscriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis*, Co. Litt. 113 a, 113 b. *Ellis* v. *Mayor, &c., of Bridgnorth*, 15 C. B., N. S. 52; 32 L. J., C. P. 273.

(*t*) Patteson, J., *Carr* v. *Foster*, 3 Q. B. 588.

(*u*) 2 Bl. Comm. 64. Roll. Abr. PRESCRIPTION B.

320 a licence to get coal or minerals, which does not oust the grantor of his right to dig for coal and minerals in the same land, is a mere profit *à prendre*, or incorporeal right lying in grant (*x*), and may consequently be claimed by prescription; but a claim to take *all* the coal, to the exclusion of any right in the owner of the soil to get it, is a claim to a part of the soil itself, and cannot be claimed by prescription (*y*).

A prescription by immemorial usage can, in general, only be for things which may be created by grant; for the law allows prescriptions only to supply the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by showing the grant. Upon immemorial usage, therefore, the law will presume a grant, and allow such usage as evidence of a good title. Therefore, for such things as cannot be created at this day by any manner of grant, or reservation, or deed, a prescription is not good (*z*).

There can be no prescriptive right in the nature of a servitude so large as to preclude the ordinary uses of property by the owner of the lands affected by the privilege, and to extinguish or destroy all the profits or produce ordinarily derivable from the soil. Where, therefore, a defendant claimed a prescriptive right, as the occupier of a brick-kiln, to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick-kiln, it was held that an unlimited claim and demand of this nature upon the soil of the plaintiff could not be sustained; for it would, as claimed, enable the defendant "to take all the clay, or, in other words, to take from the plaintiff the whole close" (*a*).

To raise a presumption of a grant of an easement or profit from long-continued, uninterrupted enjoyment of the privilege, the enjoyment must have been open and notorious, and exercised as a matter of right. The long-continued exercise of the privilege on the one side, and the sufferance and endurance of it on the other, must not be due to force or intimidation. If it has been exercised and enjoyed by stealth, or if the privilege has been sought for, and has been conceded, as a kindness and matter of favour, to be enjoyed during the pleasure of the grantor, it will fail to create a servitude (*b*). Where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant or conveyance, there is no ground for presuming one.

(*x*) *Chetham* v. *Williamson*, 4 East, 475. *Doe* v. *Wood*, 2 B. & A. 738.

(*y*) *Wilkinson* v. *Proud*, 11 M. & W. 33. *Clayton* v. *Corby*, 5 Q. B. 419.

(*z*) *Potter* v. *North*, 1 Ventr. 387. 3 Cruise's Digest, tit. 31, ch. 1. *Att-Gen.* v. *Matthias*, 4 K. & J. 592; 27 L. J., Ch. 761.

(*a*) *Clayton* v. *Corby*, 5 Q. B. 419, 422. *Wilkes* v. *Broadbent*, 1 Wils. 63.

(*b*) Bract. lib. 4, fol. 220—222.

321 In the case of the continued enjoyment by one man of a right of common, or profit *à prendre* in the land of another, and in every user of a way, the original enjoyment must have been unlawful, unless the privilege had been exercised with the sanction and authority of the owner of the soil, and can only be accounted for on the supposition that a grant had been made; and, when the enjoyment has been long continued, without interruption, a grant is presumed; but, when the enjoyment of the privilege is accounted for, and is consistent with the fact of there having been no grant, the presumption does not arise (*c*).

When the property is of such a nature that it cannot be easily protected against intrusion, and, if it could, would not be worth the trouble, proof should be given of constant, uninterrupted user and enjoyment of the privilege, with the knowledge and acquiescence of the party interested in resisting intruders, in order to raise a presumption of a grant. According to the ancient law of presumption, the enjoyment was not uninterrupted wherever it was had and exercised in spite of the remonstrance or prohibition of the owner of the fee (*d*); and, whenever there was evidence to

(*c*) *Doe* v. *Reed*, 5 B. & Ald. 236. *Livett* v. *Wilson*, 3 Bing. 118. *Boyle* v. *Tamlyn*, 6 B. & C. 337; 9 D. & R. 437.

(*d*) "*Interrumpi poterit per denuntiationem et impetrationem diligentem; et per talem interruptionem nunquam acquirit possidens ex tempore liberum tenementum.*"—Bract. lib. 4, fol. 51, cap. 22. In order to acquire a prescriptive right to do any particular thing, the right must be exercised as of right, and adversely to the owner of the fee, and the enjoyment of it must be absolute and uninterrupted during the requisite period and not dependent upon a precarious permission from the owner of the estate sought to be burdened with the servitude, and must be such an invasion of the rights of the servient owner that he could maintain an action against the person exercising it at any time during the period of its exercise, until it is perfected into a right: *Delahousie* v. *Judice*, 13 La. An. 587; *Stokes* v. *Appomatox Co.*, 3 Leigh (Va.) 318. No length of user exercised under a license from the owner of the estate will ripen into a right. The user must be in defiance of the owner of the estate, and must be exercised as of right in opposition to his right, and strictly adversely thereto. It must be exercised with the intention and purpose of acting as owner: "*Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.*" L. 3, sect. 1, *De acq. vel amit. poss.*, expresses the rule in its full force: *Sims* v. *Davis*, 1 Cheves (S. C.) 1.

No legal possession is acquired by a man walking across the land of his friend, or using a private way, thinking it to be a public one, or unless he would do the act in defiance of opposition. If it is done by the express permission of the owner no right is acquired, because the user is not adverse nor as of right, nor with the intention to possess himself of it. All his acts are covered by the license, and in recognition of the title of the owner of the estate. They are not in defiance of the owner, nor do the acts invade the owner's rights, but are subservient to it.

The rule applicable to such cases was well expressed by Wardlaw, J., in *Napier* v. *Bulwinkle*, 5 Rich. (S. C.) 311, thus: "When the enjoyment is in its nature hidden, or although it was apparent, there is no ready means of resisting it within the power of the servient owner, assent is not implied, and the influence of twenty years user, therefore, not acknowledged." In a more recent case, when the question arose as to a right to the support of adjoining soil for the buildings of the plaintiff claimed to have been acquired by twenty years' user: *Mitchell* v. *The Mayor of Rome*, 49 Ga. 19. Trippe, J., very clearly and forcibly expressed the rule thus:—"Statutes of limitations," said he, "apply to cases where one is in the adverse possession of property that may be claimed by another. The one cannot be adverse unless exercised in denial of the title, and in derogation of the right of another. It cannot be adverse to another unless he has a right of action on account of a wrong done him." See also *McGregor* v. *Waite*, 10 Gray (Mass.) 75; *Watkins* v. *Peck*, 13 N. H. 360; *Edson* v. *Munsell*, 10 Allen (Mass.) 557; *Wallace* v. *Fletcher*,

show that the user and enjoyment were had and exercised by permission, and grace and favour, there was no user and enjoyment as of right, and no prescriptive title could be gained thereby, however notorious and long continued might have been the user and enjoyment (*e*).

The general principle with regard to prescriptive rights founded on the presumption of a grant is, that a grant will not be presumed against an ignorant man; and, therefore, if an easement or profit *à prendre* has been enjoyed on land let on lease, the landlord is not to be prejudiced in his rights, and the inheritance burthened, through the *lâches* or acquiescence of the tenant in matters affecting the inheritance, without the knowledge, and privity, and sanction of the landlord (*f*). "The foundation," observes Lord

30 N. H. 153; *Tracey* v. *Atherton*, 36 Vt. 503; *School District* v. *Lynch*, 33 Conn. 334.

Under the modern doctrine, all species of titles, the acquisition of which depends upon user and enjoyment, may be acquired by prescription. Thus, in *Alves* v. *Henderson*, 16 B. Mon. (Ky.) 131, it was held that the uninterrupted enjoyment by one adversely of land belonging to the public for the period of twenty years, gave him a valid right thereto: *Church* v. *Meeker*, 34 Conn. 421; *Nichols* v. *Boston*, 98 Mass. 39.

But no right can be acquired against an estate, unless the owner is in a position to resist it: *Napier* v. *Bulwinkle*, 5 Rich. (S. C.) 311; *Mitchell* v. *The Mayor of Rome*, 49 Ga. 19. Therefore, if the owner is under any legal disabilities that prevent him from asserting his rights, as if he is a minor (*Meham* v. *Patrick*, 1 Jones (N. C.) 26; *Watkins* v. *Peck*, 13 N. H. 360), a married woman (*McGregor* v. *Waite*, 10 Gray (Mass.) 75), or an insane person (*Edson* v. *Munsell*, 10 Allen (Mass.) 557), no prescriptive right can be acquired except by a user for the requisite period after the disability ceases to exist. So, if the servient estate is in the possession of a tenant for life (*McGregor* v. *Waite*, *ante*; *Wood* v. *Veal*, 5 B. & S. 454; *Harper* v. *Charlesworth*, 4 B. & C. 574), or for a term (*Wood* v. *Veal*, *ante*), no right can be acquired against the estate which was commenced during the tenancy.

In all cases where the right is claimed by prescription, the exercise of the right for the period requisite for it to ripen into a title must be continuous and unbroken. By this, it is not meant that the user must be constantly exercised, but that it must be as continuous as the right claimed. Thus, a person in order to acquire a right of way by prescription over another's land, for the purposes of drawing wood, hay, or other crops, need not cross the lands every day in the year, but only so often as his necessity or convenience requires. He need not go there more than once a year for such purposes, but his user must be commensurate with the right claimed; and the right will be measured by the user, and will not exist for any other purpose or to any greater extent: *Brooks* v. *Curtis*, 4 Lans. (N. Y.) 283; *Atwater* v. *Bodfish*, 11 Gray (Mass.) 152; *McCallum* v. *Germantown Co.*, 54 Penn. St. 40; *Horner* v. *Stilwell*, 35 N. J. 307; *Noyes* v. *Morrill*, 108 Mass. 307; *Stiles* v. *Hooker*, 7 Cow. (N. Y.) 266; *Rexford* v. *Marquis*, 7 Lans. (N. Y.) 251.

Thus, a person by using a waterway to bring goods to a tavern, until the user has ripened into a right, is restricted to the use and purpose for which the right was acquired, and it would only exist for the tavern: *McCallum* v. *Germantown Co.*, 54 Penn. St. 40; so a person acquiring a right of way for the drawing of wood from a certain lot, can only use it for that purpose, and the right ceases when the wood is all cut from the lot: *Atwater* v. *Bodfish*, *ante*; so where a right of way to draw wood across another's land during the winter months, it is restricted to that season and purpose, and cannot be used for that purpose during the summer months, nor for any other purpose at any time: *Brooks* v. *Curtis*, *ante*; *Wright* v. *Moore*, 38 Ala. 593; so, a person who erects a dam of a given height which, if maintained in a tight condition, would flood the land of an upper owner, cannot by using the dam in a leaky condition for the requisite period acquire the right to flood the lands by rendering the dam tight: *Stiles* v. *Hooker*, *ante*.

(*e*) "*Si autem precaria fuerit et de gratiâ, quæ tempestive revocari possit vel intempestive, ex longo tempore non acquiritur jus.*"—Bract. lib. 4, fol. 221.

(*f*) See the observations of Lord Wynford, *Benest* v. *Pipon*, 1 Knapp, P. C. 70. *Davies* v. *Stephens*, 7 C. & P. 570. *Deeble* v. *Lineham*, 12 Ir. C. L. R. 16. "*Si autem fuerit seisina clan-*

Ellenborough, "of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him, unless there was some **322** probable means of his knowing what was done against him" (*g*). But, when the user and enjoyment are had and exercised under circumstances of notoriety, a jury may infer the landlord's knowledge and acquiescence in such user and enjoyment. Thus, where the lessees of a fishery had for sixty-four years been in the constant habit of landing their nets openly on a river-bank in the occupation of a tenant, and had from time to time sloped and pared the bank, and exercised various other acts of ownership upon the land, it was held that a jury was justified in inferring that the landlord knew of and acquiesced in the enjoyment of the easement (*h*). So, where there had been an uninterrupted enjoyment for thirty-eight years of the free access of light and air to windows over and across land held on lease, it was held that the landlord's knowledge of and acquiescence in the enjoyment of the visible and apparent easement was fairly to be presumed, in the absence of evidence to the contrary (*i*).

If the user and enjoyment have been had and exercised with the sufferance and permission of the tenant, but in spite of the remonstrance, protest, or objection of the owner of the fee, no right can be gained by such an enjoyment; for there can be no presumption of a grant under such circumstances.

Proof of immemorial enjoyment of the privilege claimed was, in ancient times, essential to the legal presumption of a grant; but for a long series of years before the passing of the Prescription Act, judges were in the habit, for the furtherance of justice and the sake of peace, of leaving it to juries to presume an ancient grant of an easement or profit *à prendre* from an uninterrupted enjoyment of the privilege as of right for twenty years, adopting that period by analogy to the Statute of Limitations.

Conventional servitudes—Acquisition—The Prescription Act.—The uninterrupted enjoyment for twenty years of an incorporeal right, from which juries were allowed to presume an ancient grant, was not a bar or title in itself; for, if the commencement of the enjoyment within what was called the period of legal memory could be shown, the presumption of an ancient grant in times long since passed away was rebutted, and the right defeated. To remedy this inconvenience, and make that period of enjoyment of

destina, scilicet in absentiâ dominorum vel illis ignorantibus, et, si scirent, essent prohibituri, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet."—Bract. lib. 4, fol. 221; lib. 2, fol. 52.

(*g*) *Daniel* v. *North*, 11 East, 374. *Runcorn* v. *Cooper*, 5 B. & C. 701.

(*h*) *Gray* v. *Bond*, 5 Moore, 534.

(*i*) *Cross* v. *Lewis*, 2 B. & C. 686.

an incorporeal right a bar or title of itself, which was so before only by the intervention and inference of a jury, the statute 2 & 3 Wm. 4, c. 71, was passed in the year 1832, for shortening the time of prescription in certain cases.

This statute, commonly called "The Prescription Act," recites
323 (sect. 1) that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," was, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I., whereby the title to matters which had been long enjoyed was sometimes defeated by showing the commencement of such enjoyment, which was productive of injustice; and enacts that no claim which may be lawfully made at the common law by custom, prescription, or grant to any *right of common, or other profit or benefit*, to be taken or enjoyed from or upon any land, except such matters and things as are therein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit has been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed within the time of legal memory, but that such claim may be defeated in any other way by which the same was then liable to be defeated; and, when such right, profit, or benefit has been so taken and enjoyed for the full period of *sixty* years, the right thereto is to be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the same statute (sect. 2), it is enacted that no claim which may be lawfully made at common law, by custom, prescription, or grant, to any *way or other easement, or to any watercourse* (*k*), *or the use of any water*, to be enjoyed upon, over, or from any land or water, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of *twenty* years, shall be defeated or destroyed by showing only that such way, water, or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated; and, when such way or other matter shall have been so enjoyed, as aforesaid, for the full period of *forty* years, the right thereto is to be deemed absolute and indefeasible, unless it shall appear that

(*k*) A claim to have water kept diverted is a claim to a watercourse within the section. *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R., 6 Q. B. 578; 40 L. J., Q. B. 293.

the same was enjoyed by some consent or agreement by deed or writing.

The Prescription Act does not take away any of the modes of claiming easements which existed before its passing; and therefore,

324 where, for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the plaintiff and the defendant, but there was no evidence of there ever having been unity of title, and, before the unity of possession commenced, the access of light to the plaintiff's windows had been enjoyed as far back as living memory went, it was held that the plaintiff had established his title to the access of light by proof of enjoyment from time immemorial (*l*).

Conventional servitudes—Acquisition—Prescription Act—Application of the Act.—Easements and profits *à prendre* cannot be claimed by user and enjoyment under the Prescription Act, unless the benefit or profit has been used, exercised, and taken for the more beneficial use and enjoyment of some neighbouring tenement. Easements and profits in gross, therefore, cannot be claimed by an occupier as such under the Act, because the claim must be "by custom, prescription, or grant," and it must be of such a nature as to be capable of being annexed to land, as being accessorial to the beneficial use, occupation, and enjoyment of landed property (*m*). A right, therefore, which can be of no benefit to any tenement, such as a right to cut down, and carry away and sell trees or underwood growing on a neighbour's land, or to search for and raise minerals, and carry them away and dispose of them, or a right to go upon land for recreation and amusement, cannot be prescribed for under the statute (*n*). The first section only applies to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to the case of a right claimed by a copyholder in his own copyhold tenement according to the custom of the manor, such as a right to dig gravel therein (*o*).

To bring the right within the term "easement" in the second section of the statute, it must be a right analogous to that of a right of way or a right of watercourse, and must be a right of utility and benefit, and not of mere amusement (*p*).

In order to gain a prescriptive title from uninterrupted user and enjoyment under the first and second sections of the Pre-

(*l*) *Aynsley* v. *Glover*, L. R., 10 Ch. 283; 44 L. J., Ch. 523.

(*m*) *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309.

(*n*) *Bailey* v. *Stephens*, 12 C. B., N. S. 113; 31 L. J., C. P. 228. *Mounsey* v. *Ismay*, 1 H. & C. 729; 34 L. J., Ex. 52.

(*o*) *Hanmer* v. *Chance*, 4 De G. J. & S. 626; 34 L. J., Ch. 413.

(*p*) *Mounsey* v. *Ismay*, *supra*. A right to lateral support is, it should seem, "an easement" within the Prescription Act. See per Selborne, L. C., in *Dalton* v. *Angus*, 6 App. Cas. 740; 50 L. J., Q. B. 689.

scription Act, it must be proved that the enjoyment has been "as of right." It must be such an enjoyment as of right, and without interruption, as would under the old law of prescription
325 have raised a presumption of a grant (*q*). "The whole purview of the Prescription Act," observes Lord Abinger, "shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods without interruption, and therefore necessarily imports such a user as could be interrupted by some one capable of resisting the claim. It also requires to be of right" (*r*). All circumstances, therefore, tending to rebut the presumption of a grant, and to prove that no grant could ever have existed, or have lawfully been made, are admissible in evidence to show that there was no enjoyment as of right within the meaning of the statute (*s*). It is enough, however, under the Act, to show an uninterrupted user as of right for a sufficient period, although the user was under a claim of right which might at any moment have been shown to be illegal (*t*).

By the fifth section of the Act, it is enacted that, if the party resisting the claim intends to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation. "The greatest difficulty," observes Lord Denman, "arises from the language of the concluding paragraph of this fifth section of the Prescription Act, and more particularly from the words, 'or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.' As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the legislature as consistent with such an enjoyment; and, as by the rules of pleading and of logical reasoning, every allegation by way of answer which does not deny the matter to which it is proposed as an answer is taken to confess it, we must conclude that the legislature used the words 'as of right' in such a sense as that a party confessing the enjoyment as of right for

(*q*) "*Longus usus, nec per vim, nec clam, nec precario.*"—Bract. lib. 4, fol. 222. Co. Litt. 114. *Bright* v. *Walker*, 1 C. M. & R. 219.

(*r*) *Arkwright* v. *Gell*, 5 M. & W. 234; *post*, p. 330. *Rigg* v. *Lonsdale*, 1 H. & N. 923; 25 L. J., Ex. 81. *Earl de la Warr* v. *Miles*, 17 Ch. D. 535; 50 L. J., Ch. 754.

(*s*) *Mill* v. *New Forest Comm.*, 18 C. B. 60; 23 L. J., C. P. 215.

(*t*) *Earl de la Warr* v. *Miles*, 17 Ch. D. 535; 50 L. J., Ch. 754.

forty years, or twenty, as the case may be, may account for and avoid the effect of it by alleging, in the one case, a consent or
326 agreement, provided it be by deed or writing (see sect. 2), and in the other, any contract, &c., written or parol (see sect. 5). It follows that the words 'as of right' cannot be confined to an adverse right from all time, as far as evidence shows; for, if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to enjoyment under a strict legal right; for then a 'consent or agreement' in 'writing,' not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words 'claiming right thereto,' in the second section, otherwise there will be incongruities in the construction of the Act. It seems, therefore, that the enjoyment as of right must mean an enjoyment had, not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or, though not strictly lawful, to the extent of excusing a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract, or licence, in case of a plea for twenty years. According to this view of the Act, a licence in writing must be replied to a plea of forty years' enjoyment, if it covers the whole time; and the same of a parol licence, in case of a plea for twenty years" (*u*).

The proviso in sect. 1 of the Prescription Act, that the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing, supposes that there may be an enjoyment as of right, though by consent or agreement; but that applies to cases where the title to the dominant and servient tenements is such that the enjoyment could be as of right within the statute, not where from unity of possession or otherwise it necessarily cannot be. The enjoyment must be of right against the land, not against the individual (*x*).

(*u*) Per Cur., *Tickle* v. *Brown*, 4 Ad. & E. 382.

(*x*) *Warburton* v. *Parke*, 2 H. & N. 64; 26 L. J., Ex. 299.

A user and enjoyment which does not give a valid title as
327 against the owner of the inheritance cannot give a title as against the lessee and the persons claiming under him; for no title at all can be gained by a user and enjoyment which does not give a valid title against all persons having estates in the land over or upon which the easement has been enjoyed (*y*).

Where a tenant enjoyed a right of common appurtenant to a tenement rented by him over land which was possessed and occupied by his landlord as tenant for life, it was held that, as the landlord could not have an enjoyment as of right against himself, so neither could his tenant. All the tenant's rights were derived from his landlord, whatever he enjoyed being enjoyed by grant from the latter; and such an enjoyment is not an enjoyment as of right within the statute (*z*).

Conventional servitudes—Acquisition—Prescription Act—Rights of way.—If there is a ten years' enjoyment of a right of way, and then a cessation for ten years under a temporary agreement for a different and substituted way, there may be a sufficient enjoyment of the original right for twenty years to make it indefeasible under the statute (*a*).

Enjoyment of a way over land held on lease does not give any right of way as against the reversioner, unless the enjoyment has been had with his knowledge and acquiescence, so as to be an enjoyment "as of right." Thus, where a stranger entered on the land of the reversioner in the occupation of his lessee, and traversed the land with carts and horses in the exercise of an alleged right of way, it was contended that the trespass, being accompanied with a claim of right, would, if it continued unopposed by the reversioner, be evidence of a right of way as against him at some future period. "But acts of this sort," observes Taunton, J., "cannot operate as evidence of right as against the reversioner of land demised to tenants, because the reversioner, during the demise, has no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it: as, therefore, he had no remedy by law for the wrongful act done by the defendant, the act done by him, or any other stranger, would be no evidence of right as against the plaintiff, so long as the land was in the possession of a lessee."

(*y*) *Bright* v. *Walker*, 1 C. M. & R. 220. *Winship* v. *Hudspeth*, 10 Exch. 7; 23 L. J., Ex. 268. *Wilson* v. *Stanley*, 12 Ir. C. L. R. 356.

(*z*) *Warburton* v. *Parke*, 2 H. & N. 64; 26 L. J., Ex. 298. *Gayford* v. *Moffat*, L. R., 4 Ch. 133.

(*a*) *Payne* v. *Shedden*, 1 Mood. & Rob. 382.

328 *Conventional servitudes—Acquisition—Prescription Act—Rights of water.*—All persons having lands on the margin of a flowing stream have, as we have seen (*b*), certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*c*).

When a mill has been erected upon a stream, and has stood there and been worked for the period of twenty years, it gives to the mill owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations prejudice the right of a lower mill, the case would be different (*d*).

A custom in a particular county for all persons to use the water in their districts for certain purposes—*e. g.*, mining—will not prevent a man from gaining a prescriptive right to the use of water, subject to such custom (*e*).

If the water of a natural stream is conducted to the plaintiff's land by an artificial cut or channel made through the land of the defendant, and the plaintiff and the former occupiers of the plaintiff's land have for more than twenty years enjoyed this flow of water, and have from time to time during that period gone upon the defendant's land, and repaired the banks of the artificial cut, and cleaned it out, and placed stones and stakes, and maintained a dam in the natural stream for the purpose of penning back the water, and making it flow through the artificial watercourse, a prescriptive right to the flow of water and to the exercise of these customary acts will be gained (*f*).

Prescriptive rights to foul the pure water of a stream, and convert a natural watercourse into a sewer, may be gained by twenty years' uninterrupted user and enjoyment of the privilege. "The general rule of law," observes Lord Ellenborough, "as

(*b*) *Ante*, p. 271 *et seq.*
(*c*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 611; 26 L. J., C. P. 148.
(*d*) *Saunders* v. *Newman*, 1 B. & A. 261.
(*e*) *Gaved* v. *Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353.
(*f*) *Beeston* v. *Weate*, 5 El. & Bl. 986; 25 L. J., Q. B. 115.

329 applied to this subject, is that, if a stream is corrupted in quality, as by means of the exercise of certain noisome trades, yet, if the occupation of the stream by the party so taking or using it has existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament" (*g*). Where the method of manufacture is varied, *e. g.*, by the substitution of some other material for rags in the manufacture of paper, the prescriptive right to foul a stream by pouring into it the refuse from the mill is not destroyed, if the substituted materials are reasonable and proper for the purpose, and the pollution is not increased (*h*).

The circumstances under which a watercourse was originally made, and under which it has been subsequently enjoyed, may prove the enjoyment, however long continued, to have been without right or any pretence or claim of right. The artificial nature of an adit or watercourse constructed for the purpose of draining a mine, and a notorious practice in mineral districts for the owners of mines to make watercourses for the purpose of draining their mines, and resume and discontinue the working of their mines at their own convenience, and according as it suits their interests, may fix all persons with the knowledge that those who cleared the mine by the adit notoriously reserved to themselves the right of working the mine at any time, with all the rights of fouling the water flowing from the mine with the dirt and rubbish which usually attend mining operations, so as to prevent parties who have taken advantage of the accidental non-user of the mine to use the adit-water from having an enjoyment as of right, and gaining a title to the use of the water uncontaminated by mining operations (*i*), or to its use at all (*k*).

The proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been artificial, is quite indefensible (*l*); but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same, whether they are natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them,

(*g*) *Bealey* v. *Shaw*, 6 East, 214. *Wright* v. *Williams*, 1 M. & W. 77. *Carlyon* v. *Lovering*, 1 H. & N. 789.

(*h*) *Baxendale* v. *McMurray*, L. R., 2 Ch. 790.

(*i*) *Magor* v. *Chadwick*, 11 Ad. & E. 585.

(*k*) *Gaved* v. *Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353.

(*l*) *Ivimey* v. *Stocker*, L. R., 1 Ch. 396; 35 L. J., Ch. 467.

330 depends upon the character of the watercourse, whether it is of a permanent or temporary nature, and upon the circumstances under which it was created (*m*). The flow of water for twenty years from the eaves of a house does not give a right to the neighbour to insist that the house shall not be pulled down, or altered so as to diminish the quantity of water flowing from the roof. The flow of water for twenty years from a drain made for agricultural improvements does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that the one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right (*n*). So the user by one canal company of the surplus water of another canal company for more than forty years will give no right to the last-mentioned company for its continuance, if a grant for that purpose by the first-mentioned company would have been *ultra vires* (*o*).

If a steam-engine or sough is constructed and used by the owner of a mine to drain it, and the water pumped up by the engine, or collected by the sough, flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, no right to the water in perpetuity can be gained from any such user, so as to burthen the owner of the mine and his assigns with the obligation of keeping up the steam-engine or the sough, and pumping or collecting water for the benefit of the adjoining landowners. In cases of this sort no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the watercourse itself such a right may be acquired (*p*). If a farmer, by some system of drainage, draws off the rainfall from his lands, and pours it into the plaintiff's ditch, and so creates a new and artificial supply of water, and the latter uses the water for more than twenty years, and after that the farmer adopts a new mode of drainage, and in so doing cuts off the artificial supply of water, the plaintiff has no remedy for the loss of the water, the supply being of a temporary character, and the circumstances showing that the one party never intended to give, nor the other to enjoy, the use of the artificial drainage-water, as a matter of right (*q*).

(*m*) *Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136. *Gaved* v. *Martyn*, *supra*. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, L. R., 4 App. Cas. 121.

(*n*) Per Cur., *Wood* v. *Waud*, 3 Exch. 779. *Mason* v. *Shrewsbury and Hereford Rail. Co.*, L. R., 6 Q. B. 578; 40 L. J., Q. B. 293. See also *Chamber Coll. Co.* v. *Hopwood*, 32 Ch. D. 549.

(*o*) *Staffordshire and Worcestershire Canal Co.* v. *Birmingham Canal Navigation*, L. R., 1 H. L. 254.

(*p*) *Arkwright* v. *Gell*, 5 M. & W. 232.

(*q*) *Greatrex* v. *Hayward*, 8 Exch. 291. *Rawstron* v. *Taylor*, 11 *ib.* 369.

331 *Conventional servitudes—Acquisition—Prescription Act—Right of support.*—A right to lateral support for a building from adjoining land may be acquired by twenty years' uninterrupted enjoyment; and it is so acquired, 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 building (*r*).

Conventional servitudes—Acquisition—Prescription Act—Houses resting against each other.—If two houses are built against each other with separate and independent walls resting upon separate and independent foundations, it was formerly held that one house has no right of support from the other, even if it has received that support for twenty years; but in a modern case it has been decided that where ancient buildings belonging to different owners adjoin each other each building has a right of support from the other, which can be claimed under the Prescription Act (*s*).

Conventional servitudes—Acquisition—Prescription Act—Right to a boundary fence.—We have seen that the presumption of legal title by grant to easements and incorporeal rights in the lands of others is founded on adverse enjoyment of such rights from time immemorial. But, where the enjoyment can be satisfactorily accounted for, and is consistent with there having been no grant, there is, as we have seen, no ground for presuming one. In the case, therefore, of proof of enjoyment by one landowner of a fence erected by his neighbour, and repaired, as occasion required, by the latter, there is no proof of such adverse enjoyment as raises a presumption of a grant of the benefit of the fence by one landowner to the other. Every man is bound by law to take care that his beasts do not trespass upon the lands of his neighbours. He may prevent their doing so, either by employing servants to keep them within the limits of his own land, or by enclosing his land with fences, so that the cattle cannot escape. The making of a fence, therefore, between his own land and that of his neighbour, does not raise any inference that the fence was intended for the benefit of his neighbour, although the fence prevents his neighbour's beasts from trespassing as well as his own; for it is for his own benefit to prevent his beasts from trespassing upon his neighbour's property (*t*).

Conventional servitudes—Acquisition—Prescription Act—Right to the access of light.—The third section of the Prescription Act provides that, where the access and use of light to and for any dwelling-house, workshop, or other building (*tt*), shall have been actually

(*r*) *Dalton* v. *Angus*, L. R., 6 App. Cas. 740; 50 L. J., Q. B. 689.

(*s*) *Lemaitre* v. *Davis*, 19 Ch. D. 281; 51 L. J., Ch. 173. *Tone* v. *Preston*, 24 Ch. D. 739; 53 L. J., Ch. 40. And see *ante*, p. 306.

(*t*) *Boyle* v. *Tamlyn*, 6 B. & C. 337.

(*tt*) See *Harris* v. *De Pinna*, *post*, p. 333.

332 enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local custom or usage to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement (*u*), expressly made or given for that purpose, by deed or writing. "Upon this section it is material to observe," says Lord Westbury, "that the right to what is called 'an ancient light' now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor" (*x*).

"This section," observes Parke, B., "is differently worded from the others, and the acquisition of right to light is much favoured, as a far less time gives an indefeasible right; and the proviso in the 7th section (*y*), which excludes the time when a person, otherwise capable of objecting, is an infant, idiot, *non compos*, *feme coverte*, or tenant for life, from other periods of computation, includes it in this. It also differs from the 2nd section, in not requiring that the enjoyment should be by a person 'claiming right' in express terms. What, then, is the enjoyment contemplated by the 3rd section? We think it clear, notwithstanding the absence of the words in the 2nd section above referred to, that it converts into a right such an enjoyment only of the access of light over contiguous land as had been had for the whole period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself, and that the statute puts this species of negative easement, as it has been termed, on the same footing, in this respect, as those positive easements provided for by the other sections, all of which, after long enjoyment as easements, are invested with the quality of rights. In the first place, the access of light, under this section, must have been enjoyed for twenty years without interruption—not in the sense of an uninterrupted or continuous user, but without such interruption as is mentioned in the subsequent section—that is, an interruption submitted to for one year after the party shall have had notice thereof, and of the person making or authorizing the same to be made (*z*). From this it follows, that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time" (*a*). Where, therefore, the owner in fee of an ancient house and the land surrounding it, having enjoyed the **333** access of light to his windows across such adjoining land, his

(*u*) See *Bewley* v. *Atkinson*, 13 Ch. D. 283; 49 L. J., Ch. 153.

(*x*) *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J., C. P. 344.

(*y*) *Post*, p. 337.

(*z*) *Flight* v. *Thomas*, 8 Cl. & Fin. 231.

(*a*) Parke, B., *Harbidge* v. *Warwick*, 3 Exch. 556; 18 L. J., Ex. 245.

own property, for more than twenty years, sells such surrounding land, and the purchaser builds thereon, so as to shut out the light from the ancient house, the owner has no remedy, as his enjoyment being over his own land is not such an enjoyment as is contemplated by the statute (*b*). The light must have reached the building by the same definite channel during the period (*bb*).

If windows have been enjoyed subject to the payment of a rent, the payment of the rent is no evidence of any interruption of enjoyment (*c*).

Conventional servitudes—Acquisition—Prescription Act—Light—Unity of possession.—If the house and windows and the adjoining premises over which light comes are in the possession of the same person, no grant can be presumed from the enjoyment of the light in that condition of the property, and no right to the light can be acquired, as we have just seen, under the statute by reason of such enjoyment (*d*). Therefore, where the plaintiff and his father, whom he succeeded, had occupied a house, of which they were successively seised in fee, for more than sixty years, and had also, during the whole period of their occupation of the house, occupied an adjoining garden as tenants from year to year under three successive landlords, of whom the defendant was the last, and the light came to the windows of the house across this garden, and the defendant, having determined the yearly tenancy and got possession of the garden, began to raise the garden-wall, and in so doing obstructed the windows of the plaintiff's house, it was held that the enjoyment of the light across the garden, during the unity of possession of the house and garden, was not such an enjoyment of light as could be made the foundation of a prescriptive right under the statute, and that the plaintiff consequently could not maintain any action for the obstruction of his windows (*e*). The accruing right to the light is suspended during the unity of possession (*f*).

Where, on the other hand, the windows and the lands across which the light comes are in the occupation of different parties, and there is no unity of possession of the dominant and servient tenements, a prescriptive right will be gained by twenty years' uninterrupted enjoyment, although the servient land across which the light comes is held on lease (*g*). It is true that, if a man opens a window on adjoining land let on lease, and the landlord or reversioner of that land objects to it, the latter may have no means of

(*b*) *White* v. *Bass*, 7 H. & N. 722; 31 L. J., Ex. 283.
(*bb*) *Harris* v. *De Pinna*, 33 Ch. D. 238.
(*c*) *Plasterers' Co.* v. *Parish Clerks' Co.*, 6 Exch. 630.
(*d*) *White* v. *Bass*, *supra*.
(*e*) *Harbidge* v. *Warwick*, 3 Exch. 556; 18 L. J., Ex. 245.
(*f*) *Ladyman* v. *Grave*, L. R., 6 Ch. 763.
(*g*) *Cross* v. *Lewis*, 2 B. & C. 686.

334 redress, or power of preventing the right to light being acquired by twenty years' enjoyment, unless he can induce his tenants to block up the windows, or get an acknowledgment in writing that the right is enjoyed by consent only; but such want of redress and inability of prevention will, nevertheless, not prevent the right from being acquired (*h*).

Conventional servitudes—Acquisition—Prescription Act—Enlargement of windows.—A person does not, by enlarging a window, lose his right to the enjoyment of light through the ancient aperture. But, if an ancient window is supplanted by a new window, varying in size, elevation, or position, from the ancient window, the new window may be obstructed by the adjoining landowner, but not the space occupied by the ancient aperture (*i*).

The right to light is *primâ facie* a right to that amount which would come naturally to the window. A man, therefore, does not lose his right, because, for a period, he may require for the purpose of his business only a subdued light (*k*).

It is not necessary that the house should be occupied, or even that it should be fit for immediate habitation, during the statutory period, provided it is structurally complete (*l*).

Conventional servitudes—Acquisition—Prescription Act—Interruption.—By sect. 4 of the Prescription Act, it is enacted, that no act or other matter shall be deemed to be an interruption, unless the same shall have been submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof, and of the person making the same, or authorizing the same to be made. Where, therefore, the use of light and air had been enjoyed for nineteen years and three hundred and thirty days, and was then interrupted by the erection of a building, which interruption continued to the time of the commencement of the action, but the interruption was not submitted to or acquiesced in, as the plaintiff brought his action within a few months thereof, it was held that such erection of a wall was not an interruption preventing the establishment of the right within the terms of the fourth section of the statute (*m*). But, though an interruption must be acquiesced in for a full year before it breaks the period, where the subject-matter has, previously to the interruption, been enjoyed as of right, interruptions acquiesced in for less than a year may be of great weight as evidence on the question whether there ever was

(*h*) *Frewen* v. *Phillips*, 11 C. B., N. S. 455; 30 L. J., C. P. 356.

(*i*) *Blanchard* v. *Bridges*, 4 Ad. & E. 191. *Chandler* v. *Thompson*, 3 Campb. 80. *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 L. J., Ch. 123. *Davies* v. *Marshall*, 1 Dr. & Sm. 557. *Turner* v. *Spooner*, 1 Dr. & Sm. 467; 30 L. J., Ch. 801. See *post*, p. 358.

(*k*) *Yates* v. *Jack*, L. R., 1 Ch. 295.

(*l*) *Courtald* v. *Legh*, L. R., 4 Ex. 126; 38 L. J., Ex. 124.

(*m*) *Flight* v. *Thomas*, 11 Ad. & E. 699; 8 Cl. & Fin. 241.

335 a commencement of an enjoyment as of right. Such interruptions are explanatory of the real nature of the user. If the enjoyment has been contentious, it is not of right. Therefore, where a person had been summoned, and convicted, and fined, for drawing off water from a watercourse, it was held that the conviction and fine, and payment of the fine, were proper and most material evidence of the user and enjoyment not having been of right (*n*). But it does not follow that an interruption is acquiesced in because an action has not been brought. Where there have been protests or a correspondence on the subject, it is a question for the jury whether the interruption has been acquiesced in or submitted to or not (*o*). Where the lord has attempted to stop the user of a common, the fact that some of the tenants have yielded to such attempts is not an interruption of the right within the meaning of the Act, so as to bar the freeholders as a body, who have never yielded to or acquiesced in the lord's claim (*p*).

The enjoyment of the profit *à prendre* or easement, under the statute, must be an enjoyment for a continuous period, without such interruption as is defined in the fourth section of the statute. The enjoyment of the privilege must be continuous (*q*); but the exercise of the right need not be continuous. Formerly it was thought that some act of user must take place within each year (*r*); but this has since been held not to be necessary; for, where proof was given of the enjoyment of a profit *à prendre* at the time of the commencement of an action, and for thirty years before, but enjoyment during the whole of the intermediate period could not be proved, it was held to be a question for the jury, whether at that time the right had ceased, or was still substantially enjoyed. Thus, where there was an actual enjoyment of common of pasture for forty years next before the commencement of an action, with the exception of an interval of two years out of the forty, when the claimant ceased to use the common, because he had no commonable cattle to depasture, and not in consequence of any obstruction to his exercise of the right, it was held that the jury were justified in finding a continued enjoyment of the right during the two years in which it was not exercised (*s*). "It has been ingeniously argued," observes Lord Denman, "that a thirty years' enjoyment cannot have taken place where there has been two years' intermission;

(*n*) *Eaton* v. *Swansea Water Co.*, 17 Q. B. 267.

(*o*) *Bennison* v. *Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137. *Glover* v. *Coleman*, L. R., 10 C. P. 108; 44 L. J., C. P. 66.

(*p*) *Warrick* v. *Queen's College*, L. R., 10 Eq. 105; 6 Ch. 716; 40 L. J., Ch. 780.

(*q*) *Onley* v. *Gardiner*, 4 M. & W. 500. *Ward* v. *Robins*, 15 M. & W. 242.

(*r*) *Lowe* v. *Carpenter*, 6 Exch. 831.

(*s*) *Carr* v. *Foster*, 3 Q. B. 581.

336 but the words of sect. 1 are 'without interruption,' not 'without intermission,' and the intermission must be a matter open in every case to explanation; and, where actual enjoyment is shown before and after the period of intermission, it may be inferred from evidence that the right continued during the whole time." "Interruption," further observes Patteson, J., "must clearly mean an obstruction by the act of some other person than the claimant, not a cessation by him of his own accord." "No necessary inference of interruption in the enjoyment arises," further observes Williams, J., "from a cesser of enjoyment during two, three, or even seven years." "If there is proof to the satisfaction of a jury of a long enjoyment of the alleged privilege, they ought not to negative it merely because there was a time during which there was no enjoyment" (*t*). But where it appeared that a way had only been used for the removal of wood cut on an adjoining close at intervals of several years (generally twelve), and that between these intervals the road was occasionally stopped up though the party claiming the way had used it as often as he wished during the wood-cutting, it was held that there had been no uninterrupted enjoyment of the way (*u*). Where an artificial impediment in the shape of a stang or rail had been erected, which prevented the access of cattle from the plaintiff's farm to the land over which the right of common was claimed, and this stang was removed by agreement, and then the plaintiff's cattle depastured on the land, and continued so to do for twenty-eight years continuously after the removal of the stang, down to the time of the commencement of the action, it was held that an enjoyment for thirty years could not be presumed from this evidence (*x*).

"The asking leave from time to time breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right" (*y*).

The Prescription Act expressly requires (sects. 1, 2) enjoyment "without interruption for the full periods therein mentioned." Sect. 6 enacts, that no presumption shall be allowed or made in support of any claim on proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years; and by sect. 4 it is enacted, that each of the respective periods of years thereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein

(*t*) Willes, J., *Darling* v. *Clue*, 4 F. & F. 334.

(*u*) *Hc'lins* v. *Verney*, 13 Q. B. D. 304; 53 L. J., Q. B. 430.

(*x*) *Bailey* v. *Appleyard*, 8 Ad. & E. 165.

(*y*) *Tickle* v. *Brown*, 4 A. & E. 382. *Bright* v. *Walker*, 1 Cr. M. & R. 219. *Monmouth Canal Co.* v. *Harford*, 1 C. M. & R. 614.

337 the claim or matter to which such period may relate shall have been, or shall be, brought in question. It was formerly held that the enjoyment, in order to give a right under the statute, must be up to the time of the commencement of the suit (*z*); but, when a prescriptive right has once been gained by twenty or thirty years' uninterrupted enjoyment as of right, it is not lost again by mere non-user; for it does not follow that a man has lost his right merely because he has not thought fit to exercise it. An exercise of the right once a year down to the time of the commencement of the action is not, therefore, essential to the proof of a prescriptive title under the statute. "The intention," observes Willes, J., "was to give enjoyment under the Act the same effect as the evidence which would sustain a prescriptive claim before the Act, except that the terminus of the statutory enjoyment must be a suit or action which discloses the nature of the claim, and gives an opportunity of litigating it. The evidence, therefore, to sustain a prescriptive claim need not come down to the commencement of the suit, nor to any definite period" (*a*).

Conventional servitudes - Acquisition — Prescription Act — Disability.—The seventh section of the Prescription Act provides that the time during which any person otherwise capable of resisting the claim shall be an infant, idiot, *non compos mentis*, *feme coverte* (*b*), or tenant for life, shall be excluded from the computation of the respective periods, except where the claim is thereby declared to be absolute and indefeasible. The claim is by the statute declared to be absolute and indefeasible in those cases where there has been an enjoyment as of right, and without such interruption as is mentioned in sect. 4, of a way, watercourse, or use of water, or other easement, for the term of forty years, and of a profit *à prendre* for the term of sixty years, and of the access and use of light and air to any dwelling-house, workshop, or other building for twenty years, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Where a defendant claiming a prescriptive right to the enjoyment of a profit *à prendre* in the soil of the plaintiff showed an uninterrupted enjoyment for twenty years before a life estate, and during its continuance, and for six years after its determination up to the commencement of the action, and the question was whether

(*z*) *Ward* v. *Robins*, 15 M. & W. 242. *Battishill* v. *Reed*, 18 C. B. 705; 25 L J., C. P. 290. *Parker* v. *Mitchell*, 11 Ad. & E. 788.

(*a*) *Cooper* v. *Hubbuck*, 12 C. B., N. S. 456; 31 L. J. C. P. 323. *Ward* v. *Ward*, 7 Exch. 838.

(*b*) There seems to be little doubt that this exception is done away with (as in the case of the Statute of Limitations) by the Married Women's Property Act, 1882. See *ante*, p. 269.

338 that enjoyment was sufficient, or whether the thirty years must be the actual thirty next before the commencement of the action, it was held that the two sections of the statute,—viz. sect. 4, enacting that the respective periods of enjoyment should be deemed and taken to be the period next before some suit or action, and sect. 7, providing that the time during which any person capable of resisting the claim was tenant for life, &c., should be excluded in the computation,—must be read together, so that the period is thirty years next before the action, excluding in the computation of those thirty years any tenancy for life (*c*).

If the plaintiff sets up a tenancy for life, he excludes the time of that tenancy, and drives the defendant to show thirty years' enjoyment, either wholly before the tenancy for life, if it is still subsisting, or partly before and partly after, if it is ended. But it has been said, "What if there had been an interruption for two years during the tenancy for life, and within thirty years before the action? is the plaintiff to be deprived of the benefit of such interruption?" The answer is, "No: although the tenant for life cannot, by acquiescence, burthen the estate, he may, by resistance, free it; and, if the plaintiff chooses to avail himself of that resistance, he may traverse the enjoyment as of right for thirty years, and show the interruption." The defendant will not then be allowed to give the tenancy for life in evidence, in order to avoid the effect of the interruption (*d*).

Where there has been a thirty years' enjoyment of a profit *à prendre* during a tenancy for life, the tenancy for life must be specially pleaded by the reversioner, in order to exclude such thirty years' enjoyment from the computation of the prescriptive period under the statute. Thus where, in an action of trespass, the defendant pleaded an uninterrupted user and enjoyment of a profit *à prendre* for thirty years under the first section, and the plaintiff by his replication traversed the enjoyment, and the defendant, at the trial, proved enjoyment for thirty years next before the action, it was held that the plaintiff was not at liberty to prove a tenancy for life during part of those thirty years, as he had not set it up by his replication (*e*).

If a tenancy for life during the thirty years' period is replied and traversed by the rejoinder, the defendant may insist that the thirty years' enjoyment alleged in the plea is made up of time preceding and following the tenancy for life (*f*).

Conventional servitudes—Acquisition—Prescription Act—Disability—Lands demised for life or years.—By sect. 8 of the Prescription

(*c*) *Clayton* v. *Corby*, 2 Q. B. 824.
(*d*) *Clayton* v. *Corby*, 2 Q. B. 825.
(*e*) *Pye* v. *Mumford*, 11 Q. B. 675.
(*f*) *Clayton* v. *Corby*, 2 Q. B. 813.

339 Act, it is expressly enacted that, "when any land or water upon, over, or from which any such way or other convenient watercourse, or use of water, shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way, or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant (*g*) on the determination thereof."

By the ancient law of prescription, whenever it appeared that the land over or upon which an easement of this sort had been enjoyed was in the occupation of a tenant for life, or tenant for term of years, during the whole period of the enjoyment of the privilege, the presumption of a grant was rebutted and the easement extinguished, however long and notorious might have been the user and enjoyment, and although the owner of the fee was fully aware of all that had been done upon the land (*h*), and had made no protest against, or objection to, the enjoyment of the privilege. But since the Prescription Act, if the privilege has been enjoyed without such interruption for forty years, or as far back as living memory will go, the right cannot be defeated merely by showing that the land was on lease during the whole period of enjoyment. It must be shown that the reversioner, within three years after the determination of the particular estate, resisted the claim to the easement (*i*).

"The period, during which the land over which the right is claimed has been leased for a term exceeding three years, is not, under sect. 8, to be excluded from the computation of a twenty years enjoyment. Sect. 7 excludes certain times, including that of a tenancy for life, but not that of a tenancy for years, from the computation of the 'periods' thereinbefore mentioned; and a twenty years' enjoyment is one of those periods. But sect. 8 provides for the exclusion of certain other times, among which is a tenancy for more than three years, not from the periods thereinbefore mentioned, but from one particular period only, expressly mentioned, namely, that of an enjoyment for forty years" (*k*).

(*g*) A remainderman is not a person entitled to the reversion expectant on a term. *Symons* v. *Leaker*, 15 Q. B. D. 629; 54 L. J., Q. B. 488.

(*h*) *Bradbury* v. *Grinsell*, 3 Saund. 175 (i), in notis. *Barker* v. *Richardson*, 4 B. & A. 581. *Wood* v. *Veal*, 5 *ib.* 456.

(*i*) *Wright* v. *Williams*, 1 M. & W. 100. *Wilson* v. *Stanley*, 12 Ir. Com. Law Rep. 357.

(*k*) Ld. Campbell, *Palk* v. *Skinner*, 18 Q. B. 574; 22 L. J., Q. B. 27.

340 *Conventional servitudes—Acquisition by custom.*—To give validity to a custom—which has been well described to be a usage obtaining the force of law within a particular district or at a particular place, over the persons or thing to which it relates—it must be certain and reasonable in itself. It is presumed to have commenced from time immemorial (*l*), and must be proved to have continued without interruption for the time mentioned in the Prescription Act; and in analogy to that Act it must further be shown to have been as of right. A custom, therefore, to demand a licence to fish, although upon payment of an ancient and reasonable fee, cannot be supported (*m*). The question whether a custom is reasonable or not is a question of law. A custom is not unreasonable merely because it is contrary to a rule or maxim of the common law, nor because it is prejudicial to the interests of a particular individual; but, if it is highly inconvenient in its enjoyment, and the inconvenience is real, general, and extensive, it will be bad, though it has prevailed from time immemorial (*n*).

A custom claimed by the inhabitants of a particular district to go upon the soil of another, to take or to use water from a spring or well, or to wash and water cattle in a pond, is a good custom (*o*); and so is a custom claimed by victuallers, coming to a fair holden at stated periods, to enter upon that part of the common or waste of a manor where the fair is held, and there erect booths and stalls, and put down posts, and place tables on the land, making a certain customary payment to the lord of the manor, when demanded (*p*). An immemorial custom to erect stalls upon the highway at a fair for the sale of commodities is good (*q*). But a statute sessions for the hiring of servants is not an immemorial fair; and, consequently, a custom to erect stalls upon the highway for the sale of commodities at such statute sessions cannot be supported (*r*). A custom for the inhabitants of a village to resort to village greens, or uninclosed waste land or commons, the property of the lord of the manor, for village sports, and for the purpose of recreation and amusement, is a good custom (*s*); and so is a custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a May-

(*l*) See, as to this presumption, *Bryant* v. *Foot*, L. R., 2 Q. B. 161; 3 *ib.* 497; 37 L. J., Q. B. 217. *Mills* v. *Mayor of Colchester*, *infra*.

(*m*) *Mills* v. *Mayor of Colchester*, L. R., 2 C. P. 476; 3 *ib.* 575; 37 L. J., C. P. 278.

(*n*) *Tanistry's case*, Davys, 31, 32; Co. Litt. 113 a. *Tyson* v. *Smith*, 9 Ad. & E. 406; 6 *ib.* 745. *Rogers* v. *Brenton*, 10 Q. B. 26.

(*o*) *Race* v. *Ward*, 4 El. & Bl. 702; 24 L. J., Q. B. 153.

(*p*) *Tyson* v. *Smith*, 6 Ad. & E. 745; 9 *ib.* 406.

(*q*) *Elwood* v. *Bullock*, 6 Q. B. 383.

(*r*) *Simpson* v. *Wells*, L. R., 7 Q. B. 214; 41 L. J., M. C. 105.

(*s*) *Abbott* v. *Weekly*, 1 Lev. 176. *Fitch* v. *Rawling*, 2 H. Bl. 393. *Mounsey* v. *Ismay*, 1 H. & C. 729; 32 L. J., Ex. 94; 34 *ib.* 52. See *Warrick* v. *Queen's College*, L. R., 10 Eq. 105; 6 Ch. 716; 40 L. J., Ch. 780.

341 pole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year (*t*). But a claim by the inhabitants of a town of a right to go at all times over every portion of inclosed, cultivated ground cannot be supported, as it is inconsistent with any beneficial use and enjoyment of the inclosure by the owner or occupier (*u*), and *à fortiori* it is so, if the claim is upon a place beyond the limits of the parish (*x*).

Where a custom for all the inhabitants of a particular town to walk and ride over a close of arable land at all seasonable times in the year was claimed, it was held that "seasonable time" was partly a question of law and partly one of fact, and that when the corn was standing was not a seasonable time (*y*).

The inhabitants of a vill or parish cannot as such claim by custom to have a profit *à prendre* from the soil of another (*z*). Therefore, a custom for all the inhabitants occupying lands in a particular district to take drift sand or stones from a close contiguous to the sea-shore, for the mending of their roads, cannot be supported, as the sand, when it drifts on the close from the beach, becomes part of the soil of the close (*a*). Neither can the inhabitants of a parish claim a right by custom to angle and catch fish in another's pond, although the claim is confined to a right to catch them, without setting up a right to take them away; for such a right, vested in a multitude of persons, would be destructive of all the fish (*b*). But a claim by the inhabitants of a village to take estovers in a royal forest, if founded on a grant from the Crown, is good; for, as the Crown has power to create corporations, a grant by the Crown to a class of persons is valid; and for the purpose of the validity of the grant, such persons will be considered a corporation *quoad* the grant; for grants by the Crown in derogation of its forestal rights are construed liberally for the subject (*c*). So, as the land between ordinary high-water mark and low-water mark belongs to the Crown, in the absence of proof of a grant of such land to a lord of a manor or to a private person (*d*), various customary and prescriptive rights and privileges

(*t*) *Hall* v. *Nottingham*, 1 Ex. D. 1; 45 L. J., Ex. 50.

(*u*) *Dyce* v. *Hay*, 1 Macq. 305. *Bell* v. *Wardell*, Willes, 202.

(*x*) *Sowerby* v. *Coleman*, L. R., 2 Ex. 96; 36 L. J., Ex. 57. As to squares in London, see *Tulk* v. *Metropolitan Board of Works*, L. R., 3 Q. B. 94, 682; 37 L. J., Q. B. 272.

(*y*) *Bell* v. *Wardell*, Willes, 202.

(*z*) *Gateward's case*, 6 Rep. 59 b. *Lord Rivers* v. *Adams*, 3 Ex. D. 361. *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

(*a*) *Blewett* v. *Tregonning*, 3 Ad. & E. 554; *Att.-Gen.* v. *Mathias*, 4 K. & J. 579; 27 L. J., Ch. 761. *Constable* v. *Nicholson*, 14 C. B., N. S. 230; 32 L. J., C. P. 240.

(*b*) *Bland* v. *Lipscombe*, 4 El. & Bl. 713, note (*e*). But see *Goodman* v. *Mayor of Saltash*, L. R., 7 App. Cas. 633; 52 L. J., Q. B. 193.

(*c*) *Willingale* v. *Maitland*, L. R., 3 Eq. 103; 36 L. J., Ch. 64. *Chilton* v. *Corporation of London*, 7 Ch. D. 735; 47 L. J., Ch. 433. *Lord Rivers* v. *Adams*, 3 Ex. D. 361.

(*d*) *Post*, p. 437.

342 over the sea-shore have grown up and been acquired by the public, and by communities and private individuals, by reason of immemorial usage and enjoyment. Where an action of trespass was brought against a defendant for digging in the plaintiff's land, and the defendant pleaded that the *locus in quo* was four acres of land adjoining the sea, and that all the men of Kent, from time immemorial, have used when they have fished in the sea to dig in the land adjoining, and pitch stakes for hanging their nets to dry, it was held that such a custom, confined to the sea-shore, might be good; for, observes Clarke, C. J., "If I have land adjoining the sea, so that the sea ebbs and flows on my land, when it flows every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right; and, when the sea has ebbed, then in this land which was flowed before, peradventure he may justify his digging, for this land is of no great profit" (*e*).

The general doctrine, that a right to take a profit in the soil of another cannot by law rest on custom, is founded on the notion that such an interest must, for its existence, have some person in whom it is vested, and that a fluctuating body of persons, which has no entirety or permanence, cannot take that interest which by supposition is immemorial and permanent, because such a body, from its nature, cannot prescribe for anything. Necessity, however, controls this, and creates certain exceptions in the case of rights of common in manors, and of the stannary customs of Cornwall in respect of the right of digging and searching for tin.

Conventional servitudes—Acquisition—Manorial customs (*f*).—Rights of common, claimable by the copyhold or customary tenants of a manor in the demesne lands of the lord of the manor (*g*), illustrate both the rule, that a profit *à prendre* is not claimable by custom, and the exception to that rule. Thus the right of common of pasture in itself is an interest in land—the taking of a profit of the soil—and properly matter of prescription. If the copyholders of one manor will claim it in the wastes of another manor, they must do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but, if they claim it in the

(*e*) 8 Edw. 4, 19. Bro. Abr. CUSTOMS, 46.

(*f*) Proof of entries on the rolls of a manor court are admissible in evidence to prove manorial customs (*Dammerell* v. *Protheroe*, 10 Q. B. 20). A presentment in a manor court, setting forth the bounds of a manor, is likewise evidence of such bounds, although some portion of the document has been cut off, if there is no reason to suppose that that part contains any evidence to the contrary of the part produced. When an ancient manor-book is offered in evidence, it must be proved that it comes from the proper custody. *Evans* v. *Rees*, 10 Ad. & E. 151.

(*g*) *Gateward's case*, 6 Co. 60 a. *Grimstead* v. *Marlow*, 4 T. R. 719. *Austin* v. *Amherst*, 7 Ch. D. 689; 47 L. J., Ch. 467.

343 lord's wastes, they cannot prescribe in their own names and rights, by reason of the want of permanence; nor can they in their lord's name, as he cannot claim common in his own land; they are therefore, from necessity, allowed to claim it by custom (*h*). The necessity grows out of the original compact between the lord and the customary tenants, when they received permission to cultivate for their own benefit, on condition of the render of certain services, certain portions of the lord's land. That compact included the right of common on the lord's waste; and the law will not suffer that right to want a legal character, and so be without the means of legal enforcement, though at the expense of strict legal reasoning (*i*).

A custom to dig sand and gravel in the waste of a manor for the repair of a dwelling-house, when out of repair, may be supported (*k*). But a privilege claimed by the customary tenants of a manor having gardens, parcels of their customary tenements, to dig and carry away turf from the waste for the improvement of their garden-walks, or for making and repairing banks or mounds of grass on their customary tenements, has been held to be bad (*l*).

A custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface of their own copyhold tenements, and dig and get clay therefrom without stint, for the purpose of making and selling bricks, is a good manorial custom. It has been contended that such a custom is bad, as being inconsistent with the right of the lord, who has an interest in the soil, and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do. "We are," however, observes the court, "unable to draw any sound distinction between a custom for copyholders to take all the timber or trees (*m*), or all the minerals in their own copyholds, and a custom to take clay. It appears to us, that the cases of profits *à prendre* or easements on the waste of the lord, or *in alieno solo*, have no application to the present question. A copyholder may, by custom, not only have a possessory, but a proprietary, right in the trees and minerals in his own copyhold tenement. In the case of minerals, the taking them is, in effect, a taking of a portion of the *corpus* of the copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only, by custom, work old mines already opened, but that he may also, by custom, dig within his tenement for new ones, and,

(*h*) *Foiston* v. *Crachroode*, 4 Co. 369. *Heydon and Smith's case*, 13 Co. 67.
(*i*) *Rogers* v. *Brenton*, 10 Q. B. 26.
(*k*) *Peppin* v. *Shakspear*, 6 T. R. 748.
(*l*) *Wilson* v. *Willes*, 7 East, 121.
(*m*) See *Blewett* v. *Jenkins*, 12 C. B., N. S. 16.

344 if successful, work them" (*n*). The right may exist, in its most extensive form, to sell the produce for profit, or, in a more restricted form, to use the coal, &c., for their own private purposes only (*o*).

A claim on the part of the lord of a manor, founded on the custom of the manor, of an unlimited and unrestricted right to enclose and confer in severalty upon any person, from time to time, such portions of the waste as he in his discretion may think fit, cannot be supported, as it is utterly inconsistent with the existence of any right of common; for the lord might enclose the whole of the waste, and so annihilate the rights of the commoners. A custom claimed by the lord of the manor, or his tenants, to dig coal-pits in the enclosed freehold lands of the manor, when and as often as they please; to lay their coals, when got, on any part of the lands of the customary tenants, near to the coal-pits, at any time of the year they please; and to let them lie on such lands as long as they please, is uncertain and unreasonable, and therefore void; for it might deprive the tenant of the whole benefit of his land (*p*).

Conventional servitudes—Acquisition—The rights of tinbounders in Cornwall are founded on custom. The right seems to have originated in each instance in a virtual contract, as in the case of rights of common. When the lord, or owner of waste, uninclosed and uncultivated land, would not search for and work tin himself, or devote his waste exclusively to other purposes by inclosure, he has permitted the tinner to enter on the waste and work for and get tin, on condition of the render to him of a certain portion, fixed by custom, of the produce of the tin mine. Here, as in the instance of a right of common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it, in justice, cannot prescribe for it; from necessity, therefore, that the right may not be defeated, they are allowed to claim it by custom (*q*). The estate or interest of the tinbounders is of an anomalous character; they have a mere chattel, passing to executors, not to heirs; and they lose all their interest if they cease to work the mine (*r*). If the tinbounders abandon the mine, and the owner retakes possession, he will be entitled to any ease-

(*n*) *Salisbury* (*Marquis of*) v. *Gladstone*, 6 H. & N. 129; 9 H. L. C. 692; 30 L. J., Ex. 3; 34 *ib.* C. P. 222. See *Lingwood* v. *Gyde*, L. R., 2 C. P. 72; 36 L. J., C. P. 10.

(*o*) *Portland* (*Duke of*) v. *Hill*, L. R., 2 Eq. 765; 35 L. J., Ch. 439.

(*p*) *Broadbent* v. *Wilks*, Willes, 363. *Hilton* v. *Earl Granville*, 5 Q. B. 726. *Blackett* v. *Bradley*, 1 B. & S. 140; 31 L. J., Q. B. 65. But see, per L. C. and Lord Chelmsford, in *Wakefield* v. *Duke of Buccleuch*, L. R., 4 H. L. 377. And a grant to that effect would be good. *S. C.* and *Rowbotham* v. *Wilson*, 8 H. L. C. 359; 30 L. J., Q. B. 965.

(*q*) *Rogers* v. *Brenton*, 10 Q. B. 26.

(*r*) *Irimey* v. *Stocker*, L. R., 1 Ch. 396; 34 L. J., Ch. 633; 35 *ib.* 467.

345 ments, such as a right to the flow of water in an artificial watercourse, to which the tinbounders had acquired a title by prescription; for, although there is no privity of estate between the tinbounders and the owner, yet it must be presumed that the right to the use of the water had been originally acquired by arrangement with the owner as well as the tinbounders (*r*).

Conventional servitudes—Acquisition by statute—Allotments under Inclosure Acts.—Rights which are part of the ownership of the soil, unless expressly reserved under Inclosure Acts, pass with the soil to the persons to whom allotments are made (*s*). Where, therefore, by an Act for the inclosure and allotment of waste lands in a manor, it was provided that nothing in the Act should defeat the right of the lord of the manor to the seigniories and royalties incident to the manor, but that he should hold and enjoy all courts, fairs, markets, &c., with free warren and liberty of hunting, hawking, fishing, and fowling "to the said manor, or to the lord thereof, incident, belonging, or appertaining," in as ample a manner as before the Act, it was held that, as his right to sport over the waste before the Act was not a licence or liberty "incident to him as lord," but a method of direct enjoyment of his own soil and freehold, the Act did not reserve any such right of sporting to him, and that his right thereto was gone (*t*). *A fortiori*, therefore, the same was held, where the Act provided that a certain portion of the waste should be allotted to the lord of the manor in satisfaction for his right and interest as such lord (*u*). Where, however, in the reservation of the manorial rights of sporting in the Act, other rights not manorial, such as the right of taking coals, minerals, &c., were joined in the reservation, it was held that the right of sporting was not lost, but that the terms of the clause, though nominally terms of reservation only, were sufficient expressly to create or confer such a right (*x*). The Inclosure Commissioners have power under the 11 & 12 Vict. c. 99, s. 1, to sever the right to take game from the ownership of the soil, if the lord of the manor makes that a condition of his assent to the inclosure (*y*).

Conventional servitudes—Acquisition—Statutory property and interest of navigation companies in the water of a navigable river.—Acts of Parliament incorporating companies for the purpose of rendering rivers navigable, and purporting to vest in the company the river or stream to be made navigable, vest in the company much

(*r*) *Ivimey* v. *Stocker*, *supra*.
(*s*) *Townley* v. *Gibson*, 2 T. R. 701. *Doe* v. *Davidson*, 2 M. & S. 175.
(*t*) *Greathead* v. *Morley*, 3 M. & G. 139. *Bruce* v. *Helliwell*, 5 H. & N. 609; 29 L. J., Ex. 297. *Sowerby* v. *Smith*, L. R., 9 C. P. 524; 43 L. J., C. P. 290.
(*u*) *Robinson* v. *Wray*, L. R., 1 C. P. 490.
(*x*) *Ewart* v. *Graham*, 7 H. L. C. 331; 29 L. J., Ex. 88. *Musgrave* v. *Forster*, *infra*. *Leconfield* (*Lord*) v. *Dixon*, L. R., 2 Ex. 202; 3 *ib.* 32.
(*y*) *Musgrave* v. *Forster*, L. R., 6 Q. B. 590; 40 L. J., Q. B. 207.

346 more extensive rights over the water of the stream than those which the common law gives to riparian proprietors. They create a new species of statutory property and interest in the water, which renders any abstraction of it unlawful, except by a riparian proprietor for his necessary purposes, although no actual damage may be done to the navigation (*z*). But navigation companies and canal companies have no power of granting any exclusive right of sailing upon or navigating a river or canal beyond what is expressly given to them by statute; and therefore, where a canal company, by deed, granted to the plaintiff "the sole and exclusive right or liberty to put pleasure-boats on the canal, and let them out for hire, for purposes of pleasure only," it was held that the canal company had no power to grant any such exclusive privilege (*a*).

Conventional servitudes—Acquisition—Statutory servitude imposed upon railway companies of keeping up and maintaining fences.—The general Railway Act, 8 & 9 Vict. c. 20, which enacts (sect. 68) that railway companies shall make and maintain fences for separating the land taken for the use of the railway from the adjoining lands, and for preventing the cattle (*b*) of the owners or occupiers thereof from straying thereout, by reason of the railway, applies only to adjoining land of other persons (*c*), and does not impose upon railway companies any greater liability in respect of the maintenance of fences than is imposed by the common law upon occupiers, who are bound to maintain and repair fences for the benefit of the adjoining occupiers (*d*). Railway companies, therefore, are not bound to fence against trespassers upon the adjoining lands. Where the plaintiff's sheep escaped from his own land into the adjoining close, and were trespassing there, and then passed on to the defendants' railway, from defect of fences, and were killed by a train, it was held that the defendants were not responsible for the injury; for the plaintiff was not the owner or occupier of land adjoining the railway, and the company, consequently, were not bound to fence against him (*e*); and, where cattle strayed into a high-road adjoining a railway, and through defect of fences got upon the railway and were killed, it was held that the company were not responsible for the injury, as the cattle were trespassers on the highway, and the owners of the cattle were not occupying

(*z*) *The Medway Navigation Co.* v. *Earl of Romney*, 9 C. B., N. S. 575; 30 L. J., C. P. 236.

(*a*) *Hill* v. *Tupper*, 2 H. & C. 121.

(*b*) The word "cattle" includes pigs; and the company must put up such a fence that a pig, not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it. *Child* v. *Hearn*, L. R., 9 Ex. 176; 43 L. J., Ex. 100.

(*c*) *Marfell* v. *South Wales Rail. Co.*, 8 C. B., N. S. 525; 29 L. J., C. P. 315.

(*d*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Wallis*, 14 C. B. 224; 23 L. J., C. P. 85. *Buxton* v. *North Eastern Rail. Co.*, L. R., 3 Q. B. 549; 37 L. J., Q. B. 298. See, however, *Besant* v. *Great Western Rail. Co.*, 8 C. B., N. S. 368.

(*e*) *Ricketts* v. *East and West India Docks, &c. Rail. Co.*, 12 C. B. 174.

347 the road with their cattle at the time they strayed from the road on to the railway (*f*).

But the statute is for the benefit of all persons who are lawfully using adjoining land; and, consequently, the railway company must fence against the cattle of a third person which are on the land with the licence of the occupier (*g*); and, if cattle are passing along a highway under the care of the servants of the owner, the latter is lawfully using the way, and is deemed to be a temporary occupier of the highway, and, consequently, an occupier of land adjoining the railway within the words of the statute, so as to render it incumbent upon the company to maintain fences for the safety of his cattle so traversing the highway. Where a colt strayed from a field on to a public road, and the servants of the owner of the colt went in pursuit of it, headed it, and drove it back along the highway towards the field from which it had escaped, and the colt turned through an open gate into a coal-yard abutting upon a railway, and not fenced therefrom, and passed on to the railway, and was killed by a passing train, it was held that the railway company were responsible for the accident, as the owner's servants were in the act of driving the colt home at the time it escaped through the open gate, and the colt was not then trespassing upon the highway (*h*). But there is no duty imposed by statute or by the common law upon railway companies to fence off from their railway their own yards and inclosures around their stations; and, if cattle left in their yards stray therefrom, from the want of such fences, and get on the railway, and losses arise, the company are not responsible for such losses, unless it is shown that the cattle were under the care of the company's servants, or that the delivery of them was proceeding (*i*), and that they had failed to take proper means to prevent the cattle from straying (*k*).

If a railway company lets surplus land, the tenant cannot maintain an action against the occupier of the adjoining lands, if, by reason of the insufficiency of the fence, the cattle of the adjoining occupier trespass on his land (*l*).

An arrangement with the landlord releasing the company from their statutory obligation to fence will not prevent the occupier from recovering from the company for the loss of a cow killed by reason of the neglect of the company to repair fences (*m*).

Transfer of conventional servitudes.—Easements and profits *à*

(*f*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Wallis*, 14 C. B. 224; 23 L. J., C. P. 85.

(*g*) *Dawson* v. *Midland Rail. Co.*, L. R., 8 Ex. 8; 42 L. J., Ex. 49.

(*h*) *Midland Rail. Co.* v. *Daykin*, 17 C. B. 129.

(*i*) *Rooth* v. *North Eastern Rail. Co.*, L. R., 2 Ex. 173; 36 L. J., Ex. 83.

(*k*) *Roberts* v. *Great Western Rail. Co.*, 4 C. B. 506; 27 L. J., C. P. 266. *Marfell* v. *South Wales Rail. Co.*, 8 C. B., N. S. 534; 29 L. J., C. P. 315.

(*l*) *Wiseman* v. *Booker*, 3 C. P. D. 184.

(*m*) *Corry* v. *Great Western Rail. Co.*, 7 Q. B. D. 322; 50 L. J., Q. B. 386.

348 *prendre* in gross, not appendant or appurtenant to land, cannot be kept alive, so as to burthen the land for all time in the hands of subsequent purchasers and proprietors; and no easement, privilege, or profit to be enjoyed over, or taken from, land can be made appendant or appurtenant to land, unless it is accessorial to the use and enjoyment of landed property (*n*). There must be a dominant tenement for whose benefit the right exists, as well as a servient tenement (*o*). Thus, a right of way unconnected with the enjoyment or occupation of land cannot be annexed as an incident to an estate; nor can a way appendant to a house or land be granted away or made a way in gross; for no one can have such a way but he who has the land to which it is appendant. It is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and annex them to it; nor can he subject the land to a new species of burthen, so as to bind it in the hands of an assignee. "It would be a novel incident annexed to land, that the owner and occupier should, for purposes wholly unconnected with that land, and merely because he is owner and occupier, have a right of way over other land; and a grant of such a privilege or easement can no more be annexed, so as to pass with the land, than a covenant for any collateral matter" (*p*).

"Private ways over another man's grounds," observes Blackstone, "may be grounded on a special permission, as when the owner of the land grants to another a liberty of passing over his grounds to go to church, to market, or the like: in which case the grant is particular, and confined to the grantee alone; it dies with the person, and the grantee cannot assign over his right to any other person" (*q*). Thus a licence to a man to hunt in my park, or to walk in my orchard, extends but to himself; and a way granted to church over any land extends not to any other but the grantee himself (*r*); and therefore he may not give or grant this to another (*s*). But, if the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment thereof, it passes with the tenement to which it is annexed to the successive assignees and owners thereof by a grant of the tenement, so that the benefit and the burthen of the exercise and enjoyment of the incorporeal right will accompany the dominant

(*n*) *Ellis* v. *Mayor, &c. of Bridgnorth*, 15 C. B., N. S. 52; 32 L. J., C. P. 273. As to when a right of shooting is an incorporeal right in gross, see *Overseers of Hilton* v. *Overseers of Bowes*, L. R., 1 Q. B. 359; 35 L. J., M. C. 137.

(*o*) *Nemo potest servitutem acquirere urbani vel rustici prædii, nisi qui habet prædium; nec quisquam debere, nisi qui prædium habet.*—Instit. lib. 2, tit. 4, § 3. De Servitutibus.

(*p*) *Ackroyd* v. *Smith*, 10 C. B. 188. *Bailey* v. *Stephens*, 12 C. B., N. S. 91; 31 L. J., C. P. 226. *Hill* v. *Tupper*, 2 H. & C. 121.

(*q*) 2 Bl. Comm. 35.

(*r*) Wingate's Maxims, 379.

(*s*) Shep. Touch. 239.

349 and servient tenements into the hands of the several successive assignees and owners thereof, so long as such dominant and servient tenements remain vested in the hands of separate proprietors (*t*).

A claim by one landowner to enter upon his neighbour's land and cut down trees and sell them, is a claim of a profit *à prendre* in gross, and cannot be made appurtenant to land, as it is in nowise accessorial to the use and enjoyment of an estate; but a claim to cut down thorns and firewood to burn in the dwelling-house of the claimant, is a profit *à prendre* accessorial to the use and enjoyment of the dwelling-house, and may be made appendant or appurtenant thereto, so as to give the owners and occupiers thereof for the time being a right to the privilege (*u*).

An incorporeal hereditament in the nature of a profit *à prendre* is an estate capable of being inherited by the heir and assigned to a purchaser, or otherwise conveyed away. It is a tenement within the definition of Lord Coke, who says that the word "tenement" includes not only corporate inheritances, but also all inheritances issuing out of them, or concerning or annexed to them, or exercisable within them, as rent, estovers, common, or other profits granted out of land (*x*). If, therefore, a landowner grants to a man and his heirs a right to dig for and carry away stone, clay, or minerals, the incorporeal right may be demised by the grantee for years or for life, or conveyed away to another and his heirs (*y*). Where the Lord Mountjoy, by deed inrolled, bargained and sold the Manor of Camford to one Brown in fee, and by the same indenture Brown granted to the Lord Mountjoy, his heirs and assigns, a right to dig for ore in the waste land of the manor, and also to dig turf there, and the Lord Mountjoy demised this interest to one Laicot for twenty-one years, and Laicot assigned the same over to two other men, it was held that the assignment was good, but that the two assignees could not work severally but together, with one stock and such workmen as belonged to them both; and that the assignee had no exclusive right to dig for ore, but that the landowner himself, or the grantor of the privilege, might als dig for ore without derogating from the grant (*z*). But grants of profits issuing out of land carrying an assignable interest can only be made in gross, and can only be assigned by the grantees by the ordinary conveyances known to the law; and it is not because the grantee may happen to be the

(*t*) See *post*, p. 353, as to the merger and extinguishment of easements and profits *à prendre* by unity of ownership of the dominant and servient tenements.

(*u*) *Dowglass* v. *Kendall*, Cro. Jac. 256.

(*x*) Co. Litt. 20 a.

(*y*) *Muskett* v. *Hill*, 5 Bing. N. C. 707. *Martyn* v. *Williams*, 1 H. & N. 827; 26 L. J., Ex. 117.

(*z*) *Mountjoy's case*, Godb. 17; 4 Leon. 147. *Chetham* v. *Williamson*, 4 East, 476.

350 owner of a close at the time the grant is made to him that such a conveyance can be dispensed with in favour of the persons who, from time to time, may succeed him in the ownership of that close (*a*). A right of common for cattle levant and couchant on a particular tenement cannot be aliened so as to become a right in gross (*b*); but it is otherwise, if the right is for a certain number of beasts (*c*).

A mere personal privilege or easement, such as a right of way in gross, not annexed or appurtenant to a tenement, cannot be assigned or granted over (*d*). A licence of pleasure cannot be assigned. Thus, if a licence is granted to me to walk in another man's garden, or to go through another man's grounds, I may not give or grant this to another (*e*).

Extinguishment of conventional servitudes.—A title once gained by grant, prescription, or custom, may be extinguished by the act of the owner, as by release or abandonment, or by the act of the law, as by unity of possession of the dominant and servient tenement, by destruction of the dominant tenement, and possibly by encroachment, or by non-performance of the conditions of the grant. In the case of ways of necessity, the servitude will also be extinguished by the cesser of the necessity (*f*).

Extinguishment of conventional servitudes—Release.—A right of common is extinguished by an express release of part of the land originally subject to it, because such release casts a greater burden on the rest of the land (*g*); but the law is otherwise in the case of an exclusive right of pasturage (*h*).

A mere parol licence or agreement will suffice for the destruction, although it is insufficient for the creation, of an easement. Thus, if a person possessed of an easement over the land of an adjoining landowner, verbally authorizes the latter to do an act of notoriety upon his own land which, when done, will be inconsistent with the continued enjoyment of the easement, and the licence or authority is acted upon, and the thing done, the authority so given and acted upon cannot be revoked; and the easement, consequently, is extinguished. Where the plaintiff, for example, having a right to the uninterrupted access of light and air across

(*a*) Willes, J., *Bailey* v. *Stephens*, 12 C. B., N. S. 91; 31 L. J., C. P. 228.

(*b*) *Tyringham's case*, 4 Co. Rep. 36 b.

(*c*) *Daniel* v. *Hueslip*, 2 Lev. 67, per Hale, C. J.

(*d*) *Ackroyd* v. *Smith*, 10 C. B. 188.

(*e*) Wingate's Maxims, 379, cited Shep. Touch. 239.

(*f*) By the French law, "servitudes cease when things are in such a state that it is impossible any longer to make use of them." They revive, if things are re-established in such a manner that they can be made use of, unless a sufficient space of time has already elapsed to raise a presumption that the servitude has been extinguished. A servitude is extinguished also by non-usage during thirty years. Cod. Civ., Arts. 703, 706.

(*g*) *Rotheram* v. *Green*, Cro. Eliz. 593. Per Willes, J., *Johnson* v. *Barnes*, L. R., 7 C. P. 592; 41 L. J., C. P. 250.

(*h*) *Johnson* v. *Barnes*, L. R., 8 C. P. 527; 42 L. J., C. P. 259.

351 the defendant's area, had given the defendant a parol licence or permission to put a skylight over his area, and the skylight was erected by the defendant on his own land, and, when built, was found to impede the passage of the air and light and to obstruct the plaintiff's easement, it was held that, as the parol licence or permission had been acted upon and executed, and the skylight built, the licence was irrevocable, and the easement was extinguished (*i*). So, where the plaintiff, having a right to the use of a stream of water which flowed through the land of the defendant, gave the defendant a parol licence or permission to lower the banks of the river, and erect a weir, and divert a portion of the water which had previously flowed to the plaintiff's mill, it was held that the plaintiff, after he had so given up his right to the water that had been diverted, and had suffered the defendant to act upon the faith of such relinquishment, and to incur expense in doing on his own land the very thing that was authorized by the plaintiff to be done, could not then lawfully retract such consent, and throw on the defendant the burthen of restoring things to their former condition (*k*).

Extinguishment of conventional servitudes—Abandonment.—A title once gained by prescription or custom cannot be lost merely by non-user for ten or twenty years; for, when there is once a title by prescription vested, it cannot be taken away by cesser of user of the right of late time (*l*). The question of abandonment is a question of fact, to be determined upon the whole of the circumstances of the case; and the non-user is evidence with reference to abandonment. Where a *modus decimandi* was alleged by prescription time out of mind for tithes of lambs, and thereupon issue was joined, the jury found that before twenty years then last past there was such a prescription, and that for these twenty years he (the plaintiff) had paid tithe lamb *in specie*. It was objected: 1. That the issue was found against the plaintiff; for that the prescription was general for all the time of prescription, and twenty years fail thereof: 2. That the party by payment of tithes *in specie* had waived the prescription or custom. But it was adjudged for the

(*i*) *Winter* v. *Brockwell*, 8 East, 309.

(*k*) *Liggins* v. *Inge*, 7 Bing. 682. *Blood* v. *Keller*, 11 Ir. Com. Law Rep. 130. The same rule prevails in the civil law. In the "Digest," for example, it is laid down, that "if I have a right of discharging my eaves-droppings into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way. *Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in eâ aream ædificandi, stillicidii immittendi jus amitto. Et similiter, si per tuum fundum via mihi debeatur, et permisero tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ.*"—Dig. lib. 9, tit. 6, l. 8.

(*l*) Co. Litt. 114 b. *Clay* v. *Gardiner*, 4 M. & W. 500. *Battishill* v. *Reed*, 18 C. B. 697; 25 L. J., C. P. 290.

plaintiff in the prohibition; for, albeit the *modus decimandi* had
352 not been paid by the space of twenty years, yet, the prescription being found, the substance of the issue was found for the plaintiff (*m*).

Conventional servitudes—Extinguishment by abandonment—Disuse of right of way.—The presumption of abandonment of a right of way does not arise from the mere fact of non-user, when nothing has been done adverse to the user, and no obstruction has been offered to the enjoyment of the right. Thus, where an immemorial right of way had been enjoyed by the defendant from the defendant's close across the adjoining land of the plaintiff to the high road, and the defendant had demised his close to the plaintiff, and after that to several other tenants, who obtained by leave and licence of the plaintiff and others a more easy and convenient access to and from the property, and the old prescriptive way was consequently disused for a great many years, it was held that the prescriptive right was not extinguished by the non-user (*n*). The use of the

(*m*) Coke's Inst. s. 170.

(*n*) *Ward* v. *Ward*, 7 Exch. 838. *Cook* v. *Mayor of Bath*, L. R., 6 Eq. 177. An easement acquired by grant can never be lost by mere non-user. It can only be defeated or extinguished by an adverse user for the requisite period: *Smilie* v. *Hastings*, 24 Barb. (N. Y.) 44; *Jewett* v. *Jewett*, 16 Id. 150; nor can it be extinguished or renounced by parol agreement: *Dyer* v. *Sandford*, 9 Met. (Mass.) 395; but where a parol licence is given to the owner of the servient estate to interrupt or obstruct the easement, it may, after the licence is executed by the licensee, be of such a character as to operate as an abandonment of the easement: *Dyer* v. *Sandford*, *ante*; *Morse* v. *Copeland*, 2 Gray (Mass.) 302. So, it may be extinguished by the unity of title in two estates in the same person: *Grant* v. *Chase*, 17 Mass. 443; *McTavish* v. *Carroll*, 7 Md. 352; *Drakely* v. *Sharp*, 9 N. J. 9; in such a case all lesser rights and easements are r[illegible]; *Warren* v. *Blake*, 54 Me. 276; but if the lands are held by a defective title, and the easement by a valid one, the easement is not extinguished by the unity of title: *Tyler* v. *Hammond*, 11 Pick. (Mass.) 193. So it ceases when the estate to which it was appurtenant ceases: *Huffman* v. *Savage*, 15 Mass. 130.

The rule may be stated thus—when an easement is once acquired it cannot generally be lost, except by a non-user for a period equal to that requisite to gain it, and an adverse user by the owner of the estate. Non-user is merely evidence from which an abandonment may be presumed, and is weak or strong according to the circumstances; mere non-user is not enough; there must either be an adverse user, or the non-user must be such as clearly to show an intention and purpose to abandon it: *White* v. *Crawford*, 10 Mass. 183; *Williams* v. *Nelson*, 23 Pick. (Mass.) 141; *Nitzell* v. *Paschall*, 3 Rawle (Penn.) 76; *Hatch* v. *Dwight*, 17 Mass. 289; *Wright* v. *Freeman*, 5 Ire. 154; *Corning* v. *Gould*, 16 Wend. (N. Y.) 531; *Thomas* v. *McDonald*, N. Y. 381; *Farrar* v. *Cooper*, 34 Me. 394; *Yeakle* v. *Nace*, 2 Whart. (Penn.) 123; *Jennison* v. *Walker*, 11 Gray (Mass.) 425; *Dyer* v. *Depue*, 5 Whart. (Penn.) 584.

Non-user may be explained, as by showing that the person had no occasion for it; and unless there is an adverse user by the owner of the estate, or such a state of facts as clearly indicate an abandonment, it cannot be predicated of non-user alone: *Hurd* v. *Curtis*, 7 Met. (Mass.) 94; *Corning* v. *Gould*, 16 Wend. (N. Y.) 535; *Farrar* v. *Cooper*, 34 Me. 394; *Miller* v. *Gorlick*, 5 Barb. (S. C.) 183.

When the owner of the right does that which clearly indicates an abandonment of the easement, non-user for a less period than that required to acquire the right will be sufficient, but the owner of the use must be coupled with such acts as clearly indicate an intention, not merely to cease to exercise, but to abandon the right. Thus, in *Williams* v. *Nelson*, 23 Pick. (Mass.) 141, the owners of a mill and dam on a stream had acquired a prescriptive right to flow certain lands belonging to upper owners. After the right had become vested in

new track may be considered as an exercise of the old right, and evidence of the continued enjoyment of it (*o*). When, therefore, a new way has been substituted by agreement of the parties in lieu of an old prescriptive way, and the new way is stopped, the old prescriptive right of passage revives (*p*), unless the non-user of the original right of way is accompanied by acts warranting the conclusion that it was intended to release the pre-existing easement (*q*).

If the jury find the right of way once well commenced, it must be shown that it has subsequently been released, abandoned, or destroyed. An express release of the easement would, of course, destroy it at any moment; so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time. It is not so much the duration of the cesser of enjoyment, as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances (*r*).

Conventional servitudes—Extinguishment by abandonment—Disuse of right to water.—A person who has a prescriptive right to a flow

them they took down their mill and removed all the machinery except the wheel, leaving the dam, however, still standing. Some of the owners declared that the mill would not again be used. The owners of the lands above, which had formerly been flowed, cultivated the lands and stocked them with grasses. At the end of nine years the owners resumed the occupation of the mill and the full exercise of all their former right to flow the lands. The court held that this was not such an abandonment of the right as prevented their resuming it, and the doctrine of the court is clearly right. There was in this case a mere cesser of use; the dam was left standing, and the wheel was left in its usual place. It was not the mill or its machinery that created the injury, but the dam and its use. The dam, which was the instrument through which the right was acquired, was not disturbed, and its use might well be resumed at any time before the right was defeated by adverse use.

In *Jennison* v. *Walker*, 11 Gray (Mass.) 425, there was an express grant to lay an aqueduct through the plaintiff's land, but the defendant's grantors having ceased to use it, and the plaintiff having taken up the logs and dam with other acts adverse to the right for a period of thirty years, it was held that the right was lost. See *Arnold* v. *Stevens*, 24 Pick. (Mass.) 106; *Banner* v. *Angier*, 2 Allen (Mass.) 128; *Wiggins* v. *McCleary*, 49 N. Y. 346; *Owen* v. *Field*, 102 Mass. 114; *Hoffman* v. *Savage*, 15 Id. 130; *Butts* v. *Thrie*, 1 Rawle (Penn.) 218.

This doctrine was applied in *Railroad Co.* v. *Covington*, 2 Barb. (N. Y.) 532, where a railroad company having an easement to maintain a railroad over one's land, took up the rails and ceased to use it, and conveyed the road, but to other parties, the court held that this operated as an abandonment of the easement, although the non-user had existed for but a short period.

(*o*) *Payne* v. *Shedden*, 1 M. & Rob. 382.

(*p*) *Lovell* v. *Smith*, 3 C. B., N. S. 120.

(*q*) *Mulville* v. *Fallon*, 6 Ir. Rep., Eq. 458.

(*r*) *Reg.* v. *Chorley*, 12 Q. B. 519. *Williams* v. *Eyton*, 2 H. & N. 771; 27 L. J., Ex. 176.

353 of water to a pond or well does not lose his right merely because he has ceased to use his pond or well, and has allowed it to become choked with weeds (*s*). But if, having a right to foul the water, he lies by, and allows other persons to incur expense, which would be useless if his right to foul the water continued, he must be taken to have abandoned it (*t*).

Conventional servitudes—Extinguishment by abandonment—Abandonment of easements of light and air.—If a person entitled to an easement of light and air does any act of notoriety showing that he abandons the enjoyment of the light and air he enjoyed, he may lose his right in a much less period of time than would suffice to enable him to gain it. Where the owner of a building with ancient windows overlooking the defendant's premises pulled down the building and erected another with a blank wall without any windows, and fifteen years afterwards the defendant erected a building next this blank wall, and the plaintiff then opened windows in the blank wall in the place where his ancient windows formerly stood, and brought an action against the defendant for the obstruction to the light and air caused by the defendant's new building, it was held that the windows thus opened could not claim the privileges of the ancient windows which had formerly existed on the same spot, that those privileges had been lost by manifest disuse, and that the action was not maintainable (*u*).

If a window has been bricked up for twenty years, it is, when re-opened, *primâ facie*, a new window (*x*). But, if the facts show that the windows were only temporarily disused, that the frames and sashes were kept in, or the spaces filled with a temporary hoarding which could readily be removed, the owner of the window-spaces will not lose his right to the easement of light and air by the disuse of the windows for any period short of twenty years, unless the adjoining landowner has been permitted to build against them, and to incur expense, in the reasonable belief that the windows have been permanently abandoned, in which case the owner of the windows cannot then insist upon his ancient right and claim damages for an injury which has been brought about by his own negligence and want of care (*y*).

Conventional servitudes—Extinguishment by merger—Unity of ownership of the dominant and servient tenements.—Easements and profits *à prendre* may become merged and extinguished in the general rights of property, when the land benefited by, and the

(*s*) *Hale* v. *Oldroyd*, 14 M. & W. 792; Co. Litt. 114 b.
(*t*) *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; 2 Ch. 478; 36 L. J., Ch. 584.
(*u*) *Moore* v. *Rawson*, 3 B. & C. 332.
(*x*) *Lawrence* v. *Obee*, 3 Camp. 514.
(*y*) *Stokoe* v. *Singers*, 8 El. & Bl. 39; 26 L. J., Q. B. 257. *Cook* v. *Mayor of Bath*, L. R., 6 Eq. 177.

354 land burthened with, the easement or profit pass into the hands of one common proprietor, or when the person possessed of the incorporeal right becomes the owner of the land over or upon which the right is exercised; for a man cannot, strictly speaking, have an easement in his own land (*z*). Thus, if a man has a rent or common by prescription, unity of possession of as high and perdurable estate in the land is an interruption in the right; for a title by prescription vested will be destroyed by unity of ownership of the dominant and servient tenements (*a*). So, if one man erects on his own land a building which wrongfully darkens the windows of the adjoining proprietor, and afterwards purchases the house with the darkened windows, the tort is thenceforth purged by the unity of ownership, and the easement or privilege of enjoying the unobstructed access of light and air annexed to the darkened windows is extinguished; for, both houses being in the hand of one person, he may deal with them as it seems best to him. If, therefore, he afterwards grants or conveys the house with the darkened windows, the grantee cannot lawfully complain of the nuisance, and has no remedy for its abatement. If one of two houses, which belonged to two different proprietors, has been built so as wrongfully to overhang the other, and they afterwards come into one hand, the wrong is now purged; so that, if the houses come afterwards again into several hands, yet neither party can complain of the wrong done before (*b*).

The obligation imposed in certain cases by custom, prescription, or contract, upon the owner of an estate to maintain a fence for the benefit of the owner or occupier of the adjoining land, is an obligation in the nature of a servitude. Where, therefore, adjoining lands, which have once belonged to different persons, one of whom is bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership; and, where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words are introduced into the deed of conveyance for that purpose (*c*).

If a man who has a right of common appurtenant (*d*) becomes himself the owner of the land over which the right of common extends, the incorporeal right is merged in the legal ownership, and the land is discharged; for a man cannot have common in his

(*z*) *Outram* v. *Maude*, 17 Ch. D. 391.
(*a*) Co. Litt. 114 b. *Onley* v. *Gardiner*, 4 M. & W. 500. *Battishill* v. *Reed*, 18 C. B. 697; 25 L. J., C. P. 290.
(*b*) *Robins* v. *Barnes*, Hob. 131; Rolle's Abr. Customs (D.), pl. 7. *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290.
(*c*) Bayley, J., *Boyle* v. *Tamlyn*, 6 B. & C. 337.
(*d*) *Ante*, p. 285.

355 own land (*e*); and, if the owner afterwards grants the land to which, before the extinguishment, the right of common was attached, with all easements and profits thereunto "appertaining" or "belonging," these words will not be sufficient to revive or re-create the right (*f*). So, if a man purchases part of the land, the right of common is extinguished, unless it is a right of common appendant, in which case it will be apportioned, because it is of common right (*g*).

If a copyhold tenement to which a right of common is annexed becomes vested in the lord by forfeiture, the right of common is not extinguished; it remains by custom annexed to the customary tenement; and, though the right is in abeyance while the estate remains in the lord, it is re-created or revived by a re-grant of the estate as a copyhold tenement *cum pertinentiis*. "When copyholders for life, according to the custom, have used to have common in the wastes of the lord of the manor, or estovers in his woods, or any other profit *à prendre* in any part of the manor, and afterwards the lord aliens the wastes or woods to another in fee, and afterwards grants certain copyhold houses and lands for lives, such grantees shall have common of pasture, or common of estovers, &c., notwithstanding the severance; for the title of the copyholder is paramount to the severance; and the custom unites the common or estovers, which are but accessaries or incidents, as long as the house and lands, being principal, are maintained by the custom; which customary appurtenances are not appertaining to the estate of the lord; for he is the owner of the freehold and inheritance of all the manor; but they are appertaining to the customary estate of the copyholder, after the grant made unto him; which profit *à prendre*, being due by custom to the copyhold tenement (notwithstanding the feoffment or fine, &c., of the waste or woods made by the lord), remains and is preserved by the custom, which is, as hath been said, the title of the copyholder, and is paramount to the severance; but, if the copyholder had derived his interest from the estate of the lord, then clearly, by the feoffment, fine, &c., of the lord, all those who afterwards claim by him, shall be barred of any profit *à prendre* in the same waste or woods" (*h*).

If, indeed, the lord grants the fee to a copyholder, the estate can never again become a copyhold estate, and the right of common is extinguished; "for the common first used was gained by custom, and annexed to the estate, and is lost with it" (*i*).

(*e*) *Nelson's case*, 3 Leon. 128. *Saunders* v. *Oliffe*, Moore, 467. *Tyringham's case*, 4 Rep. 38 a.

(*f*) *Clements* v. *Lambert*, 1 Taunt. 204. *Grymes* v. *Peacock*, 1 Bulstr. 17.

(*g*) Co. Litt. 122 a.

(*h*) *Swayne's case*, 8 Rep. 63 b. *Brown's case*, 4 Co. 21 b. *Benson* v. *Chester*, 8 T. R. 401.

(*i*) *Badger* v. *Ford*, 3 B. & Ald. 155. *Massam* v. *Hunter*, Yelv. 189.

356 For the extinguishment of a prescriptive right by unity of ownership and possession "it is requisite that the party should have an estate in the land *a quâ*, and in the land *in quâ*, equal in duration, quality, and all other circumstances" (*k*). "If," observes Alderson, B., "I am seized of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin; and, if I part with the premises, the right, not being extinguished, will revive" (*l*). If a lessor of the dominant tenement takes a week's tenancy of the servient tenement, he does not lose all the servitudes: he will only lose the statutory mode of establishing them; and he will only lose that, when it can be said that at the time of granting the lease he could grant the servitude (*m*). "If a man hath common by prescription, and taketh a lease of the land for twenty years whereby the common is suspended, after the years ended he may claim the common generally by prescription; for that the suspension was but to the possession, and not to the right, and the inheritance to the common did always remain; and, when a prescription or custom doth make a title of inheritance (as Littleton speaketh), the party cannot alter or waive the same *in pais*" (*n*).

Easements of necessity and continuous easements are not extinguished by unity of ownership; and, therefore, a necessary way over land continues, notwithstanding a unity of ownership of the dominant and servient tenements, and a subsequent conveyance of such tenements to separate proprietors (*o*); but this is not the case with regard to mere easements of convenience, which are used from time to time only, such as the right of taking water from a pump (*p*).

A private right of way is not extinguished by the subsequent dedication of the way to the public (*q*).

Conventional servitudes—Extinguishment by destruction of the dominant tenement.—Where an easement is granted for a particular purpose, or arises as accessorial to a thing granted, and the purpose can no longer be accomplished, or the thing granted ceases to exist, so that the easement can no longer be applied to the object for which it was originally granted, the easement is at

(*k*) *R.* v. *Hermitage*, Carth. 241. See *Irimey* v. *Stocker*, L. R., 1 Ch. 407; 34 L. J., Ch. 633; 35 *ib.* 467; Co. Litt. 114 b.

(*l*) *Thomas* v. *Thomas*, 2 C. M. & R. 41.

(*m*) Bramwell, B., *Warburton* v. *Parke*, 2 H. & N. 64; 26 L. J., Ex. 298.

(*n*) Coke's Inst., 170.

(*o*) *Packer* v. *Wellstead*, 2 Sid. 111. *Pearson* v. *Spencer*, 1 B. & S. 584; 3 B. & S. 761.

(*p*) *Polden* v. *Bastard*, L. R., 1 Q. B. 156; 32 L. J., Q. B. 372.

(*q*) *Duncan* v. *Louch*, 6 Q. B. 904.

357 an end (*r*). But, when mills or houses which have watercourses, or estovers, or other things appendant or appurtenant to them, are overthrown by the wind, or burned by fire, or fall by any other act of God, if the owner rebuilds them in the same manner as they stood before, they shall have the same ancient rights appendant and appurtenant to the new structure; and, although the house or mill falls by the act or default of the owner, or by the wrong of another, yet, forasmuch as the durable materials remain, he may rebuild it without the loss of anything appendant or appurtenant to it; but it ought to be reconstructed upon the old foundations of the ancient house (*s*).

A right of common appurtenant for cattle levant and couchant is not extinguished or suspended by reason of the tenement in respect of which it is claimed having been changed so as no longer to be capable of supporting cattle, if it is still in such a state that it might easily be turned to the purpose of feeding cattle (*t*).

Where the grant of a right of way is in respect of the lands, and not in respect of the person, it is not extinguished by the severance of the lands, but goes with every part of the severed lands (*u*).

Conventional servitudes—Extinguishment by encroachment.—An alteration of the dominant tenement which does not amount to a substantial variance in the mode or extent of user or enjoyment of the easement, so as to throw a greater burden on the servient tenement, does not extinguish or suspend the easement. Thus, where *A* is entitled to the right of eavesdrop, a slight raising of the eaves on the rebuilding of the premises will not affect the right (*x*). So, if a man has a watercourse to his mill, an alteration in the purpose for which the mill is used will not destroy his right. "So, if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription; for then many prescriptions will be destroyed: and, although he builds new chimneys, or makes a new addition to his old house, by that he shall not lose his prescription; but he cannot employ or spend any of his estovers in the new chimneys or in the part newly added. The same law of conduits and water-

(*r*) *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J., Ex. 185.
(*s*) 4 Co. 86 b, 88 a.
(*t*) *Carr* v. *Lambert*, L. R., 1 Ex. 168; 35 L. J., Ex. 121.
(*u*) *Newcomen* v. *Coulson*, L. R., 5 Ch. D. 133; 46 L. J., Ch. 459.
(*x*) *Harvey* v. *Walters*, L. R., 8 C. P. 162; 42 L. J., C. P. 105.

358 pipes and the like. So, if a man has an old window to his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it; for he shall prescribe to have the light in such part of his house" (*y*).

Conventional servitudes—Extinguishment by encroachment—Alterations in windows.—Opening a new window or enlarging an old window is no injury or wrong. It is one of the natural rights of property which any man is entitled to exercise; and he cannot, by exercising that right, lose any other right which he may have acquired. Therefore, having got a right to the entry of light into a window of a certain size, he does not, by making that window larger, lose his right to the entry of light to the old part of it (*z*). It follows that, if new or enlarged windows cannot be obstructed without at the same time obstructing ancient, unaltered windows, an obstruction to such last-named windows cannot be justified; neither can an obstruction to a lower window be justified, merely on the ground that an upper window has been enlarged, or a new garret window has been thrown out (*a*). Nor will the right be prejudiced by any proposed decrease of light caused by buildings erected by the owner of the dominant tenement himself (*b*), nor by any increase of light caused by clearances effected in the neighbourhood, unless amounting to so much light that no one could reasonably want more (*c*). But, if windows have been allowed to be opened, with blinds attached to them sloping upwards, so as to admit the light, but obstruct the view over the adjoining land, and the blinds are removed, the view from the windows may be obstructed, provided the obstruction causes no greater impediment to the light than was caused by the old blinds (*d*). If, however, a person possessed of an ancient diamond-paned, or stone-mullioned, or gothic window, or a window painted on the inside, puts in a modern sash with plate glass, or rubs off the paint and so increases the amount of light inside his house, and his neighbour blocks up the window, or builds immediately before it, the court will by injunction compel him to remove the obstruction (*e*).

What alterations in a window will cause a loss of the right to light is a question which underwent considerable discussion in

(*y*) *Luttrell's case*, 4 Rep. 86 a, 87 a. *Aynsley* v. *Glover*, L. R., 18 Eq. 544; 43 L. J., Ch. 777. *Butlers* v. *Dickinson*, 29 Ch. D. 155; 54 L. J., Ch. 776.

(*z*) *Tapling* v. *Jones*, 11 H. L. C. 290; 34 L. J., C. P. 344. *Aynsley* v. *Glover*, L. R., 10 Ch. 283; 44 L. J., Ch. 528. *Newson* v. *Pender*, 27 Ch. D. 43.

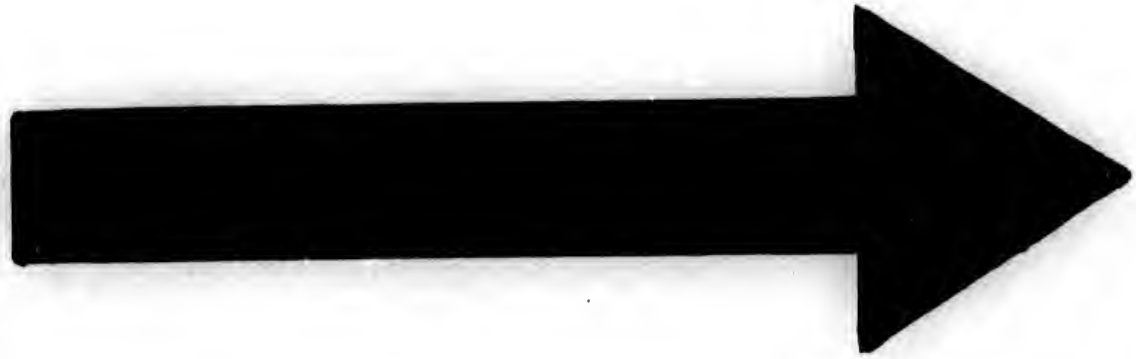
(*a*) *Binckes* v. *Pash*, 11 C. B., N. S. 342; 31 L. J., C. P. 347, 350.

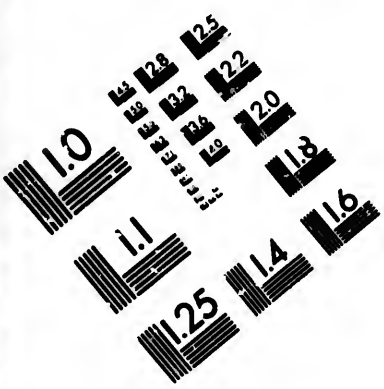
(*b*) *Staight* v. *Burn*, L. R., 5 Ch. 163; 39 L. J., Ch. 289. *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; 49 L. J., Ch. 529.

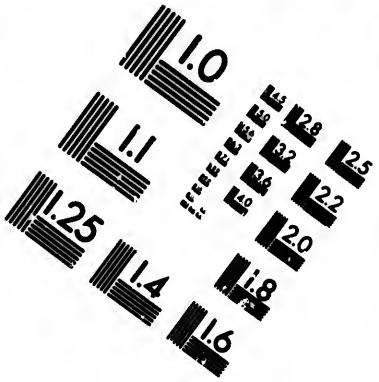
(*c*) *Dyer's Co.* v. *King*, L. R., 9 Eq. 438; 39 L. J., Ch. 339.

(*d*) *Cotterell* v. *Griffiths*, 4 Esp. 69.

(*e*) *Turner* v. *Spooner*, 1 Drew. & Sm. 467; 30 L. J., Ch. 803.







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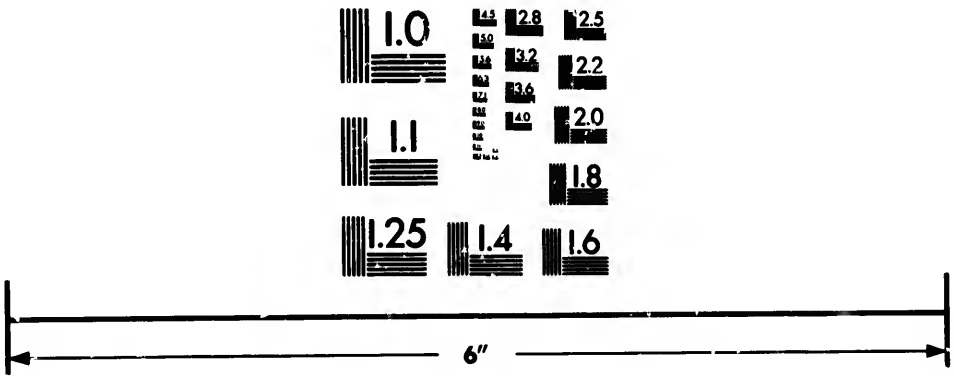

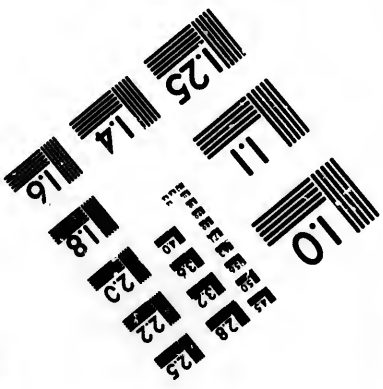

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359 recent times (*f*). It is clear that an extension of the window in the same plane will not cause a loss of the old light; neither is the light gone, when the house, having been pulled down for the purpose of being rebuilt, is rebuilt in substantially the same position; and, even where the new house is set back or altered, so that the new windows are in a parallel plane at a greater distance or in a diagonal plane at a similar distance, the right is not lost so long as a substantial portion of the light which would have passed over the servient tenement through the old windows, passes also, or, but for the obstruction complained of, would pass through the new windows (*f*). An intention to abandon the light must be clearly established by evidence (*ff*).

Conventional servitudes—Extinguishment by non-performance of conditions annexed to the grant.—If a right of way is granted to another, he contributing and paying his rateable share and proportion of the expense of repairing the way, and repairs become necessary, and the way is repaired by the grantor, and the grantee refuses to pay his rateable proportion of the expense, his right of way will become forfeited, or will be suspended, until the accomplishment of the condition annexed to the grant; but the grantee has the right to use the way without paying anything until repairs become necessary, and the cost of them has been ascertained, and the grantee has refused to pay his share of the cost (*g*). If a right of watercourse is granted, with certain limitations and restrictions, and the grantee exceeds his limited right, and refuses to conform to the restrictive conditions, he loses his right altogether, until he makes his enjoyment of it conformable to the conditions of the grant (*h*).

Conventional servitudes—Extinguishment of ways of necessity.—A way by necessity is commensurate only with the existence of such necessity, so that, when the necessity ceases, the right of way also ceases. Where, therefore, a person who has a way of necessity over the lands of another is able to approach the land for which the way was used by passing over his own soil, the right of way is extinguished. "When, by a subsequent purchase, he is enabled to reach his house, farm, or field, without touching the land of his neighbour, the necessity of going upon the land of the latter ceases; and, the necessity ceasing, the right founded upon such necessity ceases also" (*i*). But the easement revives again when the necessity for it revives (*k*).

(*f*) *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.*, 6 Ch. D. 757; 46 L. J., Ch. 871. *Barnes* v. *Loach*, 4 Q. B. D. 494; 48 L. J., Q. B. 756; *Scott* v. *Pape*, 31 Ch. D. 554.

(*ff*) *Greenwood* v. *Hornsey*, 33 Ch. D. 471.

(*g*) *Duncan* v. *Louch*, 6 Q. B. 904.

(*h*) *Cawkwell* v. *Russell*, 26 L. J., Ex. 34.

(*i*) *Holmes* v. *Goring*, 2 Bing. 76.

(*k*) *Pearson* v. *Spencer*, 1 B. & S. 584; 3 *ib.* 761.

360 *Injuries to rights of property in land—What constitutes a trespass.* —Every entry upon land in the occupation or possession of another constitutes a trespass, in respect of which an action for damages is maintainable, unless the act can be justified. If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done (*l*). If the entry is made after notice or warning not to trespass, or is a wilful and impertinent intrusion upon a man's domestic privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable (*m*); but, if there has been no insulting or wilful and persevering trespass, and no actual damage done, and no question of title is involved, the damages recoverable may be merely nominal.

Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass. Every injury to the possession of the occupier is, in principle, an injury to the property; and, therefore, if a man is unlawfully turned out of his dwelling-house, that amounts, in point of law, to an injury to the dwelling-house (*n*).

Where an action was brought for trespassing on a close and treading down the grass, and the defendant pleaded that he had land lying next the said close, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, and the plaintiff demurred, it was adjudged for the plaintiff; for, "though a man doth a lawful thing, yet, if any damage do hereby befall another, he shall answer for it, if he could have avoided it" (*o*).

So, where, to an action of trespass for mowing the plaintiff's land and carrying away the grass, the defendant pleaded that he had land adjoining the plaintiff's, and, in mowing his own land, involuntarily and by mistake he mowed some of the plaintiff's land, intending only to mow his own land, it was held that this was no answer; for the act was voluntary, and the knowledge and intent of the defendant could not be ascertained and were immaterial (*p*).

(*l*) *Ante*, p. 39.

(*m*) *Merest* v. *Harvey*, 5 Taunt. 443.

(*n*) *Meriton* v. *Coombes*, 9 C. B. 787; 19 L. J., C. P. 336. *Lane* v. *Dixon*, 3 C. B. 776.

(*o*) Mich. 6 E. 4, p. 7, pl. 18. The true *ratio decidendi* in this case is not that a man who does a lawful thing which causes damage to another shall answer for it if he could have avoided it, but that the act of cutting the thorns, in itself lawful, when coming into conflict with the plaintiff's right to the exclusive enjoyment of his own land, is subordinated thereto, and becomes unlawful if it cannot be exercised without violating the plaintiff's superior right. *Ante*, p. 18.

(*p*) *Baseley* v. *Clarkson*, 3 Lev. 37.

361 If one man throws stones, rubbish, or materials of any kind, on the land of another, this is a trespass for which he is responsible in damages (*q*). To pour water out of a pail into another man's yard, or to fix a spout so as to discharge water upon another's land, or to suffer filth to ooze through a boundary-wall and to run over another's close or yard without his leave or permission, is a trespass, unless a right of way over the adjoining close, or a right to discharge water upon it, or a right for the passage of waste water and refuse through it, has been gained (*r*).

Trespass—Abuse of a licence or authority rendering a person a trespasser ab initio.—When a man has a special privilege or authority given by the law to enter upon lands for any purpose whatever, and he exceeds his authority by doing on the land what he had no right to do, or by staying longer than he had a right to stay, he becomes a trespasser *ab initio*, and is in the same position as if he were a perfect stranger acting without any colour of excuse or justification (*s*). Thus, if, in pursuance of an authority given by the law to enter upon lands to make a seizure of goods, he exceeds his authority by breaking open the outer doors of a dwelling-house, he is a trespasser *ab initio*, and all his subsequent acts are trespasses (*t*).

Trespass—Continuing trespasses.—If a man throws a heap of stones, or builds a wall, or plants posts or rails, on his neighbour's land, and there leaves them, an action will lie against him for the trespass; and the right to sue will continue from day to day, till the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance on the land, and another action for continuing the thing so erected; for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of the right to continue the injury (*u*). But, where the injury is not of a continuing nature, and the damages which flow therefrom, when they accrue, have accrued once for all, then the recovery of judgment in a previous action is a good bar (*x*).

(*q*) Williams, J., *Cox* v. *Burbidge*, 13 C. B., N. S. 438; 32 L. J., C. P. 89. Holt, C. J., *Mason* v. *Keeling*, 1 Ld. Raym. 608; 12 Mod. 336. *Dawtry* v. *Huggins*, Clayton, 32. Vin. Abr. TRESPASS (B).

(*r*) *Reynolds* v. *Clarke*, 2 Ld. Raym. 1399.

(*s*) Com. Dig. TRESPASS (C), 2. *Six Carpenters' case*, 8 Co. 146 a. *Reed* v. *Harrison*, 2 W. Bl. 1218. *Aitkenhead* v. *Blades*, 5 Taunt. 197. If a person who has a licence to enter premises for one purpose enters for another or different purpose, he is a trespasser: *Malcolm* v. *Spoon*, 12 Met. (Mass.) 279; *Abbott* v. *Wood*, 13 Me. 115. But if the entry is lawful, and while upon the premises the licensee forcibly injures the personal property of the owner, he is not a trespasser as to the entry, but is only liable for the injury to the property: *Dumont* v. *Smith*, 4 Den. (N. Y.) 319.

(*t*) *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146.

(*u*) *Holmes* v. *Wilson*, 10 Ad. & E. 503. *Bowyer* v. *Cook*, 4 C. B. 236. *Ante*, p. 56. Each day that the thing forcibly placed upon the land remains there is a continuous trespass, and a judgment in one action does not bar a recovery in another.

(*x*) *Ante*, p. 56.

Nuisances (*y*).—The term nuisance, derived from the French word *nuire*, to do hurt or to annoy, is applied in the English law to infringements upon proprietary rights which interfere with their
362 comfortable enjoyment, but do not amount to a disseisin, either actual or implied. Thus, a man may become responsible for a nuisance by erecting a building which overhangs the house or land of his neighbour, or by constructing a cornice, or fixing a spout, or any projection which causes, or has a tendency to cause, an unnatural quantity of rain-water to descend on his neighbour's house and land (*z*); also, by erecting and working a noisy smith's forge, or noisy workshops (*a*), or a stinking tallow-furnace, smelting-house, dye-house, lime-kiln, tan-pit, privy, or hog-sty (*b*); or making a cesspool, the filth of which percolates through the soil and contaminates the water of his neighbour's well or spring (*c*); or burning lime or bricks; or erecting a glass-house or brew-house so near to a dwelling-house that the smoke and smell thereof enter the house and render it unfit for habitation (*d*); or setting up a lime-pit for cleaning skins, or a dye-house, and letting the drainage therefrom run into a water-course or pond, and corrupt the water, or destroy or injure the fish and the fishing (*e*); or disturb-

(*y*) As to nuisances which can be dealt with summarily, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 91—111.

(*z*) *Penruddock's case*, 5 Co. 205. *Baten's case*, *ib.* 96. *Reynolds* v. *Clark*, Fort. 212. *Fay* v. *Prentice*, 1 C. B. 828. In Wood on Nuisances, p. 1, a nuisance is defined as "a wrong arising from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, making an obstruction of, or injury to the rights of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt, that the law will presume a consequent damage."

The erection of a house so that its eaves overhang the lands of another, or the putting up of a spout or other contrivance so as to convey the water therefrom to another's lands, is clearly a nuisance: *Codman* v. *Evans*, 7 Allen (Mass.) 431; *Aiken* v. *Benedict*, 39 Barb. (N. Y.) 400; *Bellows* v. *Sackett*, 15 *id.* 96. Every person making erections upon the line of his own lands is bound to keep the water, snow, and ice falling or forming there from being precipitated upon his neighbour's land: *Shipley* v. *Fifty Associates*, 106 Mass. 194; *Ball* v. *Nye*, 99 *id.* 582; *Martin* v. *Simpson*, 6 Allen (Mass.) 102.

(*a*) *Bradley* v. *Gill*, Lutw. 69. *Elliotson* v. *Feetham*, 2 Bing. N. C. 134. In *Whitney* v. *Bartholomew*, 21 Conn. 213, while it was held that a blacksmith's shop is not a nuisance *per se*, yet that it might become so either by reason of excessive smoke or noise emanating therefrom. The use of fuel which developes dense or offensive smoke is a nuisance: *Rhodes* v. *Dunbar*, 57 Penn. St. 274. So is smoke that vitiates the taste, or which by reason of its pungency is disagreeable, or which soils clothes hung out to dry: *Cartwright* v. *Gray*, 12 Grant's Ch. (Ont.) 400. In *Dennis* v. *Eckhardt*, 3 Grant (Penn.) 390, a tinsmith's shop near a dwelling, which disturbed residents by the noise made there, was held a nuisance.

(*b*) *Poynton* v. *Gill*, *Morley* v. *Pragnell*, Cro. Car. 510. *Jones* v. *Powell*, Hutt. 135. *Bliss* v. *Hall*, 4 Bing. N. C. 183; 5 Sc. 504. In *State* v. *Payson*, 37 Me. 361, a pig pen near a highway, which emitted noisome smells to the annoyance of travellers, was held a common nuisance. So a cattle pen near a dwelling, in which calves were kept, and by their bleating disturbed the sleep of the occupant, has been held a nuisance: *Bishop* v. *Banks*, 33 Conn. 118; *State* v. *Koster*, 35 Iowa, 221.

(*c*) *Norton* v. *Scholefield*, 9 M. & W. 665.

(*d*) *Walter* v. *Selfe*, 4 De G. & Sm. 321; 20 L. J., Ch. 433. *Jones* v. *Powell*, Palm. 539. See Wood on Nuisances, pp. 603—620, where the instances in which brick burning has been held to be a nuisance are given.

(*e*) *Aldred's case*, 9 Co. 59 a. *Hodgkinson* v. *Ennor*, 4 B. & S. 229. *Ottawa*

ing a decoy-pond by the firing of guns in the neighbourhood of the pond (*f*); or stopping or diverting water that used to run to another's mill (*g*).

Every occupier of land is entitled to the reasonable enjoyment thereof as a natural right of property, and may maintain an action against any one who allows any filth or other noxious thing produced by him on his own land to interfere with this enjoyment, or who, by artificial means, causes things in themselves inoffensive to pass into his neighbour's property to the prejudice of his enjoyment thereof (*h*). The rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there, anything of a kind or in a quantity not necessary for the ordinary enjoyment of his property, and likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the necessary consequence of its escape; but he can excuse himself by showing that the escape was owing to the plaintiff's default, or was the consequence of *vis major* or the act of God. The person whose mine is flooded by

363 the water from his neighbour's reservoir, or whose cellar is

Gas Co. v. *Thompson*, 39 Ill. 601; *Brown* v. *Illins*, 25 Conn. 583. The following trades have been held to be *primâ facie* nuisances:—Fat boiling: *Howard* v. *Lee*, 3 Sand. (N. Y.) 126; *Peck* v. *Elder*, 3 *id.* 126; *Dubois* v. *Budlong*, 15 Abb. Pr. (N. Y.) 445. Lime kiln: *Hutchins* v. *Smith*, 63 Barb. (N.Y.) 252. Tannery: *Francis* v. *Schoellkoppf*, 53 N. Y. 152. Privies: *People* v. *Reed*, 2 Parker's Cr. Rep. (N. Y.) 160; *Treadwell* v. *Davis*, 39 Ga. 84; *Marshall* v. *Cohen*, 44 Ga. 489. Hog pens: *Smith* v. *McConathy*, 11 Mo. 517; *Reg.* v. *Waterhouse*, 26 L. T., N. S. 761. Slaughter houses: *Catlin* v. *Valentine*, 9 Paige, Ch. (N. Y.) 575; *Brady* v. *Weeks*, 3 Barb. (N. Y.) 156; *Allen* v. *State*, 34 Tex. 230. Cattle yards: *Bishop* v. *Banks*, 33 Conn. 34; *Ill. Centl. R. R. Co.* v. *Grabell*, 50 Ill. 241; *Babcock* v. *N. J. Stock Yards*, 20 N. J. 296. Soap and bone boileries: *Hammond* v. *Les*, 3 Sand. (N. Y.) 281; *Radenburg* v. *Coats*, 6 Grant's Ch. (Ont.) 140; *Meigs* v. *Lester*, 23 N. J. 199. Livery stables: *Aldrich* v. *Howard*, 8 R. I. 246; *Burdett* v. *Swanson*, 17 Texas, 289; *Morros* v. *Brewer*, Anth. N. P. (N. Y.) 368. Glue works: *Charity* v. *Riddle*, 14 F. C. (Sc.) 237; *Colville* v. *Middleton*, 19 *id.* 339. Tripe works: *Farquhar* v. *Watson*, 17 *id.* 692; *Glasgow Waterworks Co.* v. *Aird*, 18 *id.* 450. Neats' foot oil: *Com.* v. *Brown*, 15 Met. (Mass.) 365. Gas works: *Cleveland* v. *Gas Light Co.*, 20 N. J. 201. Piling decayed vegetables near dwelling: *Rochester* v. *Collins*, 12 Barb. (N. Y.) 339. Stable emitting offensive stenches: *Pickard* v. *Collins*, 23 Barb. (N. Y.) 444. Preparation of blood for Prussian blue, &c.: *Jamison* v. *Hilleote*, 12 F. C. (Sc.) 237. Burning black ashes of soap: *Bellamy* v. *Comb*, 17 F. C. (Sc.) 158. Burning horses' hoofs: *Gulliek* v. *Tremlitt*, 20 W. R. 358. Boiling horseflesh and carrion: *Gridley* v. *Booth*, 12 L. T., N. S. 469. Burning fuel mixed with animal matter, or other substances emitting obnoxious smells: *Roberts* v. *Clarke*, 17 L. T., N. S. 384. Ponderetto works: *Ponderette Co.* v. *Van Keuren*, 23 N. J. 255. Distillery: *Smith* v. *McConathy*, 9 Mo. 517. Candle and tallow factory: *Allen* v. *State*, 34 Tex. 230. Boiling whale blubber, and fish works: *Trotter* v. *Farnie*, 5 W. & S. (Sc.) 649. Collecting or drawing up water, so that it becomes stagnant and emits offensive smells: *State* v. *Stoughton*, 5 Wis. 291; *Beach* v. *People*, 11 Mich. 106. Chemical works: *Com.* v. *Rumford Chemical Works*, 14 Gray (Mass.) 231. Brewery: *Rev.* v. *Morris*, Vent. 26. Bone mill: *Reg.* v. *Micklin*, 6 W. W. A'B. (Victoria) 68. And any and every use of property which charges the air with noisome smells to such an extent as to render the enjoyment of adjoining property uncomfortable.

(*f*) *Keble* v. *Hickeringill*, 11 Mod. 74, 130; 3 Salk. 9; Holt, 14. *Carrington* v. *Taylor*, 11 East, 571. See *Ibbotson* v. *Peat*, 3 H. & C. 644; 34 L. J., Ex. 118.

(*g*) F. N. B. 184.

(*h*) *Hurdman* v. *North Eastern Rail. Co.*, 3 C. P. D. 168; 47 L. J., C. P. 368.

invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences (*i*). The predecessors of the defendants had fenced their land with wire rope, which the defendants allowed to remain, and from time to time partially repaired. From long exposure, the strands of the wires composing the rope decayed; and pieces of it fell to the ground and lay hidden in the grass of the adjoining pasture, occupied by the plaintiff. The plaintiff's cow grazing there, having swallowed one of these pieces, and having died in consequence, it was held that the defendants were liable to compensate the plaintiff for the loss of the cow (*k*). So, where the defendants planted on their own land, and at about four feet from their boundary, a yew tree, which grew over the boundary, and projected into the adjoining meadow of the plaintiff, and the plaintiff's horse, feeding in the meadow, ate of the yew tree, and was poisoned, and died, it was held that the defendants were liable (*l*). But a man is not liable to an action, simply because the leaves from a yew tree growing on his land get, by some unexplained means, on to his neighbour's land, and are there eaten by and poison his cattle, the tree not being in a boundary fence, and the defendant not having been guilty of any negligence (*m*).

The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbour, even though it has been put there before he took possession. Where, therefore, the damp from an artificial mound on the defendant's land penetrated the plaintiff's wall, it was held that the defendant was liable for the nuisance (*n*).

If a man commits a nuisance, and afterwards does away with **364** it, and with all the effects of it, before action brought, the cause

(*i*) *Rylands* v. *Fletcher*, L. R., 3 H. L. 339. *Snow* v. *Whitehead*, 27 Ch. D. 588; 53 L. J., Ch. 885. *Ballard* v. *Tomlinson*, 29 Ch. D. 115; 54 L. J., Ch. 454.

(*k*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254; 47 L. J., C. P. 358.

(*l*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5.

(*m*) *Wilson* v. *Newberry*, L. R., 7 Q. B. 31; 41 L. J., Q. B. 60.

(*n*) *Broder* v. *Saillard*, 2 Ch. D. 692; 45 L. J., Ch. 414.

of action is extinguished (*o*): but the abatement of the nuisance is no defence in point of law against a complaint for an antecedent injury. If damage has been sustained, the defendant is not the less bound to compensate for that, because he has promptly and properly repaired his fault (*p*).

A nuisance may be caused by several persons acting independently of each other. In such a case it will be no defence that the injury caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, or that it is impossible for the plaintiff to show what share each has had in causing the nuisance (*q*).

Where a nuisance arising from any noxious or offensive gas or gases is wholly or partially caused by the acts or defaults of several persons, any person injured by such nuisance may proceed against any one or more of such persons, and may recover damages from each person made a defendant in proportion to the extent of the contribution of such defendant to the nuisance, notwithstanding that the act or default of such defendant would not separately have caused a nuisance (*r*).

Nuisance — Continuing nuisances. — The continuance of the nuisance is a fresh injury for which another action may be brought, and so, *toties quoties*, until the obstruction is removed (*s*), or the wrongful act done away with (*t*). And a person is entitled to bring an action for damage by subsidence after receiving compensation for previous subsidence (*u*).

Nuisance — Nuisances from the non-repair of, or from neglecting to cleanse, sewers, drains, and watercourses. — Every occupier is bound to prevent the filth from his drains or cesspools from filtering through the ground into his neighbour's house or land. Where the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant, "*debuit, et solebat reparare*," and that, for want of repair, the filth of the privy ran into the cellar, it was moved, in arrest of judgment, that this being a charge laid upon the occupier of the adjoining land, the plaintiff should have shown a title by prescription to have the wall kept in

(*o*) Bro. Abr. pl. 2.

(*p*) *Bell* v. *Twentyman*, 1 Q. B. 774.

(*q*) *Thorpe* v. *Brumfitt*, L. R., 8 Ch. 650. See *Chipman* v. *Palmer*, 77 N. Y. 51, in which it was held that each person contributing to the nuisance can only be held liable for the damage done by him, which is in conformity with 44 & 45 Vict. c. 37, s. 28; but, as a common law doctrine, it has no support in principle or authority.

(*r*) The Alkali, &c. Works Regulation Act, 1881 (44 & 45 Vict. c. 37), s. 28. This section does not apply to any defendant who can produce a certificate from the chief inspector, that in the works of such defendant the requirements of this Act have been complied with, and were complied with when the nuisance arose.

(*s*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97; *ante*, p. 57.

(*t*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305.

(*u*) *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127.

365 repair for his benefit; "*sed non allocatur;*" for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it (*x*). Every landowner who constructs a sewer on his own land, and uses it for the purpose of draining his own premises, is bound to keep the filth from his sewer from becoming a nuisance to the adjoining occupiers; and if, by reason of an original faulty construction of the sewer, the filth therefrom percolates through the soil and floods the cellars of the adjoining occupiers, the landowner will be responsible for the nuisance, although such occupiers are his own tenants (*y*).

Where the plaintiff and defendant were occupiers of adjoining houses, and an old drain commenced on the defendant's premises and then passed under other houses, receiving their drainage, and back again under the defendant's house and then under the plaintiff's, and did damage by leakage into his cellar, it was held that the defendant was liable for the damage done, although he was unaware of the existence of the drain and was guilty of no negligence, for it was his duty to keep his drainage from passing to the plaintiff's premises otherwise than along its accustomed channel (*z*).

Provisions are contained in the Public Health Act, 1875, giving power to purchase and sell sewer rights (*a*), and to make and drain sewers (*b*), to alter or discontinue sewers (*c*), and to cleanse them (*d*), and giving powers to the owners and occupiers of premises to drain into sewers of the local authority (*e*), and power to the authority to enforce the drainage of houses (*f*). The cleansing of offensive ditches and the removal of filth is also provided for (*g*).

Nuisance—Offensive smells and noisome trades (*h*).—A man may, without being liable to an action, exercise a lawful trade, as that of a butcher, brewer, or the like, notwithstanding it is carried on so near the house of another as to be an annoyance to him, in rendering his residence less delectable or agreeable: provided the trade is so conducted that it does not cause what amounts in point of law to a nuisance to the neighbouring house. But if a nuisance

(*x*) *Tenant* v. *Golding*, 1 Salk. 21. *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231.
(*y*) *Alston* v. *Grant*, 3 El. & Bl. 128.
(*z*) *Humphries* v. *Cousins*, 2 C. P. D. 239.
(*a*) 38 & 39 Vict. c. 55, s. 14.
(*b*) Sects. 15—17.
(*c*) Sect. 18.
(*d*) Sect. 19.
(*e*) Sects. 21, 22.
(*f*) Sects. 23—26.
(*g*) Sects. 48—50.
(*h*) As to offensive trades, see Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 112—115. As to keeping pigs in the metropolis, see *Chelsea Vestry* v. *King*, 17 C. B., N. S. 625; 34 L. J., M. C. 9; the trade of cattle slaughtering, *Liverpool New Cattle Market Co.* v. *Hodson*, L. R., 2 Q. B. 131; 36 L. J., M. C. 30; the consumption of smoke in Birmingham, *Cooper* v. *Woolley*, L. R., 2 Ex. 88; 36 L. J., M. C. 36.

366 is created, it is no answer to an action for damages to show that the place where the trade is carried on is a fit and convenient place for such a trade, and that the exercise of the trade there is only a reasonable use by the defendant of his own land. The spot 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 any individual of his right to compensation in respect of the particular injury he has sustained from it (*i*). When, therefore, it is said that "a tan-house is necessary, for all men wear shoes, yet this may be pulled down if it is erected so as to cause a nuisance to another; so of a glass-house, for they ought to be erected in places convenient for them" (*k*): what is meant is, that they must be erected in a place where they will not cause a nuisance to anybody. There is, however, it seems, a distinction in this respect between a trade that injuriously affects property and one that causes only a certain amount of personal discomfort (*l*).

It is not necessary to prove that the smell is unwholesome. The smell of stied hogs, melting tallow, and other smells, may not be positively noxious; but they may be very noisome and sickening, keeping all who inhale them in a state of chronic discomfort, though they may not injure or destroy health (*m*). Trades are, no doubt, carried on for the benefit of the public; but the primary object is the benefit of the particular manufacturer who realizes the profit of the business; and it is no answer to a private individual, who is prejudiced or injured by the exercise of the trade in such a way as to be a nuisance, to say that others are benefited by it (*n*). But the injury to be actionable must be such as sensibly to diminish the value of the plaintiff's property and the comfort and enjoyment of it. All the circumstances, including those of time and locality, must be taken into consideration; and, in counties where great works have been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance; for, if so, the business of the whole country would be seriously interfered with (*o*). The damage must

(*i*) *Bamford* v. *Turnley*, 3 B. & S. 62; 31 L. J., Q. B. 286. *Carey* v. *Lidbitter*, 13 C. B., N. S. 470; 32 L. J., C. P. 105, overruling *Hole* v. *Barlow*, 4 C. B., N. S. 335; 27 L. J., C. P. 207. See *Hegingbotham* v. *Eastern and Continental Steam Packet Co.*, 8 C. B. 337.

(*k*) *Jones* v. *Powell*, Palm. 536.

(*l*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J., Q. B. 66.

(*m*) *Walter* v. *Selfe*, 4 De G. & Sm. 323; 20 L. J., Ch. 433.

(*n*) *Stockport Waterworks Co.* v. *Potter*, 7 H. & N. 160; 31 L. J., Ex. 9.

(*o*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J., Q. B. 66. See Wood on Nuisances, Chap. XVII.

be sensible, so that every fairly-instructed person can really and **367** clearly perceive it, not merely such as can only be made sensible by the microscope or by chemical tests (*p*).

Smoke, unaccompanied by noise or noxious vapour, may constitute a nuisance (*q*).

Brick-burning is not in itself a noxious trade (*r*); for bricks may be burned, by the selection and combination of proper substances for burning, without the emission of smoke or disagreeable smells. But if, by the use of coals or impure ashes and animal substances, smoke, and vapour, and noisome gases are communicated to the air which surrounds and enters the plaintiff's house, so as to cause inconvenience to the occupiers thereof, and render the house manifestly less comfortable, the brick-burning will be a nuisance, though the pollution of the air may not be carried to the extent of rendering it noxious to animal or vegetable health. But the inconvenience or discomfort must go to the extent of materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions amongst English people (*s*). In cases where a man is not carrying on the trade of brick-making, but is merely digging out the soil from his own land for the building of a house thereon, and when the nuisance, consequently, is of a temporary nature, and is also of a trifling character, the court will not interfere by injunction; for a man must have a house to live in; and it is reasonable that he should make his own bricks out of his own land at a slight temporary inconvenience to his neighbours (*t*).

Nuisance—Prescriptive rights to the exercise of a noisome trade.—If the trade is proved to be a noisome trade the defendant may, nevertheless, establish a prescriptive right to the exercise of the trade on the particular spot, by showing that he has exercised it without molestation or interruption for the period of twenty years (*u*). "It used to be thought, that if a man knew 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 the law now" (*x*).

(*p*) *Salvin* v. *North Brancepeth Coal Co.*, L. R., 9 Ch. 705; 44 L. J., Ch. 149.

(*q*) *Crump* v. *Lambert*, L. R., 3 Eq. 409.

(*r*) *Wanstead Local Board, &c.* v. *Hill*, 13 C. B., N. S. 479; 32 L. J., M. C. 135.

(*s*) Knight-Bruce, V.-C., *Walter* v. *Selfe*, 4 De G. & Sm. 323; 20 L. J., Ch. 433. *Pollock* v. *Lester*, 11 Hare, 266. *Beardmore* v. *Tredwell*, 3 Giff. 683; 31 L. J., Ch. 893. *Bamford* v. *Turnley*, 3 B. & S. 62; 31 L. J., Q. B. 286.

(*t*) *Att.-Gen.* v. *Cleaver*, 18 Ves. 219.

(*u*) *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; 2 Sc. 174. *Bliss* v. *Hall*, 4 Bing. N. C. 183; 5 Sc. 504. As to prescriptive rights to foul a stream, &c., see *Goldsmid* v. *Tunbridge Wells Commissioners*, L. R., 1 Ch. 349; 35 L. J., Ch. 882. *Att.-Gen.* v. *Richmond*, L. R., 2 Eq. 306; 35 L. J., Ch. 597. *Att.-Gen.* v. *Mayor of Basingstoke*, 45 L. J., Ch. 726. See Wood on Nuisances, Chap. XX., on "Prescription for Nuisances."

(*x*) Byles, J., *Hole* v. *Barlow*, 4 C. B., N. S. 336; 27 L. J., C. P. 208. And

Nuisance—Noise.—Quietness and freedom from noise are in-
368 dispensable to the full and free enjoyment of a dwelling-house. Every person, therefore, who blows a horn in the night-time in the neighbourhood of a dwelling-house, so as to disturb the repose of the inmates, is guilty of a nuisance, and is responsible in damages, unless he can show some justification for the making of a noise (*y*). Every person, also, who erects a mill, or a smith's forge, or any noisy machine, or carries on any noisy trade or manufacture adjoining a dwelling-house, whereby the comfort and quiet of the house are destroyed, and the rest of the inmates disturbed at night, is guilty of a nuisance, and is liable to an action for damages, unless he can show that he has gained a prescriptive right to make the noise by twenty years' user and enjoyment (*z*). If a belfry is erected so near to the dwelling-house of the plaintiff, that the bells when rung prevent people from being heard whilst talking in the house, or disturb the rest of the inmates at night, this is such an invasion of the domestic comfort and enjoyment of a man's home as entitles him to an injunction to prevent the nuisance (*a*). So, the setting up a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman's house, is a nuisance (*b*).

But a nuisance from noise is much more difficult to establish than when the injury complained of is the demonstrable effect of a visible or tangible cause, as when waters are fouled by sewage, or when the fumes of mineral acids passing from the chimneys of factories over land or houses produce deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically one of degree; and the law does not regard trifling inconveniences (*c*). Annoyance from noise caused by the unusual use of a house, as by turning it into a stable, may be a nuisance, where like annoyance from the ordinary use of it would not be (*d*).

Nuisance—Water.—A person who, for his own purposes, brings upon his land, and collects and keeps there, water in such quantities as to be likely to do mischief if it escapes, is *primâ facie* answerable

see *Tipping* v. *St. Helen's Smelting Co.*, L. R., 1 Ch. 66. The rule in this country has always been otherwise, and the fact that a person goes to a nuisance does not deprive him of his remedies: *Taylor* v. *People*, 6 Parker's Cr. Rep. (N. Y.) 353; *Brady* v. *Weeks*, 3 Barb. (N. Y.) 156; *Howell* v. *McCoy*, 3 Rawle (Penn.) 356; *Mills* v. *Hall*, 9 Wend. (N. Y.) 316; *Smith* v. *Phillips*, 8 Phila. (Penn.) 10; *Catlin* v. *Valentine*, 9 Paige, Ch. (N. Y.) 575; *Comm.* v. *Upton*, 6 Gray (Mass.) 473.

(*y*) *R.* v. *Smith*, 2 Str. 703.

(*z*) *Bradley* v. *Gill*, 1 Lutw. 69. *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; 2 Sc. 174.

(*a*) *Soltau* v. *De Held*, 2 Sim., N. S. 133; 21 L. J., Ch. 159. See Wood on Nuisances, Chap. XVIII., on "Noise and Vibration."

(*b*) *Walker* v. *Brewster*, L. R., 5 Eq. 25; 37 L. J., Ch. 33.

(*c*) See the observations of Lord Selborne, L. C., *Gaunt* v. *Finney*, L. R., 8 Ch. 8; 42 L. J., Ch. 122.

(*d*) *Ball* v. *Ray*, L. R., 8 Ch. 467.

for all the damage which is the natural consequence of its escape, although he has not been guilty of any negligence (*e*). Thus, if

(*e*) *Rylands* v. *Fletcher*, L. R., 3 H. L. 330. *Wilson* v. *New Bedford*, 109 Mass. 261; *Cahill* v. *Eastman*, 18 Minn. 324.

For injuries resulting from natural causes a person is never liable, however extensive or disastrous they may be, nor with however little labour or expense he could remove the cause and prevent the injury. All such damage is *damnum absque injuriâ*. In *Woodruff* v. *Fischer*, 17 Barb. (N. Y.) 224, the defendant was the owner of a tract of swamp land adjoining the plaintiff's farm, upon which a large body of water was collected, which remained stagnant, and the evaporations from which were exceedingly injurious to the health of the neighbourhood. The swamp could easily be drained, and at a small expense; but the defendant neglected and refused to drain it. The plaintiff brought an action against him for injuries resulting to him from the miasmatic emissions from the swamp. The court held that an action could not be predicated of a nuisance that resulted from natural causes purely, no matter how serious or disastrous the consequences might be; and that a man is not obliged to drain his land, however injurious his neglect to do so may be to others, nor however easily or cheaply it might be done. See, also, *Hartwell* v. *Armstrong*, 19 Barb. (N. Y.) 164; *Mohr* v. *Gault*, 10 Wis. 313; *Knoll* v. *Light*, 76 Penn. St. 268.

So if when a person in the exercise of his right of dominion over his own premises, for the usual and ordinary purposes to which such premises are devoted, in the exercise of due care, does that which results in injury to his neighbour, by reason of natural causes incident to such use, no nuisance can be predicated against him. Thus, in *Ellison* v. *Commissioners*, 5 Jones, Eq. (N. C.) 224, the court refused to enjoin the clearing up of marsh land near the plaintiff's premises, upon the ground that the cutting down of the trees and exposing the soil to the direct rays of the sun would cause the liberation of unwholesome and noxious vapours. The court held that this was a legitimate and ordinary exercise of dominion over property essential to its improvement and ordinary enjoyment, with which courts could not interfere, and for injuries resulting from which no action at law or in equity could be predicated.

The case of *Mohr* v. *Gault*, 10 Wis. 313, is still further illustrative of the fact, that no nuisance can be predicated of a natural cause, except when it is the result of some interference with the natural order of things by "the hand of man." In that case the defendant was the owner of certain lands, and the bed of a running stream, which formed the outlet of a natural pond. Upon the occasion of a severe freshet large quantities of earth and débris were deposited in the bed of the stream, which choked the free passage of the water, and sent it back upon the plaintiff's land, and produced serious damage. The defendant had no dam upon the stream, and had not by his own act, or that of others, in any manner contributed to the cause or the result. The plaintiff, claiming that it was the duty of the defendant to clear out the stream, and restore it to its natural condition, brought an action against him for the injuries he had sustained by the flooding of his lands. But the court held that the action would not lie; that no man could be made liable for injuries resulting from purely natural causes; and that in order to create an actionable nuisance, the hands of man must have contributed thereto.

In this case, if the defendant had erected a dam upon the stream, or in any manner interfered with the natural flow of the water, so that the choking up of the stream could be traced to his original act, he would have been liable; for the injury would have been a result of which he was the promoting cause.

This idea was well illustrated in a case recently decided in the Supreme Court of Pennsylvania, *Knoll* v. *Light*, 76 Penn. St. 268. In that case the defendant had erected a dam upon a stream which ran through his land, and also through the plaintiff's land, situated above his premises on the stream. The dam had stood for many years, and had never been productive of injury to the plaintiff or others by setting the water back. But after the dam had stood for several years, a species of grass began to grow in the bed of the stream, and choked it up, and finally choked the passage of the water to such an extent as to flood the plaintiff's land, for which injury the plaintiff brought an action. The court below charged the jury, that if they should find that the grass would not have grown in the channel of the stream, and produced the injury to the plaintiff, except for the erection and maintenance of the defendant's dam across the stream, the plaintiff would be entitled to recover, even though the injury would not have occurred except for the growing of the grass, because the defendant's interference with the natural condition of the stream had produced the injurious result; but that if the grass would have grown there even though the dam had not been built, and the erection of the dam had

any one, by artificial erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neigh-
369 bour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured (*f*). So, where by reason of an unprecedented rainfall, a quantity of water accumulated against one side of a railway embankment, and the railway company, to preserve their embankment, cut trenches in it through which the water escaped on to the land of the plaintiff on a lower level, it was held that, although they had not brought the water on to their land, and there was no negligence on the part of the company, they were nevertheless liable, as they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff (*g*). But, if a man uses all reasonable care to keep the water safely, he is not liable for an escape of the water which injures his neighbour, if the escape is caused by

not contributed to the production of the injury, no action would lie, as no person could be made liable for an injury that results from purely natural causes, nor unless he has done some act which contributes to it. The jury found a verdict for the plaintiff, and the ruling of the court was sustained upon appeal.

In *Wilson* v. *New Bedford*, 108 Mass. 261, the plaintiff was the owner of a farm with a dwelling and barn thereon, and had sold to defendants a portion of his land "for the purpose," as expressed in the agreement of sale, "of constructing, using, and maintaining an aqueduct and reservoir, and all other works necessary and convenient for introducing water into the city." In pursuance of this agreement, the defendants erected a dam on the premises, and created a large artificial pond within the distance of about one thousand feet of the plaintiff's farm. As a consequence of this large accumulation of water, and the raising of the water above its usual and natural level, the natural drainage of the plaintiff's land was cut off and destroyed; but whether it became impregnated with the water that naturally percolated there, in consequence of the cutting off of the natural drainage, or whether it was also increased by the water from the pond, did not distinctly appear, but that the soil became charged with water and escaped into his cellar, from one or the other of these causes, was a fact found in the case. The court held that the plaintiff was entitled to recover for this injury, notwithstanding the sale for the purposes before named. Chapman, J., in delivering the opinion of the court, said: "He ought to be compensated, and the law would be defective if it failed to give him a remedy."

The mere fact that natural causes combine with artificial to produce an injury that would not have happened except for the artificial cause, can never be a defence. If natural causes did not combine with artificial, no nuisance would arise. It is not the fact that a person carries on a trade that liberates noisome smells, smoke, or noxious vapours upon his premises that makes the exercise of the trade by him there a nuisance, but because he does not confine its ill effects to his own premises. This he could always do, except for the fact that the gases liberated by him are mingled with the atmosphere, and in the natural process of distribution are carried by it over the premises of others. Except for the fact that the air is constantly "travelling," so to speak, all the ill effects of his trade would be confined to his own premises, and no nuisance would arise. Thus it will be seen that in all cases of injury from purely natural causes an actionable nuisance does not exist; but when the injury results from natural causes, and would not have arisen except for some act done by man, the fact that the injury results in part from the one cause and in part from the other is no defence, but liability attaches for all the consequences precisely the same as though the entire injury had resulted from artificial causes: *People* v. *Townsend*, 3 Hill (N. Y.) 479; *Phinzey* v. *Augusta*, 47 Ga. 263; *Bellows* v. *Sackett*, 15 Barb. (N. Y.) 96; *Mills* v. *Hall*, 9 Wend. (N. Y.) 315; *Cahill* v. *Eastman*, 18 Minn. 324; *Rooker* v. *Perkins*, 14 Wis. 79; *Miller* v. *Trushart*, 4 Leigh (Va.) 569; *Stoughton* v. *State*, 5 Wis. 271; *Munson* v. *People*, 5 Parker, Cr. Rep. (N. Y.) 16; Wood on Nuisances, pp. 115—139.

(*f*) *Hurdman* v. *North Eastern Rail. Co.*, 3 C. P. D. 168; 47 L. J., C. P. 368.

(*g*) *Whalley* v. *Lancashire & Yorkshire Rail. Co.*, 13 Q. B. D. 131; 53 L. J., Q. B. 285.

the act of God or *vis major*, such as a storm or an extraordinary rainfall which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented (*h*); and, if he brings it on to his land in the ordinary, reasonable, and proper mode of enjoying his land, he is only liable for an escape which is attributable to negligence (*i*). Thus, the owner of one story of a house is not liable, without negligence, to the owner of the story below for the damage caused by a rat eating into a cistern on the upper floor, and so causing the water to flow into the lower story, the cistern being for the mutual benefit of both stories (*k*). Nor is the occupier of an upper floor liable, without negligence, to the occupier of a lower for the leakage of water from a water-closet of which he has the exclusive use (*l*).

Nuisance—Flooding of mines.—In the case of strata of minerals which are on an incline, there is no servitude on the owner of the upper mines for the benefit of the owner of the mines on the dip to preserve either the surface or the subjacent minerals as water-tight as the undisturbed state of the strata; and, consequently, where mineral workings have caused a breaking-up of the surface and a consequent flow of rain-water through the surface, which is no longer water-tight, into the workings, and so into the adjacent mines on the dip, there is no right of action on the part of the owner of the lower mines against the person who, by working the upper mines, has caused the damage (*m*). So, if, in consequence

370 of a mine-owner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the dip, the latter cannot maintain any action, if the working is carried on with skill and in the usual manner; because excavating and raising the minerals are considered the natural use of mineral land, and damage arising from the natural use by a neighbour of his land is not actionable (*n*). Where the owner of a coal-field excavated his coal, and in so doing left large hollows, which filled with water, and then, when the adjoining landlord proceeded to work his coal, the subterranean water from the hollows flowed into his workings and flooded them, it was held he had no right of action for the damage (*o*). From the necessity of the case, every owner of a mine must submit to the inconvenience of having the water of

(*h*) *Nichols* v. *Marsland*, L. R., 10 Ex. 255; 2 Ex. D. 1; 44 L. J., Ex. 134. *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; 49 L. J., Q. B. 708.

(*i*) *Smith* v. *Fletcher*, L. R., 9 Ex. 64; 43 L. J., Ex. 70. *Crompton* v. *Lea*, L. R., 19 Eq. 115; 44 L. J. Ch. 69. Per Brett, M. R., in *Whalley* v. *Lancashire & Yorkshire Rail. Co.*, *supra*.

(*k*) *Carstairs* v. *Taylor*, L. R., 6 Ex 217; 40 L. J., Ex. 129.

(*l*) *Ross* v. *Fedden*, L. R., 7 Q. B. 661; 41 L. J., Q. B. 270.

(*m*) *Wilson* v. *Waddell*, 2 App. Cas. 95.

(*n*) *Hurdman* v. *North Eastern Rail. Co.*, 3 C. P. D. 168; 47 L. J., C. P. 368.

(*o*) *Smith* v. *Kenrick*, 7 C. B. 565.

an adjoining mine upon a higher level descend upon his mine, so long as it descends in the natural course of drainage; but that does not entitle the owner of the adjoining mine to throw upon him, in some other and more objectionable way, water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property (*p*). Therefore, where the owner of a mine on a higher level pumped up into it water from a lower level (for the purpose of working a lower seam), so that more water flowed into the adjoining mine, which was on a lower level, than would have resulted from the natural gravitation of the water from the higher to the lower level, an action was held to lie against the owner of the higher mine (*q*). So, where the defendant, a mine owner, had diverted a natural watercourse which ran across and over his mine, and had constructed the diverted watercourse so inefficiently that, on the occasion of heavy falls of rain, the water flowed over the top of the artificial bank of the watercourse into fissures and holes in the surface of the adjoining land, and so into the plaintiff's mine, it was held that the defendant was liable (*r*). Where a mine-owner had a mine which could not be worked without letting in a river and flooding the mine, and through that the adjoining mine of the plaintiff, it was held that the plaintiff was entitled to an injunction to restrain the working of the mine (*s*).

Nuisance—Fire.—Every person who lights a fire is clothed by the common law with a heavy responsibility to his neighbours as regards the safe keeping of such fire. By the ancient custom of

371 the realm, "*quilibet homo et fœmina ignem suum, die et nocte, salve et secure custodire teneatur, ne pro defectu debitæ custodiæ ignis hujusmodi damnum aliquod vicinis suis eveniat*" (*t*). It was formerly held that, if a fire broke out accidentally in a man's house, and raged to such a degree as to burn his neighbour's house, he in whose house the fire first happened was liable to an action on the case on this general custom of the realm (*u*). In Rolle's Abridgment it is said: "If my fire by misfortune burns the goods of another man, he shall have an action on the case against me. If the fire lights suddenly on my house, I knowing nothing of it, and burns my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me. If my servant puts a candle or other fire in a place in my house, and it falls and burns

(*p*) Wood, V.-C., *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 542.
(*q*) *Baird* v. *Williamson*, 15 C. B., N. S. 376; 33 L. J., C. P. 101.
(*r*) *Fletcher* v. *Smith*, 2 App. Cas. 781; S. C. nom. *Smith* v. *Musgrave*, 47 L. J., Ex. 4.
(*s*) *Crompton* v. *Lea*, L. R., 19 Eq. 115; 44 L. J., Ch. 69.
(*t*) Rastr. Entr. p. 18. *Panton* v. *Isham*, 3 Lev. 356; 1 Salk. 19.
(*u*) Bac. Abr., Actions on the Case, F., p. 104, 7th ed.

all my house and the house of my neighbour, action on the case lies against me by him; and the law is the same if my guest should do it, or a person who enters my house with my leave or knowledge" (*x*). "But, if a man out of my house, against my will, puts fire into the straw of my house or elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them, &c.; for that cannot be said to be by malfeasance on my part, but against my will" (*y*).

But, although the master of a house, or the raiser of a fire, was clothed with this extensive responsibility as regarded the lighting, safe-keeping, and spreading of such fire, yet, if the fire spread by reason of the act of God, or from some superior cause which could not have been prevented, controlled, or resisted by human agency, the master of the house, or the lighter of the fire, was held excused. Thus, where the defendant's servant kindled a fire in the defendant's field in the way of husbandry, and in the ordinary course of his employment as a farm servant, and the wind drove the fire into an adjoining heath and coppice of the plaintiff, and set it on fire, it was held that if the defendant could have shown that the spreading of the fire had been occasioned by a sudden storm, which could not have been foreseen, guarded against, or controlled by human agency, that would be good evidence to excuse the defendant (*z*).

To put the law on a proper footing, by rendering a person responsible only on proof that the fire was occasioned by the actual

372 negligence of himself or his servant (*a*), it was enacted by the 6 Anne, c. 31, ss. 6, 7, that no action or suit shall be maintained against any person in whose house or chamber any fire shall *accidentally* begin, or any recompense be made by such person for any damage occasioned thereby. This statute was repealed by the 12 Geo. 3, c. 73, s. 46, which statute was itself repealed; and by the 14 Geo. 3, c. 78, s. 86, the above protection is extended to all persons in whose stable, barn, or other building, or on whose estate any fire shall *accidentally* begin; but no contract between landlord and tenant is to be defeated or made void.

It was thought for a long time that the word "accidental" in these statutes was employed in contradistinction to wilful, and that the same fire might be said to begin accidentally, and yet be the result of a certain amount of negligence; but it has been since

(*x*) 1 Roll. Abr., ACTION SUR CASE B. Danvers, Abr. 10.

(*y*) Markham, J., *Beaulieu* v. *Finglam*, 2 H. 4, fol. 18, pl. 6. Amongst the Romans, where fire was little used, and candles were unknown, it was considered that damage from fire seldom occurred without imprudence or negligence; and those through whose neglect, however slight, a fire occurred, were held answerable for the damage done by it. Domat, liv. 2, tit. 8, s. 4.

(*z*) *Tubervil* v. *Stamp*, 1 Salk. 13; 1 Ld. Raym. 264.

(*a*) *Canterbury* (*Viset.*) v. *Att.-Gen.*, 1 Phil. 306; 12 L. J., Ch. 284.

held that these statutes refer only to fires produced by mere chance, or which are incapable of being traced to any cause, and so stand opposed to the negligence of either servants or masters, and that they do not, consequently, protect persons from the ordinary common-law responsibility in respect of fires occasioned by negligence (*b*). Thus, where the occupier of a meadow adjoining some cottages belonging to the plaintiff stacked a hayrick on the extremity of the meadow in too green a condition, close to the plaintiff's cottages, and the hay smoked, and steamed, and exhibited unequivocal symptoms of approaching combustion, and the defendant was frequently warned of the danger of the stack's taking fire, and said that he would "chance it," but he ultimately caused a hole to be cut through the centre of the rick, which, unfortunately, hastened the catastrophe it was intended to avert, and the haystack caught fire, and the fire spread to the barn and stables of the defendant, and thence to the plaintiff's cottages, and totally consumed them, it was held that the defendant was responsible for the destruction of the cottages, and that, in cases of this sort, "it is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man" (*c*).

Every person who puts a dangerous thing in motion which causes injury to another is, in general, responsible for the mischief it occasions (*d*). Where a man shooting with a gun at a fowl hit his own house and set it on fire, and the fire spread to the house of his neighbour and destroyed it, it was held that the firer of the gun was responsible for the damage, although the fire was

373 occasioned rather by an accident or misadventure than by negligence (*e*).

Nuisance—Fire spreading from railways to the adjoining property.—If railway companies allow quantities of long dead grass, or any other combustible material, dangerously to accumulate along their railway, and the combustible matter is ignited from lighted coals or sparks escaping from their locomotive engines, and the fire spreads from the railway to the adjoining coppices and fires them, the railway company will be responsible for the damage done; for such a fire is not a fire which accidentally begins on their estate, but is a fire caused by their negligence in not keeping the railway free from combustible materials likely to be ignited by their furnaces and to cause damage to their neighbours; and they will be liable, although they could not reasonably anticipate that such conse-

(*b*) *Filliter* v. *Phippard*, 11 Q. B. 357. *Canterbury* (*Visct.*) v. *Att.-Gen.*, *supra*. This is the rule in this country.

(*c*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; 4 Sc. 251.

(*d*) Grose, J., in *Leame* v. *Bray*, 3 East, 600.

(*e*) *Anon.*, Cro. Eliz. 10.

quences would ensue from their negligence (*f*). They may be expressly authorized by statute to use locomotive furnaces of a dangerous character; but no statute can exempt them from the consequences of negligence in the management of their railways, or the construction of their fire-boxes, chimneys, or furnaces, whereby coals of fire are thrown on the adjoining property. If they neglect to avail themselves of all such contrivances as are in known practical use to prevent the emission of sparks from their engines they will be responsible for such neglect (*g*); and, if they run locomotive engines without statutable authority, in that case they are responsible for any damage caused by such engines in setting fire to adjoining property or otherwise, although they have not been guilty of negligence (*h*). The owners of locomotives under the Locomotive Acts are not protected (*i*).

Nuisance—Fires occasioned by the negligence of servants.—The 14 Geo. 3, c. 78, s. 84, imposes penalties upon servants who, through negligence or carelessness, fire any houses or buildings; but this enactment does not exempt the master from responsibility for the negligent acts of the servant whilst carrying into execution the master's orders, and doing something which the master has employed him to do (*k*). If the work the servant is employed to execute does not require the use of fire, but the servant, nevertheless, kindles a fire for his own purposes, to cook his dinner or light his pipe, and carelessly throws burning material amongst

374 combustibles, and destroys valuable property, the master is not responsible for the unauthorized act of his servant (*l*). Where a maid-servant, in order to clear a chimney of soot, set fire to the soot with a quantity of furze, and burnt the house down, it was held that the master was not responsible for the damage, as it was no part of the servant's business to clean the chimney, or to use fire for the purpose (*m*).

Although a lessee coming into possession of houses and buildings under a contract with a lessor, who might, if he had thought fit, have taken security against damage from fire, is not responsible to such lessor for fire caused by involuntary and unintentional neglect, yet, if a fire, originating in negligence, spreads

(*f*) *Smith* v. *London & South Western Rail. Co.*, L. R., 5 C. P. 98; 6 *ib.* 14; 40 L. J., C. P. 21.

(*g*) *Fremantle* v. *London & North Western Rail. Co.*, 10 C. B., N. S. 89; 31 L. J., C. P. 12. *Vaughan* v. *Taff Vale Rail. Co.*, 3 H. & N. 743; 5 *ib.* 679; 28 L. J., Ex. 41; 29 L. J., Ex. 247. But see per Bramwell, L. J., in *Powell* v. *Fall*, *infra*. See Wood on Railway Law, Vol. II., Chap. XIX.

(*h*) *Jones* v. *Festiniog Rail. Co.*, L. R., 3 Q. B. 733; 37 L. J., Q. B. 214.

(*i*) *Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J., Q. B. 428.

(*k*) *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; 4 Sc. 252.

(*l*) *Williams* v. *Jones*, 3 H. & C. 256, 602; 33 L. J., Ex. 297.

(*m*) *McKenzie* v. *McLeod*, 10 Bing. 385; 3 L. J., N. S., C. P. 75.

from the demised premises to other buildings of the lessor, the lessee will be responsible for the damage done to them (*n*).

Nuisance—Injuries from gunpowder and explosive substances.—Whoever introduces gunpowder or explosive materials into a building is responsible for damage occasioned by the introduction of such dangerous substances. If a person mixes things together, which alone are perfectly innocent, but which are liable to explode on coming into contact, he is responsible for the consequences; and, if an explosion ensues, he must make good the damage (*o*).

Nuisance—Liability of the occupier.—The rule of law is that for all injuries done upon land and buildings in the nature of nuisances the occupier is chargeable, when they are occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself; and he should take care not to bring persons there who do any mischief to others (*p*). Thus, where the occupier of lands grants a licence to another to burn bricks on the land, and the licensee in doing so commits a nuisance, the occupier is liable (*q*). But the occupier is not liable for a nuisance arising from the act of third persons done upon his land, but without his authority and against his will (*r*).

Proof of the exercise of acts of ownership over the tenement on which the nuisance exists, such as paying the wages of workmen employed there, locking the doors, or chaining the gates at night, or giving orders that it should be done, posting bills in the windows, or paying a woman to open the shutters and air the house, will be sufficient *primâ facie* evidence of actual or constructive occupation. Proof that the defendant has received rent for

375 the use of a wall, building, or pavement, and has previously repaired it when it required repairs, has been held sufficient to render the defendant responsible for a nuisance existing thereon (*s*).

If the plaintiff complains of a nuisance arising from the non-repair of drains and sewers, it must be shown that the defendant

(*n*) *Panton* v. *Isham*, 3 Lev. 359.

(*o*) Tindal, C. J., *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; 4 Sc. 252. See Wood on Nuisances, pp. 153, 154; also *Myers* v. *Malcolm*, 6 Hill (N. Y.) 292; *Cuff* v. *Newark, &c. R. R. Co.*, 35 N. J. L. 574; *Wier's Appeal*, 74 Penn. St. 230; *People* v. *Sands*, 1 John (N. Y.) 78; *Heeg* v. *Licht*, 80 N. Y. 579.

(*p*) *Laugher* v. *Pointer*, 5 B. & C. 547, 560; 8 D. & R. 556. For a nuisance created by a tenant or occupier, there can be no question as to his liability, but for a nuisance existing when he went into possession, according to the weight of authority, he is not liable, unless he in some manner promotes the same, in which case he is jointly liable with the landlord therefor: *Irwin* v. *Wood*, 51 N. Y. 224; *Congreve* v. *Smith*, 18 N. Y. 84; *Stephanie* v. *Brown*, 50 Ill. 428; *Portland* v. *Richardson*, 54 Me. 46. But in Ohio, *Clark* v. *Fry*, 8 Ohio St. 358; Pennsylvania, *Bears* v. *Ambler*, 9 Penn. St. 193; Michigan, *Fisher* v. *Thirkell*, 21 Mich. 1; and Massachusetts, *Lowell* v. *Spaulding*, 4 Cush. (Mass.) 277, it is held that the tenant alone is liable.

(*q*) *White* v. *Jameson*, L. R., 18 Eq. 303.

(*r*) *Saxby* v. *Manchester & Sheffield Rail. Co.*, L. R., 4 C. P. 198; 38 L. J., C. P. 154.

(*s*) *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El. 697; 28 L. J., Q. B. 215; 29 *ib.* 53. *Payne* v. *Rogers*, 2 H. Bl. 349.

had the use and occupation of the drain and sewer. Proof that the defendant occupies the land through which the sewer runs does not cast upon the defendant the duty of cleaning out the sewer, or repairing it, or preventing it from becoming a nuisance. It does not follow, from his being the occupier of the land through which the sewer runs, that he has the occupation and use of the sewer. He may never have used it or occupied it, and may have no power to touch it, or interfere with it in any way. The persons who have a right to use the sewer, and who exercise that right, are, in general, bound to cleanse the sewer, and repair it, and prevent it from becoming a nuisance, unless the duty of so doing is imposed on others by express legislative enactment.

Nuisance—Liability of the landlord.—If a nuisance is created on premises, and a man purchases the premises with the nuisance upon them, though there is a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet, by purchasing the reversion with the existing nuisance, he makes himself liable for the continuance of the nuisance. But if, after the reversion is purchased, the nuisance is erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, and he knew of it, that would make the landlord liable; he is not to let the land with the nuisance upon it (*t*).

A landowner who creates a nuisance upon his land, or purchases land with an existing nuisance upon it, cannot, by granting or conveying the land to another, get rid of his responsibility on the ground that he has no longer any control over the nuisance. "Before his assignment over he was liable for all consequential damages; and it is not in his power to discharge himself by granting it over; more especially where he grants it over reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz. the rent, for the same: for surely, when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. Suppose the lessor or assignor had been seised in fee, and had erected this nuisance, and then infeoffed

376 another over, he had conveyed this as a nuisance, and *causa causæ est causa causati.* If a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it; for it is a fundamental principle of law and reason, that he that does the first wrong shall answer for all consequential

(*t*) Littledale, J., *R.* v. *Pedly*, 1 Ad. & E. 827. *Gandy* v. *Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151.

damages; and the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it is abated" (*u*).

If a landlord erects privies in such a situation that the use of them must necessarily create a nuisance, and the privies are demised to tenants who use them and create a nuisance, the landlord will be responsible for the erection and continuance of the nuisance (*x*); and, whenever the very existence of the thing demised constitutes a nuisance, the landlord is responsible (*y*). This has been held to be the case where the thing demised consisted of a wall erected so as to obstruct the access of light and air to ancient windows (*z*); or a dam or mound of earth stopping up the channel of a river or watercourse, or keeping a mill-pond at an undue elevation (*a*). But, if the landlord demises tenements and premises which are not in themselves a nuisance, but may or may not become a nuisance, according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant. He is not responsible for enabling the tenant to commit a nuisance if he pleases. Therefore, where the landowner erected a coffee-shop with a low chimney under the plaintiff's windows, and let the coffee-shop to a tenant who lighted a fire in the chimney and created a great smoke, which penetrated the plaintiff's dwelling-house and caused a nuisance, it was held that the landlord was not responsible for this nuisance, as the tenant could have burnt coke or charcoal in the chimney, and have used the chimney without necessarily creating a great smoke, or might have abstained from making fires at all when the wind was in such a direction as to carry the smoke to the plaintiff's house (*b*). An occupier who uses premises demised to him so as to create a nuisance is, of course, always responsible for the consequences of his wrongful act.

The landlord is responsible to the occupiers and proprietors of the adjoining property, if he demises houses which are in a

377 ruinous state and dangerous to the neighbourhood, either from original faulty construction, or from want of proper and timely repair (*c*), unless at the time of the demise he did not know that

(*u*) Per Cur., *Rosewell* v. *Pryor*, 12 Mod. 639; 2 Salk. 460. *Thompson* v. *Gibson*, 7 M. & W. 462.

(*x*) *R.* v. *Pedly*, 1 Ad. & E. 822. *Marshall* v. *Cohen*, 44 Ga. 488; *Smith* v. *Humbert*, 2 Kerr (N. B.) 602.

(*y*) *Thompson* v. *Gibson*, 7 M. & W. 456.

(*z*) *Rosewell* v. *Pryor*, *supra*.

(*a*) Roll. Abr. NUISANCE, K. 2. *Leslie* v. *Pounds*, 4 Taunt. 649. *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El. 697; 28 L. J., Q. B. 215; 29 *ib.* 53.

(*b*) *Rich* v. *Basterfield*, 4 C. B. 805. See *Brown* v. *Bussell*, L. R., 3 Q. B. 251.

(*c*) *Todd* v. *Flight*, 9 C. B., N. S. 377; 30 L. J., C. P. 21. *R.* v. *Pedly*, 1 Ad.

the houses were in a dangerous state, and was not to blame for not knowing it, and the tenant has covenanted to repair (*d*). But, if the houses and buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighbourhood, the landlord is not responsible for the nuisance, unless he has taken upon himself the burden of repairing and maintaining the premises during the existence of the lease (*e*), or has renewed the lease after the houses had become ruinous and in danger of falling; for an owner of a house is not as such liable for want of repair (*f*).

When both landlord and tenant are responsible for the injury, the plaintiff may proceed against either at his election. But he can have only one satisfaction for the same wrong; and, having sued and recovered judgment against one, he cannot recover against the other (*g*).

Injuries to rights of common.—A commoner may maintain an action for an injury done to the common by taking away from it the manure which was dropped on it by the cattle, though his proportion of the damage may be inappreciable; for the repetition of a tortious act of this kind might eventually be made the foundation of a right, to the serious injury of the other commoners. The action may be brought by the lord, or by any one of the commoners; and all the commoners may maintain separate actions for the wrong (*h*).

If one commoner puts more cattle on the common than he is entitled to do, he is liable to be sued by all or any one of the other commoners who have a right to depasture beasts upon the same common; and it is no answer to the action that the plaintiff has himself surcharged the common, or that the damage is insignificant; for the wrong-doer might, by repeated torts of this sort, eventually enlarge his right. But, if the beasts have been put upon the common by the lord of the manor, or with his licence and permission, the commoner cannot maintain an action, unless he has sustained actual damage, and can show that there was not

378 a sufficiency of pasture for his beasts (*i*). Any act that totally

& E. 822. *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311; 46 L. J., C. P. 675. See also *Anderson* v. *Oppenheim*, 5 Q. B. D. 602; 49 L. J., Q. B. 708.

(*d*) *Gwinnell* v. *Eamer*, L. R., 10 C. P. 558. See Wood on Nuisances, pp. 950—955.

(*e*) *Payne* v. *Rogers*, 2 H. Bl. 349. *Leslie* v. *Pounds*, 4 Taunt. 648. *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El. 697; 28 L. J., Q. B. 215; 29 *ib.* 53. *Robbins* v. *Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1. See Wood on Nuisances, pp. 126—129; *Benson* v. *Suarez*, 28 How. Pr. (N. Y.) 511.

(*f*) *Chauntler* v. *Robinson*, 4 Exch. 173.

(*g*) *Rosewell* v. *Pryor*, 2 Salk. 460; 12 Mod. 636. *Brent* v. *Haddon*, Cro. Jac. 555.

(*h*) *Pindar* v. *Wadsworth*, 2 East, 159.

(*i*) *Hobson* v. *Todd*, 4 T. R. 73. *Smith* v. *Feverell*, 2 Mod. 7. *Greenhow* v. *Ilsley*, Willes, 619.

destroys the herbage, as feeding innumerable rabbits on a common, will support an action against the lord (*k*).

A commoner may sue a railway company for disturbance, if they have made a railway over the common without making him compensation for his rights under the Lands Clauses Act, although they have compensated the lord of the manor and taken a conveyance of the soil from him (*l*).

Injuries to rights of water—Defilement of springs and running streams.—Every person who throws dirt and rubbish into a stream so as to block up the channel, or defiles the water with gas refuse and filth, and prevents the riparian proprietors and others from having the beneficial use of the water they have been accustomed to have, is guilty of a nuisance, and may be made responsible in damages (*m*), unless he has gained a prescriptive right to carry on an offensive trade on the river-bank, and corrupt the water (*n*). Provisions for the protection of water are contained in the Public Health Act, 1875 (*o*).

Injuries to rights of water—Disturbance of the permissive use and enjoyment.—A landowner or occupier of a house, who receives permission from an adjoining landowner to draw water from the premises of the latter through a pipe or watercourse, is entitled to an action for damages, if the water is fouled by a wrong-doer, and damage is sustained by him from the fouling of the water. Though there may be no right on the part of a plaintiff to have water flow to his premises, yet, if the water does come, and the defendant fouls it without having any right so to do, and so causes foul water to flow into the plaintiff's premises, and the plaintiff sustains damage therefrom, and the defendant cannot justify, the plaintiff will be entitled to recover all the damage he has sustained from the wrongful act. The plaintiff in such a case relies upon no title to the water as a riparian proprietor, but merely alleges that he was lawfully in the enjoyment and use of water flowing through his premises in a pure and unpolluted state, and that the defendant wrongfully fouled it (*p*).

Injuries to the right of support.—If a house is *de facto* supported by the soil of a neighbour, this is a sufficient title to the support against any one but that neighbour, or one claiming under him (*q*).

379 A man who should prop his house up by a shore resting on his

(*k*) *Wells* v. *Watling*, 2 W. Bl. 1233.
(*l*) *Stoneham* v. *London & Brighton Rail. Co.*, L. R., 7 Q. B. 1; 41 L. J., Q. B. 1.
(*m*) *Murgatroyd* v. *Robinson*, 7 El. & Bl. 391; 26 L. J., Q. B. 233. *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231. *Stockport Water Works Co.* v. *Potter*, 7 H. & N. 160; 31 L. J., Ex. 9.
(*n*) *Bealey* v. *Shaw*, 6 East, 214. See Wood on Nuisances, p. 501, Chapter on "Pollution of Water."
(*o*) Sects. 68—70, and sect. 332.
(*p*) *Laing* v. *Whaley*, 3 H. & N. 685; 27 L. J., Ex. 422; affirming *Whaley* v. *Laing*, 2 H. & N. 476.
(*q*) And as to right of support of buildings by buildings, see *ante*, pp. 306, 331.

neighbour's ground, would have a right of action against a stranger who, by removing it, should cause the house to fall, though he could have no action against his neighbour, if the latter took it away, and caused the same damage (*r*).

Injuries to right of support—Negligence in pulling down houses—Negligent excavations.—It is the duty of all persons to use due care and skill, and take due, reasonable, and proper precautions in pulling down houses and walls which rest against, or are in contact with, an adjoining house or wall; and, if an injury is sustained from a neglect to exercise such care, skill, and precaution, a wrong is done, and the wrong-doer is responsible for the damage (*s*); and it is no answer to an action for damage done to set forth that the damage was repaired by the defendant before action, although the fact may be given in evidence in reduction of damages (*t*). If a man negligently and carelessly excavates his own land close to the foundations of his neighbour's house without giving the latter any warning, or giving him an opportunity of shoring up or protecting his house, the careless excavator will be responsible for the damage he occasions (*u*). But the duty of taking care does not arise where the excavator is ignorant of the existence of the thing which may be injured by the want of care. Thus, where a landowner excavated in his own land close to a cellar of his neighbour's, not knowing of the existence of the cellar, it was held that he could not be made responsible for an injury to the cellar (*x*), no right to support having been gained by long enjoyment.

Obstructions to the access of light.—To establish a cause of action for an obstruction to the access of light to the plaintiff's ancient windows, the plaintiff must prove a substantial privation of light, sufficient to render the occupation of his house comparatively uncomfortable (*y*), or to prevent him from carrying on his business as

(*r*) *Jeffries* v. *Williams*, 5 Exch. 800; 20 L. J., Ex. 14. See Wood on Nuisances, Chapter V.

(*s*) *Trower* v. *Chadwick*. 3 Bing. N. C. 334; 6 Bing. N. C. 1; 8 Sc. 19. *Walters* v. *Pfiel*, M. & M. 365. *Davies* v. *London & Blackwall Rail. Co.*, 1 M. & G. 799; 2 Sc. N. R. 74.

(*t*) *Taylor* v. *Stendall*, 7 Q. B. 634.

(*u*) *Dodd* v. *Holme*, 1 Ad. & E. 506. *Bradbee* v. *Christ's Hospital*, 4 M. & G. 758. *Massey* v. *Goyder*, 4 C. & P. 165. *Jones* v. *Bird*, 5 B. & Ald. 837. The penalty which the Metropolitan Building Act (18 & 19 Vict. c. 122), by s. 94, imposes upon any building-owner who fails to make good the damage done to an adjoining owner by the execution of any work authorized by him, is cumulative upon the remedy by action. *Williams* v. *Golding*, L. R., 1 C. P. 69; 35 L. J., C. P. 1.

(*x*) *Chadwick* v. *Trower*, 6 Bing. N. C. 1; 8 Sc. 20. See *Rylands* v. *Fletcher*, L. R., 3 H. L. 330, *ante*, p. 368. There is no duty imposed by the Metropolitan Building Act upon a building-owner, who pulls down a party wall under its authority, of protecting by a boarding or otherwise the rooms of the adjoining owner which are left exposed to the weather while the wall is being re-built. *Thompson* v. *Hill*, L. R., 5 C. P. 564; 39 L. J., C. P. 264.

(*y*) See *Kelk* v. *Pearson*, L. R., 6 Ch. 809. *City of London Brewery Co.* v. *Tennant*, L. R., 9 Ch. 212; 43 L. J., Ch. 457. We have seen, by a previous note, that in this country the doctrine prevailing in England relative to ancient lights does not prevail. But where a right to have the light enter at certain windows

380 beneficially and profitably as he had formerly done (*z*). The mere diminution of a ray or two of light will not suffice for the maintenance of an action (*a*).

There is no positive rule of law on the subject; but the question of the amount of obstruction is always a question of fact which depends on the evidence in each case (*b*). But the owner of the dominant tenement has a right to all the light which he has actually enjoyed; and the owner of the servient tenement is not at liberty to raise buildings to a height which will subtend an angle of 45° measured from a base line level with the centre of the plaintiff's light, if by so doing he will cause a serious diminution of the amount of light which the plaintiff has actually enjoyed up to that time (*c*). The owner of the right of light is entitled to the amount of light he has actually enjoyed, irrespective of the purpose for which he has enjoyed it, so that the actual mode of occupation of the dominant tenement is not the test of the right (*d*).

Justification of injuries to land.—A trespass may be justified on the ground that it was committed in the exercise of some legal or personal authority or right, or excused as having been done in self-defence, in order to escape from some pressing danger or apprehended peril (*e*), or in defence of the possession of a man's goods and chattels, or cattle, sheep, or domestic animals; for, "if I drive my beasts along the highway, and you have open, uninclosed land adjoining the highway, and my beasts enter your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have any action against me, because the chasing them was lawful" (*f*). So, if my goods have been taken by you, and placed on your land, I may justify my entry on your land for the purpose of re-taking them (*g*). If a man is bound by contract

has been acquired by grant, express or implied, the rules as to obstructions thereof stated in the text prevail.

(*z*) *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 238, 245; 35 L. J., Ch. 555.

(*a*) *Back* v. *Stacey*, 2 C. & P. 466. *Parker* v. *Smith*, 5 *ib.* 438. *Pringle* v. *Wernham*, 7 *ib.* 378. *Wells* v. *Ody*, *ib.* 410. *Curriers' Co.* v. *Corbett*, 4 De G., J. & S. 764. The Metropolitan Building Act, 18 & 19 Vict. c. 122, which, by sect. 83, gives a right to the building-owner to raise any structure, &c., upon condition of making good all damage occasioned thereby to the adjoining premises, does not authorize the erecting of such a structure as will obstruct ancient lights.

(*b*) *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 282; 49 L. T. 318. *Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. 213; 49 L. J., Ch. 829.

(*c*) *Theed* v. *Debenham*, 2 Ch. D. 165.

(*d*) *Aynsley* v. *Glover*, L. R., 18 Eq. 544, 551; 10 Ch. 283; 44 L. J., Ch. 523. *Moore* v. *Hall*, 3 Q. B. D. 178; 47 L. J., Q. B. 334.

(*e*) 37 Hen. 6, 37, pl. 27; and *post*, p. 383.

(*f*) Catesby, *arg.*, 6 Edw. 4, 7, pl. 18. *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298.

(*g*) 2 Roll. Abr. 565, pl. 9. Where cattle stray from the enclosure of the owner to the lands of another, the owner of the cattle may, even though forbidden to do so by the owner of the land, enter the premises to get his cattle, if he can do so peaceably: *Richardson* v. *Anthony*, 12 Vt. 273; but he must not let down a fence for the purpose of getting them out: *Gardner* v. *Rowland*, 2 Ired. (N. C.) 247. So a person who has property upon the land of another, which was placed there by the consent of the owner, may lawfully enter to carry it away, as bark peeled from trees under an agreement

or prescription to repair a fence between my land and his, and he neglects to repair, and by reason thereof my beasts get on to his land, it is lawful for me to go into his land after my beasts; and I **381** may plead this as a justification for the trespass, because it was rendered necessary by his default (*h*).

Justification—Liberum tenementum.—At common law, if a man had a right to the possession of land and a right to enter thereon, he might enter and obtain possession with force and arms, and retain possession by force, which gave an opportunity, we are told, to powerful men to enter upon land under pretence of feigned titles, and forcibly eject their weaker brethren (*i*); and, therefore, it was enacted (*k*), "that none henceforth make entry into any lands and tenements, but in cases where entry is given by the law; and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner" (*l*). A mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the landowner, become possessed of the land upon which he has trespassed, and which he tortiously holds; and he may, consequently, be expelled by main force (*m*). A mere intruder upon land, who has been allowed to run up a hut and occupy it, has no right to the hut or to the possession thereof; and the landlord may enter and pull down the hut about the ears of the occupants, and remove the materials (*n*). But the dwelling-houses of strangers cannot be pulled down, whilst people are living in them, for the mere purpose of abating a nuisance or preventing the enjoyment of some incorporeal right, such as a right of common (*o*). The rightful owner cannot, in any case, when he has a right of entry, whether legal or equitable, be made responsible in damages for a trespass upon his own land; for he is no trespasser, if he has a right to go upon it (*p*). But, if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully, after their title to occupy has been determined, he may be made responsible for the assault, and be indicted for a forcible entry (*q*), though he cannot be made responsible in damages for the expulsion (*r*). Having a right to enter

with the owner that he should have the bark for peeling them: *Nettleton* v. *Sykes*, 8 Met. (Mass.) 34. So, if his property has been wrongfully taken from him, and placed upon the land of another, he may lawfully enter to take it away: *Chambers* v. *Bedell*, 2 W. & S. (Penn.) 225.

(*h*) 2 Roll. Abr. TRESPASS, 565, pl. 4.

(*i*) Bac. Abr. FORCIBLE ENTRY.

(*k*) 5 Ric. 2, c. 7.

(*l*) As to recovery of possession by persons forcibly expelled, see 8 H. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15.

(*m*) *Browne* v. *Dawson*, 12 Ad. & E. 629.

(*n*) *Davison* v. *Wilson*, 11 Q. B. 890; 17 L. J., Q. B. 196.

(*o*) *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506. But see *Davies* v. *Williams*, 16 Q. B. 546; 20 L. J., Q. B. 330; *post*, p. 397.

(*p*) *Davison* v. *Wilson*, *supra*.

(*q*) *Newton* v. *Harland*, 1 M. & G. 644; 2 Sc. N. R. 474.

(*r*) *Pollen* v. *Brewer*, 7 C. B., N. S. 373.

upon his own land, he may do so peaceably; and, if his entry is resisted by force, he may, it seems, repel force by force (*s*). "Where a breach of the peace," observes Parke, B., "is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his
382 will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. It is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that the defendant entered upon it accordingly" (*t*).

A licence by a tenant to his landlord to eject him without process of law is void as being contrary to the statute (*u*).

Although a wrong-doer has allowed the person entitled to enter peaceably through the outer door, it is still illegal to turn the wrong-doer out with violence (*x*).

Damages cannot be recovered against the rightful owner for a forcible entry on land; for the statute (*y*) only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong, such as an assault or injury to furniture, committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the lawful owner (*z*).

Justification—Legal Process.—An entry upon land in pursuance of a warrant of a county court authorizing the high bailiff to give possession under the 19 & 20 Vict. c. 108, s. 50, is not justifiable, unless the party obtaining the warrant has a lawful right to the possession; and the production of the warrant alone, without proof that the party in whose favour it was issued is entitled to the land, is not, except so far as the officers of the court are concerned, any answer to an action of trespass brought by the person in possession, at any rate if he was not a party to the action in which the warrant was issued (*a*).

When the defendant justifies the demolition of a house under the powers and provisions of the Metropolis Local Management Act (*b*), or of a portion of a house projecting beyond the general line of the street under the Metropolis Local Management Amend-

(*s*) *Newton* v. *Harland*, 1 M. & G. 644; 2 Sc. N. R. 474.

(*t*) *Harvey* v. *Brydges*, 14 M. & W. 442; 1 Exch. 261. *Davison* v. *Wilson*, 11 Q. B. 890. *Meriton* v. *Coombes*, 9 C. B. 787; 19 L. J., C. P. 336.

(*u*) *Edwick* v. *Hawkes*, 18 Ch. D. 199; 50 L. J., Ch. 597.

(*x*) *Edwick* v. *Hawkes*, *supra*.

(*y*) 5 Ric. 2, c. 8.

(*z*) *Beddall* v. *Maitland*, 17 Ch. D. 174; 50 L. J., Ch. 401.

(*a*) *Hodson* v. *Walker*, L. R., 7 Ex. 55; 41 L. J., Ex. 51.

(*b*) 18 & 19 Vict. c. 120, s. 76.

ment Act (*c*), it must be shown that the person damnified had an opportunity of being heard before the board prior to the exercise of the power (*d*).

The breaking and entering a dwelling-house without warrant
383 to make an arrest for felony, or to prevent the commission of murder, are justifiable; but it must be shown, in the first case, that a felony had been committed, and that there was reasonable ground for believing that the felon was in the house (*e*); and, in the second case, that the life of some person inside the house was really in danger; that there were calls for the assistance; that the door was fastened; and that it was necessary to break it open and enter the house, and render assistance for the preservation of life (*f*).

Justification—Self-defence.—Every proprietor of land exposed to the inroads of the sea may erect on his own land groins, or other reasonable defences, for the protection of his land from the inroads of the sea, although, by so doing, he may cause the sea to flow with greater violence against the land of his neighbour, and render it necessary for the latter to protect himself by the erection of similar sea-defences. "Each landowner has a right to protect himself, but not to be protected by others, against the common enemy." But a man has no right to do more than is necessary for his defence, and to make improvements at the expense of his neighbour (*g*).

In Rolle's Abridgement it is said, "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff" (*h*). An entry on the plaintiff's land may be justified on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefore the defendant entered the plaintiff's land and took his goods back again (*i*); but the entry

(*e*) 25 & 26 Vict. c. 102, ss. 75 and 107.

(*d*) *Cooper* v. *Wandsworth Board, &c.*, 14 C. B., N. S. 180; 32 L. J., C. P. 186. *Brutton* v. *St. George's, Hanover Square* (*Vestry of*), L. R., 13 Eq. 339; 41 L. J., Ch. 134.

(*e*) *Smith* v. *Shirley*, 3 C. B. 142.

(*f*) *Handcock* v. *Baker*, 2 B. & P. 260.

(*g*) *R.* v. *Pagham Commissioners, &c.*, 8 B. & C. 360. *Whalley* v. *Lancashire & Yorkshire Rail. Co.*, 13 Q. B. D. 131; 53 L. J., Q. B. 285.

(*h*) *Cole* v. *Maundy*, 1 Roll. Abr. TRESPASS, 1 pl. 17, p. 566. *Rea* v. *Sheward*, 2 M. & W. 426.

(*i*) 3 Vin. Abr. TRESPASS, 1. As to breaking open a door to get at books and papers, see *Burridge* v. *Nicholetts*, 6 H. & N. 383; 30 L. J., Ex. 145. *Blades* v.

is not justifiable from the mere fact of the defendant's goods being on the plaintiff's land. It must be shown that they came there by the plaintiff's act (*k*), or that they had been stolen from the defendant (*l*). Thus, a landowner who starts a pheasant on his own

384 land, and shoots the bird while it is flying over the adjoining land of his neighbour, commits a trespass, if he goes on such adjoining land to pick it up (*m*).

Justification—Leave and licence.—If the defendant relies upon a plea of leave and licence, he must prove, either an express permission from the plaintiff to the defendant to come upon the land (*n*), or circumstances from which such a permission may fairly be implied (*o*). If, after a parol licence to use a way has been granted, the licensor locks a gate across the way, this is a revocation of the licence; and the licensee cannot lawfully break open the gate to use the way (*p*). A licensee can, of course, take no better title or authority than the licensor himself possesses: and, therefore, if one tenant in common gives to the defendant licence or permission to dig and carry away soil, or brick-earth, or turf, from the estate holden in common, this will give the defendant no right or title as against the other co-tenant in common, and will afford no answer to an action brought by the latter for a trespass (*q*). If the licence or permission of the wife, daughter, or servant of the plaintiff has been obtained by the defendant, this will be no evidence of a licence from the plaintiff, unless the surrounding circumstances show that the wife, daughter, or servant had the plaintiff's express or implied authority to grant the licence (*r*). Under a general plea of leave and licence, the defendant is bound to prove a licence co-extensive with all the acts of which the plaintiff complains; for, if some of those acts are not covered and authorized by the licence, the plaintiff will be entitled to damages in respect of them. A licence to a defendant, to have the key of a house, and to enter it when he pleases, will not authorize the defendant to enter the house otherwise than by the door, in the ordinary way. If, therefore, the defendant, having lost the key, enters the house by a window, he commits a trespass; and, if evil-disposed persons, following his

Higgs, 10 C. B., N. S. 713; 12 C. B., N. S. 501; 34 L. J., C. P. 286.

(*k*) *Patrick* v. *Colerick*, 3 M. & W. 485. *Anthony* v. *Haney*, 8 Bing. 186; 1 M. & Sc. 306. *Williams* v. *Morris*, 8 M. & W. 488.

(*l*) *Higgins* v. *Andrewes*, 2 Rolle R. 55.

(*m*) *Osbond* v. *Meadows*, 12 C. B., N. S. 10; 31 L. J., C. P. 281. *Blades* v. *Higgs*, 12 C. B., N. S. 501; 34 L. J., C. P. 286. *Kenyon* v. *Hart*, 6 B. & S. 249; 34 L. J., M. C. 87.

(*n*) *Kavanagh* v. *Gudge*, 7 M. & G. 316.

(*o*) *Ditcham* v. *Bond*, 3 Campb. 524.

(*p*) *Hyde* v. *Graham*, 1 H. & C. 593; 32 L. J., Ex. 27.

(*q*) *Wilkinson* v. *Haygarth*, 12 Q. B. 846.

(*r*) *Taylor* v. *Fisher*, Cro. Eliz. 246. *Holdringshaw* v. *Rag*, *ib.* 876.

example, get into the house through the same window, and rob the house, the defendant will be responsible for the damage done (*s*).

Where a man is licensed to do a thing, it necessarily implies that he may do everything without which the thing authorized to be done cannot be done. If, therefore, the plaintiff has authorized the defendant to sell furniture and effects in the plaintiff's house, the licence extends to all such assistants as may be necessary to

385 enable the defendant to effect the sale and remove the goods (*t*). A plea of leave and licence is not supported by proof that the plaintiff sold to the defendant certain goods and chattels which were deposited on the plaintiff's premises, and that the defendant entered upon the premises to remove the goods; for there is no implied authority to a purchaser to enter upon the vendor's land and help himself to the goods. There must be an express agreement to that effect (*u*).

A licence obtained by wilful misrepresentation and deceit is a mere nullity, and will not justify or excuse a trespass by a defendant who was a party to the misrepresentation (*x*). If there has been a mistake and misunderstanding between the parties without fraud, the licence will be a nullity (*y*); but the misunderstanding will go in reduction of damages in an action for the unintentional trespass. A parol licence to enjoy an easement over or upon the soil and freehold of another is at once determined, as we have seen, by a transfer of the property; and the grantee of the licence is, consequently, a trespasser, if he afterwards enters upon the land in the exercise and enjoyment of his supposed right, although he has received no notice of the transfer (*z*).

Where the plaintiff complained of three grievances, one relating to the obstruction of his lights, another relating to the taking away of the support of his building, and a third to the obstruction of his chimneys, and causing them to smoke, and the defendant pleaded that the whole of the grievances complained of arose from the pulling down of an ancient house and the building of another messuage on the site of it, and that the acts causing the grievances complained of were done with the knowledge, consent and acquiescence of the plaintiff, and upon the faith of his approval of the mode in which they were done, it was held that the plea disclosed

(*s*) *Ancaster* v. *Milling*, 2 D. & R. 714. A person who is licensed to enter lands for a particular purpose cannot justify an entry under such licence for another or different purpose, but as to such latter entry is a trespasser: *Abbott* v. *Wood*, 13 Me. 115; *Malcolm* v. *Spoor*, 12 Met. (Mass.) 279; *Dumont* v. *Smith*, 4 Den. (N. Y.) 319.

(*t*) *Dennett* v. *Grover*, Willes, 195.

(*u*) *Williams* v. *Morris*, 8 M. & W. 488.

(*x*) *Roper* v. *Harper*, 4 Bing. N. C. 20.

(*y*) *Bridges* v. *Blanchard*, 1 Ad. & E. 551. See *Davies* v. *Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61. *Rawlins* v. *Wickham*, *infra*.

(*z*) *Wallis* v. *Harrison*, 4 M. & W. 544. *Ante*, p. 313. See Wood's Landlord and Tenant, pp. 348—357.

a good defence; but it was also held that it was well answered by a replication setting up that the acquiescence and consent upon the faith of which those acts were done were obtained from the plaintiff by the representations of the defendant, that none of the grievances complained of would take place if the plaintiff would give his consent as alleged (*a*).

Remedy by action—Damages.—All damages which naturally result from the wrongful act of the defendant, and are directly traceable thereto, may be recovered by the plaintiff (*b*).

386 *Remedy by action—Damages—Wilful and malicious trespasses.*—Surrounding circumstances of aggravation will materially influence the amount of damages to be recovered for a trespass upon land. Where the plaintiff, a gentleman of fortune, was shooting upon his estate, and the defendant, a banker and magistrate, and member of parliament, went up to the plaintiff and told him he would join his shooting party, and the plaintiff declined, and ordered him off his land, and gave him notice not to shoot there, but the defendant swore that he would shoot there, and did so, and threatened and defied the plaintiff, and the jury gave 500*l.* damages, the court refused to disturb the verdict. "I do not know," observes Gibbs, C. J., "upon what principle we can grant a rule for a new trial in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that 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 half-penny for you, which is the full extent of all the mischief I have done;' would that be a compensation?" (*y*). Where a landlord entered upon premises demised to his tenant, without asking the leave of the latter, and sold the timber-trees standing in the hedge-rows, and caused them to be felled, cut up, and removed, and great damage was done to the growing crops of the tenant, and the latter brought an action against the landlord for damages, and recovered 100*l.* beyond the net value of the whole of the crops, the court declined to interfere to have the amount of damages reconsidered, although they were of opinion that the jury had taken an exaggerated view of them (*z*).

Remedy by action—Damages—Trespasses in dwelling-houses.—The law guards with great jealousy and watchfulness the peaceable

(*a*) *Davies* v. *Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61. *Rawlins* v. *Wickham*,, 3 De G. & J. 304.
(*b*) *Ante*, p. 78.
(*y*) *Merest* v. *Harvey*, 5 Taunt. 441.
(*z*) *Williams* v. *Currie*, 1 C. B. 847.

possession by every man of his dwelling-house, and enables all who have been disturbed in the enjoyment thereof to recover substantial damages from every wilful and intentional intruder, though no actual pecuniary damage can be proved to have been done in point of fact either to property or person (*a*). "Rights of action of this sort are given," observes Lord Denman, "in respect of the immediate and present violation of the possession of the plaintiff, independently of his right of property; they are an extension of that protection which the law throws around the person; and substantial damages may be recovered in respect of such rights, **387** though no loss or diminution in the value of the property may have occurred" (*b*).

Remedy by action—Damages—Injury to buildings.—The amount of damages to be recovered in an action of tort for the wrongful and malicious demolition of a house in the actual occupation of the owner, seems to be peculiarly for the consideration of a jury. The question for them to determine is, what sum of money will repair the injury done to the plaintiff by the loss of his house, and what sum will be required to replace the house, as nearly as practicable, in the situation and state in which it was at the time of the commission of the injury (*c*).

If the plaintiff's house has been thrown down by reason of the negligence of the defendant or his servants in pulling down an adjoining house, the jury ought not to give as much in damages as would be sufficient to build a new house, but should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one. Lord Kenyon likened a case of this sort to the case of marine insurances, where an allowance of one-third new for old was always made (*d*).

Remedy by action—Damages—Digging and carrying away coal.—In an action for taking away the plaintiff's coal, he is entitled to recover the value of the coal at the time of its severance from the soil; and the trespasser cannot claim any deduction therefrom in respect of the expense incurred by him in getting or severing the coal (*e*), unless there is a real disputed title, or the defendant has taken the coal inadvertently under a *bonâ fide* belief that he had a right to do so, in which case the jury may give such an amount only as the plaintiff would have obtained if he had himself severed and raised the coal (*f*). This value is the sale

(*a*) *Sears* v. *Lyons*, 2 Stark. 318.
(*b*) *Rogers* v. *Spence*, 13 M. & W. 581.
(*c*) *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 282.
(*d*) *Lukin* v. *Godsall*, 2 Peake, 15.
(*e*) *Martin* v. *Porter*, 5 M. & W. 352. See *Llynvi Co.* v. *Brogden*, L. R., 11 Eq. 188; 40 L. J., Ch. 46. *Phillips* v. *Homfray*, L. R., 6 Ch. 770; 11 App. Cas. 466.
(*f*) *Wood* v. *Morewood*, 3 Q. B. 440 n.

price at the pit's mouth, after deducting the expense (not including any profit or trade allowances) of carrying the coals from the place in the mine where they were got to the pit's mouth (*g*). The plaintiff is also entitled to compensation for any damage done beyond the removal of the coal, *e.g.*, for all injury done to his soil by digging, and for the trespass committed in dragging the coal along the adit of his mine, &c. (*h*). The estimate of the loss from

388 the removal of the coal depends upon the value of the coal at the time of its severance from the soil; and the defendant has no right to any deduction in respect of royalty payable by the plaintiff to the mine-owner on coals got from the mine (*i*).

Where an action was brought for digging into the plaintiff's close, and carrying away therefrom large quantities of earth, soil, &c., it was held that the plaintiff was entitled, by way of compensation, to what the land was worth to him, and not to the amount which would be required to enable him to replace the soil which had been taken away (*k*).

Remedy by action—Damages—Mesne *profits*.—The right to recover *mesne* profits is consequential on the right to recover the land (*l*). Under the head of *mesne* profits the plaintiff is entitled to recover: 1st, compensation for the use and occupation of the premises recovered during the time they were actually or constructively occupied by the defendant (*m*); and, 2ndly, compensation for any special damage that the plaintiff may be legally entitled to in respect of the trespasses, as if the defendant has shut up an inn (being the premises in question), and has thereby destroyed the custom (*n*). The damages under the first head, however, are not confined to the mere rent of the premises; but the jury may give more if they please, as for the plaintiff's trouble in the recovery of the premises, &c. (*o*).

Remedy by action—Damages recoverable in cases of nuisance.—Wherever the exercise and enjoyment of a right naturally incident to the possession of land, or of a profit *à prendre* or easement, have been obstructed, substantial damages are recoverable, though no actual, perceptible damage has been sustained or proved, whenever the repetition of the wrongful act, if uninterrupted and undis-

Hilton v. *Woods*, L. R., 4 Eq. 432; 36 L. J., Ch. 941. *Jegon* v. *Vivian*, L. R., 6 Ch. 742; 40 L. J., Ch. 389. *Ashton* v. *Stock*, L. R., 6 Ch. D. 719. *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25. *Trotter* v. *McLean*, 13 Ch. D. 574; 49 L. J., Ch. 256.

(*g*) *Llynvi Co.* v. *Brogden*, *Phillips* v. *Homfray*, *supra*. *In re United Merthyr Collieries Co.*, L. R., 15 Eq. 46.

(*h*) *Jegon* v. *Vivian*, *supra*. *Phillips* v. *Homfray*, *supra*.

(*i*) *Wild* v. *Holt*, 9 M. & W. 672. *Morgan* v. *Powell*, 3 Q. B. 283.

(*k*) *Jones* v. *Gooday*, 8 M. & W. 146.

(*l*) Lord Mansfield, C. J., *Aslin* v. *Parker*, 2 Burr. 668.

(*m*) *Doe* v. *Harlow*, 12 A. & E. 40. See *Doe* v. *Challis*, 17 Q. B. 166.

(*n*) *Dunn* v. *Large*, 3 Dougl. 335.

(*o*) *Goodtitle* v. *Tombs*, 3 Wils. 121.

turbed, would lay the foundation of a legal right, or be evidence against the existence of the plaintiff's right. A wrongful defilement of a stream is an injury to a right, in respect of which damages are recoverable, although no actual specific damage can be proved. Thus, where certain manufacturers erected works on the bank of a stream, and fouled the water with soap-suds, but no actual damage was proved to have been sustained by the plaintiff, it was held that he was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to the easement of discharging their foul water into the stream (*p*). So, where the

(*p*) *Wood* v. *Waud*, 3 Exch. 772. *Rochdale Canal Co.* v. *King*, 14 Q. B. 135, 138. *Ante*, p. 39. In *Freedenstein* v. *Heine*, 6 Mo. App. 287, an action was brought for causing surface water to run off upon the plaintiff's lands. No actual damage was shown, but the court held that a recovery might be had for an injury to the right.

As a rule, however, in an action for a nuisance the recovery is limited to the actual damage: *Thayer* v. *Brooks*, 10 Ohio, 161; *Luther* v. *Winnissmount Co.*, 6 Cush. (Mass.) 171. Where the injury is of a visible, tangible character, the damage is susceptible of easy estimation; but in a majority of instances the subject of damages rests largely in the discretion of the jury: *Frink* v. *R. R. Co.*, 20 La. An. 25. Where an action is brought for an injury to the comfortable enjoyment of business, by a nuisance, no definite rate for fixing the amount of damages can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; and the jury are necessarily left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance; and, whether the verdict is large or small, if, in view of the evidence, it has any reasonable foundation, it will not be disturbed because it is too small on the one hand, or too large on the other: *Pierce* v. *Dart*, 8 Cow. (N. Y.) 605; *O'Mara* v. *R. R. Co.*, 38 N. Y. 455; *Pike* v. *Doyle*, La. An. 362. But in the case of an action by the reversioner for an injury to the estate the damages are usually the subject of easy computation. Thus, if the injury complained of is the loss of a tenant, the actual rental value of the premises during the period that the premises have remained unoccupied is the limit of recovery: *Francis* v. *Schoellkoppf*, 53 N. Y. 152; *Wessom* v. *Washburn Iron Co.*, 13 Allen (Mass.) 95. Or, if the injury is to the value of the premises themselves, the difference in the value of the premises before the nuisance existed, and their value with the nuisance there, is the measure of damage: *Peck* v. *Elder*, 3 Sand. (N. Y.) 126; *Dana* v. *Valentine*, 5 Met. (Mass.) 8.

In *Seeley* v. *Alden*, 61 Penn. St. 312, it was held, in the case of an injury to a water-power by filling the water with tan bark, that, in ascertaining the measure of damages, evidence was admissible as to the value of the land with and without the nuisance. In *Selma R. R. Co.* v. *Knapp*, 42 Ala. 480, it was held, when the rental value of the property had been diminished, that, for the purpose of establishing that fact, it was not competent to show that the rental value of other property had been diminished by the same nuisance.

It has been held that when lands have been laid out into building lots, even though no buildings are erected thereon, the owner may recover for their depreciation in value by the erection of a nuisance in their vicinity; that is, he may maintain an action for the difference in their market value: *Peck* v. *Elder*, 1 Sandf. (N. Y.) 126; *Dana* v. *Valentine*, 5 Metc. (Mass.) 8. But in California it was held that in an action to recover for special damages arising from obstructing a street in front of the plaintiff's premises, evidence that the value of the premises was thereby diminished was inadmissible: *Hopkins* v. *Western Pac. R. R. Co.*, 50 Cal. 190. And the fact that the premises have been increased in value by reason of the nuisance will not prevent the recovery of damages to support the plaintiff's right: *Francis* v. *Schoellkoppf*, 78 N. Y. 152; *Wessom* v. *Washburn Iron Co.*, 13 Allen (Mass.) 95.

In the first instance, in an action for a nuisance, the recovery is limited to the actual damage sustained: *Harsh* v. *Butler*, 1 Wright (Penn.) 99; *Thayer* v. *Brooks*, 10 Ohio, 161; *McKnight* v. *Ratcliffe*, 44 Penn. St. 156; *Hatch* v. *Dwight*, 17 Mass. 289; *Shaw* v. *Cummisky*, 7 Pick. (Mass.) 76; but if the nuisance is continued after a verdict at law establishing the nuisance, exemplary damages

389 defendant, a riparian owner on the banks of a stream which fed a spout, the water of which the plaintiff, in common with the

not only may, but shall be given, and that to such an extent as to secure an abatement of the wrong: *Bradley* v. *Ames*, 2 Hay. (N. C.) 399. The fact that the person maintaining the nuisance continues its exercise after his right to do so has been denied by a verdict of a jury, is regarded as a wanton and wilful invasion of another's right, which clearly entitled the party injured to exemplary damages: *New Orleans, &c. R. R. Co.* v. *Statham*, 42 Miss. 607. In *Morford* v. *Woodworth*, 7 Ind. 83, an action was brought against the defendant for a nuisance committed by his servants. The plaintiff claimed a recovery in excess of actual damages by way of punishment, and the court refused the claim upon the ground that the defendant personally was not at fault. It is only in instances when the injury is inflicted from wanton or malicious motives, or a reckless disregard of the rights of others, or when the act results in great hardship and oppression, that punitory damages are given: *Nagle* v. *Morrison*, 34 Penn. St. 48; *Dorsey* v. *Manlove*, 14 Cal. 553; *Hodgson* v. *Medward*, 3 Grant (Penn.) 406; *Borst* v. *Allen*, 30 Ill. 30; and these elements exist when, after the legal right is determined, a party goes on with a nuisance injurious to others, and he cannot, by making changes in the method of his use of the property, screen himself from liability for exemplary damages.

Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action: *Troy* v. *Cheshire R. R. Co.*, 23 N. H. 101; *Cheshire Turnpike Co.* v. *Stevens*, 13 *ibid.* 28; *Parks* v. *City of Boston*, 15 Pick. (Mass.) 198. Thus, in an action for overflowing the plaintiff's land by a mill dam, the lands being submerged thereby to such an extent, and for such period, as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land: *Anonymous*, 4 Dall. (U. S.) 147. So, too, when a railroad company, by permanent erections, imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once (*Troy* v. *R. R. Co.*, *ante*); but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may but must be brought to recover the damage sustained: *Plumer* v. *Harper*, 3 N. H. 88; *Cheshire Turnpike Co.* v. *Stevens*, *ante*.

Where, in an action for a nuisance, it appears that, for a part of the period covered by the declaration, another person was jointly in the occupancy of the premises with the plaintiff, this does not prevent a recovery by him for damages during the entire period (*Branch* v. *Doane*, 17 Conn. 402); and where the damages are continuous in their nature, the party injured is entitled to recover for all damages done previous to the bringing of the action (*Puckell* v. *Smith*, 5 Strobh. (S. C.) 26); but, ordinarily, damages are only recoverable up to the time of the bringing of the action: *Shaw* v. *Etteridge*, 3 Jones (N. C.) 300. It is not necessary to prove actual damage. If there is an invasion of a right, which might have an effect upon the right of the plaintiff, if not asserted, nominal damages will be given where no actual damage is proved: *Paul* v. *Slason*, 22 Vt. 231; *Pastorius* v. *Fisher*, 1 Rawle (Penn.) 127. The rule is, that in all cases where a right is invaded, even though the damage is so small as not to be susceptible of estimation—infinitesimal, as it is called—the court will give nominal damages in recognition and support of the right: *Cory* v. *Silcox*, 6 Ind. 39.

All damages that are the natural and necessary consequence of a nuisance may be recovered under a general allegation of damage; but damages that, although the natural, are not a necessary, consequence, must be specially alleged, or no recovery can be had therefor. The rule may, perhaps, be stated thus: General damages are such as are the necessary consequence of an act, but damages that are the natural, although not the necessary, consequence of an act, are special, and must be specially averred: *Vanderslice* v. *Newton*, 4 N. Y. 130; *Griggs* v. *Fleckenstein*, 18 Minn. 92. Thus, in an action by a reversioner against one who shut off the access to a store owned by the plaintiff and leased to a tenant, by piling up lime, sand and other materials near the entrance thereto, so that the lime and sand were blown into the store and damaged the tenant's goods, and the access to the store being cut off so that his trade was destroyed, and he left the store, the plaintiff having failed to allege, in his declaration, the loss of a tenant as a consequence of the nuisance, it was held that no recovery could be had: *Furlong* v. *Polleys*, 30 Me. 491.

In an action for injuries to the freehold by excavations made near thereto, whereby a subsidence of the plaintiff's lands is caused, the measure is not what

other inhabitants of a certain district, was entitled by custom to use for domestic purposes, abstracted the water to such a degree as to

it would cost to replace the lot in its former condition, but the actual diminution in its value by reason of the defendant's acts: *McGuire* v. *Grant*, 20 N. J. Eq. 356; *Harney* v. *Sides, &c. Co.*, 1 Nev. 539.

For injuries to a person's house and grounds by reason of water diverted from its course by another, the measure of damages is the actual diminution in the value of the premises resulting from the wrongful diversion: *Chase* v. *N. Y. C. R. R. Co.*, 24 Barb. (N. Y.) 273. In the case of an injury to a water-course supplying a mill with motive power, by reason of obstructions placed therein, the owner of the mill may recover for all the damages sustained by him by reason of being deprived of water, not only by the obstruction, but also during its temporary necessary diversion for the removal of the obstruction: *Dayton* v. *Pease*, 4 Ohio (N. S.) 80. In an action to abate a nuisance, and for damages caused by digging a ditch on the plaintiff's lands, it was held that an order to abate the nuisance, and an award of damages sufficient to pay for filling the ditch, was erroneous, as the plaintiff could not recover prospective damages, and the award should only have been for the actual injury sustained: *De Costa* v. *Massachusetts, &c., Co.*, 17 Cal. 613. The reason for this is obvious; the ditch was the nuisance, and the abatement involved its filling by the defendant, and it was not proper for the court to punish the defendant by compelling him to fill the ditch, and pay the expense thereof to the plaintiff in addition. In an action to recover damages for a nuisance which temporarily injures the realty, and for a time prevents its use by the plaintiff, it was held that the measure of damages was the actual cost of restoring the buildings to their former condition, and the damage sustained by reason of being deprived of their use during the continuance of the nuisance: *Freeland* v. *Muscatine*, 9 Iowa, 461.

In an action by a reversioner for an injury done to his premises, the true measure of damages is the actual injury to the reversion: *Dutro* v. *Wilson*, 4 Ohio St. 101. Thus, in an action by a reversioner for cutting off the eaves of a building belonging to him and erecting a wall with a drip over his premises, it was held that the actual injury up to the time of the bringing of the action was the true measure of damage, and that, as repeated actions might be brought, evidence of the diminution of the market value of the estate could not be given.

In *Ludlow* v. *Yonkers*, 43 Barb. (N.Y.) 493, which was an action against a municipal corporation for the construction of a wall in such a negligent manner that it fell and injured the plaintiff's mill, it was held that the millowner was only entitled to recover the actual injury sustained by him, with interest from the time of the injury, and that, if rent was recoverable, it could only be recovered for such a period as was reasonably necessary to repair the premises. In *Kane* v. *Johnston*, 9 Bosw. (N. Y.) 154, the court held that, where a person's tenement and business were injured by a nuisance, a loss of anticipated profits from an illegal business cannot be recovered. But in this case no question was made but that such a recovery might be had where the business was legal, and such as was not opposed to public morals and public policy. In an action for the destruction of a bridge, it was held that the measure of damages was the value of the superstructure, and the loss of tolls during the time reasonably necessary to rebuild the bridge. The rule seems to be that, where the estate injured is actually devoted to a use that yields a profit to the owner, he is not only entitled to recover for the actual injury to the estate, but also such sum as compensates him for a loss of such profits during such period as is actually necessary to restore the property to its former condition. He cannot, however, sit down with folded arms and charge the defendant with loss during the period of his own inactivity. If a wrong has been done him, he is nevertheless bound to proper diligence himself to repair it, and during the period reasonably necessary for that purpose the law will give him full indemnity; but beyond that the loss is his own.

Neither can a person, who is not at the time when the injury is inflicted using his premises for any profitable purpose, recover damages for an injury which might have been suffered had the property been devoted to a use never contemplated by him. Damages are given as compensation for a loss actually suffered, and are intended to be measured by such a sum as the plaintiff ought to have, and the defendant ought to give, in view of all the circumstances, for the injury inflicted. But, in the absence of bad motives, of wantonness or malice, no more than actual compensation will be given: *Wooster* v. *Great Falls Manuf. Co.*, 41 Me. 159. Thus, in an action of trespass for cutting growing trees, although the actual value of the trees at the time of cutting may have been no more than for firewood, yet the recovery will not be restricted to their value for

render what remained insufficient for the inhabitants, it was held that the plaintiff might maintain an action, although he had not

that purpose, but a recovery may be had for the actual injury to the land by their cutting; and, in determining that question, all the circumstances, as well as the purpose for which the trees were designed to be used, may be considered: *Chipman* v. *Hibburd*, 6 Cal. 162.

In an action for injuries arising from the unlawful raising of a dam below the plaintiff's cotton mill, on the same stream, the operation of which was greatly impeded by back water, whereby the plaintiff's profits were greatly diminished, evidence of the profits of the manufacture was held admissible, as a basis upon which to estimate the damages, if not as an actual measure thereof: *Simmons* v. *Brown*, 5 R. I. 299. In all cases of this character the true measure of damages is the actual compensation which, in view of all the circumstances, the plaintiff ought to have for the injury (*Taber* v. *Hutson*, 5 Ind. 322); but if there are several defendants, some of whom are more culpable than the rest, yet, if they are found to be jointly liable for the injury, the damages should not be graduated by the difference in culpability, but such damages should be given against all of them, as the most culpable ought to pay: *Bell* v. *Morrison*, 27 Mass. 68. So, too, where damages result from two concurring causes, the party in fault is not exempted from full liability because he did not occasion the whole of it (*Ricker* v. *Freeman*, 50 N. H. 420); if he contributed in any measure to the injury, he may be charged with the whole injury, as much as though it had been occasioned by his individual act. There is no division of a wrong or contribution between wrongdoers.

In an action for an injury sustained by a livery stable keeper, by reason of the communication of the horse distemper to two of his horses by a horse brought by the defendant to his stable to be kept, the defendant knowing the diseased condition of his horse, the court held that the plaintiff was entitled to recover the profits he would have derived from the services of his horses during the period of their illness; and that while evidence of the profits he would probably have derived from them was not admissible definitely to fix the damage, yet that it was admissible as one of the means by which the jury might arrive at the proper measure of compensation: *Fultz* v. *Aycoff*, 25 Ind. 321; *Haines* v. *Ashfield*, 99 Mass. 540; *Albert* v. *Bleecker St. &c. R. R. Co.*, 2 Daly (N. Y. C. P.) 389. In *Gillett* v. *Western Railroad Co.*, 8 Allen (Mass.) 560, in an action for injuries to a horse by reason of a defect in a highway, the plaintiff was held entitled to recover the diminution in the value of the horse at the commencement of the action, and, in addition thereto, such sums as he had expended in its cure while under treatment, and a reasonable compensation for the loss of the use of the horse during the periods of its disability. Thus it will be seen that compensation for actual loss is the rule and measure of damages where there are no aggravating circumstances to increase them.

In an action for a nuisance, actual benefits to the plaintiff's estate therefrom cannot be considered, either in defence or in mitigation of damages: *Vinnel* v. *Vinnel*, 4 Jones (N. C.) 121. Thus, in *Francis* v. *Schoellkopff*, 53 N. Y. 152, the defendant offered evidence to prove that the rental value of the plaintiff's premises had been largely increased by reason of the erection of his tannery, which had called large numbers of people to that locality; but the court held that this evidence was not admissible, and could have no bearing upon the case in any possible view.

A lessee of lands may maintain an action for injuries to the possession by a nuisance, and may recover therefor such damages as he can show to his possessory right. Thus, in an action by the lessee of a livery stable against a person who laid gas pipes in the streets so imperfectly that the gas escaped therefrom through the ground and into the water of the well used by him in connection with the stable, rendering the water unfit for use, it was held that he might recover not only for the inconvenience to which he was thereby subjected, but also for expenses reasonably and properly incurred by him in attempts to exclude the gas from the well; but that he could not recover for injuries to his horses from drinking the water after he knew that it was so corrupted by the gas as to be unfit for that purpose: *Sherman* v. *Fall River, &c. Co.*, 2 Allen (Mass.) 524. So, too, a tenant at will of lands may recover for an injury to his possessory estate: *Foley* v. *Wyeth*, 2 *id.* 131.

It is held that inert water lying upon the surface of an estate, as well as the water with which the estate is charged, so long as it remains inert, is the property of him who owns the soil; yet, as water percolates by natural causes, and in obedience to natural laws, if an adjoining owner sees fit to excavate upon his own land he may do so, although the result be that the water in his neighbour's soil is completely exhausted: *Frazier* v. *Brown*, 12 Ohio St. 294. His wells or his springs may thereby be

himself suffered any personal inconvenience (*q*). So, too, an action may be maintained by a commoner for an injury done to his common, without proving actual damage; and, whenever there has been an obstruction to the exercise of a right of way, which, if acquiesced in for twenty years, would be evidence against the existence of the right, there is an injury in respect of which damages are recoverable, although there is no proof of actual pecuniary damage (*r*).

But, when the act of which the plaintiff complains has been done by the defendant on his own land, and the constant repeti-

destroyed, but no action lies for the injury: *Goodale* v. *Tuttle*, 29 N. Y. 466; *Mosier* v. *Caldwell*, 7 Nev. 363. So, too, one person may erect a solid wall around his estate and prevent the water therein from percolating through his neighbour's soil, as it otherwise would do, although thereby a neighbour's well is made dry and his supply of water is completely cut off, and it seems that the motive with which the act is done has no effect upon the question of liability: *Chatfield* v. *Wilson*, 28 Vt. 49; *Harwood* v. *Benton*, 32 *id.* 724; *Frazier* v. *Brown*, *ante*.

But this is only applicable to percolating or inert water; as to running streams, or watercourses upon the surface, the rule is different, and liability attaches for the sensible diversion of such water by trenches, wells or other means, even though the diversion results from percolation: *Delhi* v. *Youmans*, 45 N. Y. 363; *Dickinson* v. *Canal Co.*, 7 Ex. 282; *Pixley* v. *Clark*, 32 Barb. (N. Y.) 268.

There are a multitude of uses to which one may devote his own property that operates injuriously to another for which no damages are recoverable. Indeed, it may be said, that a man is never liable for the results of the proper exercise of a lawful act; all the injuries resulting therefrom are *damnum absque injuria*. They are not the subject of damage, for the reason that no right has been violated by their exercise; and, therefore, in the eye of the law, the person injured should neither have, nor the defendant pay, any compensation therefor. Thus, where a person excavating his own lands injured a cistern under the street, it was held that no liability existed against him: *Dubuque* v. *Malonee*, 9 Iowa, 450. So, too, where one in excavating upon his own land causes the walls of a building erected upon an adjoining lot to crack, and the building itself to fall into his pit, he being in the exercise of due care, no damages are recoverable therefor: *McGuire* v. *Grant*, 1 Dutch (N. J.) 356; *Thurston* v. *Hancock*, 12 Mass. 220; *Foley* v. *Wyeth*, 2 Allen (Mass.) 131. So, too, if a person owning lands adjoining the premises of another, upon which has been erected a palatial residence, erects upon his lands a cheap, unsightly building, which seriously annoys his neighbour, and impairs the value of his property, yet, so long as the building is not devoted to uses that make it a nuisance, no action lies therefor: *Barnes* v. *Hathorn*, 54 Me. 224. The reason is, that every person may do what he will with his own, so long as he does not trench upon the positive rights of another. His acts may be unneighbourly; they may be prompted by the most malicious motives, and for malicious purposes, yet, so long as he keeps within the scope of his legal rights, no action, either at law or in equity, will lie against him therefor: *Ross* v. *Butler*, 19 N. J. Eq. 294. The test of nuisance is not injury and damage simply, but injury and damage resulting from the violation of a legal right of another. If there is no right violated there is no nuisance, however much of injury and damage may ensue: *Mahan* v. *Brown*, 13 Wend. (N. Y.); *Chatfield* v. *Wilson*, 28 Vt. 49; *Frazier* v. *Brown*, 12 Ohio St. 294; *Smith* v. *Bowen*, 2 Dis. (Ohio) 153; but if a right is violated there is an actionable nuisance, even though no actual damage results therefrom: *Fisher* v. *Clark*, 41 Barb. (N. Y.) 327; *Pickard* v. *Collins*, 23 *id.* 444. While in the one case there is actual injury and damage, yet there is no legal injury, hence no right of action: *Quin* v. *More*, 15 N. Y. 432; *Kinsel* v. *Kinsel*, 4 Jones (N. C.) 149; while in the other, while there is no actual damage, yet there is legal injury, and consequently a right of action, the law imputing damage to sustain the right: *Pickard* v. *Collins*, 23 Barb. (N. Y.) 444; *Thurston* v. *Hancock*, 12 Mass. 220. Therefore, in all cases of nuisance, before the bringing of an action, it should first be ascertained whether a legal right has been violated; if so, a nuisance exists; if not, no nuisance exists; and, however great the damage, it is *damnum absque injurid*.

(*q*) *Harrop* v. *Hirst*, L. R., 4 Ex. 43; 38 L. J., Ex. 1.

(*r*) *Bower* v. *Hill*, 1 Bing. N. C. 549; 1 Sc. 533. *Ante*, p. 39.

tion of it, however long continued, would establish no prescriptive right against the plaintiff, there is no cause of action until some substantial perceptible damage has been sustained by the plaintiff. Proof of such damage in such a case is essential to the establishment of a cause of action. Thus, where a landowner digs in his own land, or the owner of the subsoil and minerals excavates his own freehold, there is no wrongful act, and no cause of action, until it is proved that the surface of the adjoining land has sunk down, or that the walls of a neighbouring house have cracked, or the foundations thereof have been displaced, or have given way, or that some actual perceptible damage has been done to the adjoining land or tenement (*s*).

Where the occupier of a field, who had a right to have a fence separating his field from the adjoining land repaired at the expense of the adjoining occupier, took in the horse of a neighbour for the night, and the horse got through the boundary-fence into the servient tenement, and fell into a ditch and was killed, it was held that the occupier of the dominant tenement was entitled to recover the full value of the horse (*t*). So, where the plaintiff brought an action against the defendant for the non-repair of the fences of the latter, whereby the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack, it was held that the damage was not too remote, and that there is no distinction between the smothering of cattle by the accidental falling of a hay-stack, and their being drowned by tumbling into a ditch (*u*). The defendant was the occupier of a close adjoining a

390 close occupied by the plaintiff, and was bound by prescription to maintain the fence between the closes so as to keep in the cattle in the plaintiff's close. The defendant's close was woodland; and he sold the fallage of the timber to *A*, continuing himself to occupy the close. *A* felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by *A*, and died in consequence. The court held that the damage was not too remote, and, consequently, that the defendant was liable to the plaintiff for the loss of the cows (*x*).

In cases of continuing nuisance, the jury cannot lawfully give damages in respect of any injury subsequent to the day of the commencement of the action; for every day that the nuisance

(*s*) *Backhouse* v. *Bonomi*, 9 H. L. C. 503.
(*t*) *Rooth* v. *Wilson*, 1 B. & Ald. 59. *Lee* v. *Riley*, *ante*, p. 129.
(*u*) *Powell* v. *Salisbury*, 2 Y. & J. 391.
(*x*) *Lawrence* v. *Jenkins*, L. R., 8 Q. B. 274; 42 L. J., Q. B. 147.

continues there is a fresh cause of action, in respect of which further damages are recoverable (*y*).

Remedy by injunction.—By the Supreme Court of Judicature Act, 1873, an injunction may be granted, either before, at, or after the hearing, to prevent any threatened or apprehended waste or trespass, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable (*z*). Where the right has been established in an action, and there is any reason to apprehend a repetition or a continuance of the injury complained of, there seems no reason why the court should not grant an injunction. The cases decided on the subject in the Court of Chancery before the passing of the Judicature Acts seems rather applicable to the question of granting an injunction before than after the hearing.

Remedy by injunction—Injunction to prevent trespasses.—The Court of Chancery would not grant an injunction against a temporary trespass by a wrong-doer, inflicting no permanent injury upon the property, and being only a source of temporary annoyance or discomfort, as there was an ample remedy in damages for such injuries, and the wrong-doer might at once be turned off the land (*a*). But, whenever trespasses had been repeated, an injunction was granted against the persevering wrong-doer (*b*); and a deliberate and unlawful invasion by one man of another

391 man's land for the purpose of a continuing trespass was considered a proper subject for an injunction. Thus, an injunction was granted where the defendant had laid water pipes under a highway, the soil of which was the property of the plaintiff (*c*). So, where a trespasser came upon land in the possession of the plaintiff or his tenants, and committed acts of destructive trespass, either by mining, or quarrying, or cutting down timber, without a colour, or shadow, or pretence of title, and the property might be destroyed before you could arrest his proceedings, there was a case for an injunction (*d*). Whenever, also, the trespass was of such a nature that irreparable injury would be caused by the repetition of it, and the defendant threatened to repeat it, an injunction would be

(*y*) See *ante*, p. 364.
(*z*) Sect. 25 (8).
(*a*) *Mortimer* v. *Cottrell*, 2 Cox, 205. *Att.-Gen.* v. *Hallett*, 16 M. & W. 581. *Cooper* v. *Crabtree*, 20 Ch. D. 589; 51 L. J., Ch. 189.
(*b*) *Coulson* v. *White*, 3 Atk. 21.
(*c*) *Goodson* v *Richardson*, L. R., 9 Ch. 221; 43 L. J., Ch. 790. *Allen* v. *Martin*, L. R., 20 Eq. 462.
(*d*) V.-C. Wood, *Talbot* (*Earl*) v. *Hope Scott*, 4 Kay & J. 113. *Thomas* v. *Oakley*, 18 Ves. 186. *Cowper* (*Earl*) v. *Baker*, 7 Ves. 128. *Lonsdale* (*Earl*) v. *Curwen*, 3 Bligh, 168, n. *Stanford* v. *Hurlstone*, L. R., 9 Ch. 116.

granted to restrain him from so doing. Thus, where the defendant had removed stones protecting the plaintiff's sea-wall, and an action of trespass had been brought, and damages recovered, and the defendant after that began again to remove stones, and by so doing exposed the plaintiff's land to inundation, the court granted an injunction (*e*). The court would also interfere, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on, or otherwise molesting, the owner's tenants in possession of the property, where the defendant was a pauper, and the wrongful acts were of such a nature that the recovery of damages would not constitute an adequate remedy (*f*). And, generally, in cases where irreparable injury would be caused before the right could be properly determined, the court would interfere by injunction to restrain trespasses by a stranger (*g*).

Remedy by injunction—Injunction to prevent nuisances.—The Court of Chancery has, from the earliest period, interfered by injunction to restrain the owner of land from so dealing with his property as to prejudice or destroy the rights of his neighbour, thereby enforcing the maxim, "*Sic utere tuo ut alienum non lædas.*" The foundation of this jurisdiction is that head of mischief alluded to by Lord Hardwicke—that sort of material injury to the comfort and enjoyment of property which requires the application of a power to prevent as well as remedy—an evil for which damages, more or less, would be given in an action (*h*). But, before the

(*e*) *Chalk* v. *Wyatt*, 3 Mer. 688.

(*f*) *Hodgson* v. *Duce*, 2 Jur., N. S. 1014.

(*g*) *London and North Western Rail. Co.* v. *Lancashire and Yorkshire Rail. Co.*, L. R., 4 Eq. 174. An injunction will not, as a rule, be issued to restrain the commission of a trespass, except where the person about to commit it is wholly irresponsible, and unable to respond in damages in a suit at law, or where irreparable mischief or injury will result therefrom, and the rules stated in the text prevail in our courts.

(*h*) *Att.-Gen.* v. *Nichol*, 16 Ves. 342. The jurisdiction of courts of equity to prevent or abate nuisances, is predicated upon the ground of preventing irreparable injury, c multiplicity of suits, and for the protection of rights. The right to pure air is a natural right, and is regarded as incident to land. Its sensible pollution by the exercise of a noxious trade, whereby the comfortable enjoyment of property is diminished, is a nuisance against which courts of equity will always, in proper cases, give relief: *Catlin* v. *Valentine*, 9 Paige's Ch. (N. Y.) 574; *Babcock* v. *New Jersey Stock Yard Co.*, 20 N. J. Eq. 294. Slight pollution, or such pollution thereof as is fairly incident to the ordinary use of property, are not regarded as creating actionable injuries (*Ross* v. *Butler*, 19 N. J. 294), because, otherwise, cities could not be built or business be carried on in large communities; but such interferences with its natural condition as are not fairly and reasonably incident to the ordinary use of property, that render the surrounding property physically uncomfortable by reason of the noxious mixtures communicated to it, is a nuisance, for which an action will lie at law for damages, and in equity for an injunction and damages: *Huckenstine's Appeal*, 70 Penn. St. 415; 10 Am. Rep. 170.

The production of mere inconvenience, resulting from the exercise of a trade, is not sufficient to constitute that trade a nuisance (*Barnes* v. *Hathorn*, 54 Me. 124); neither is the fact that it renders the location less eligible as a place of residence for people who pay high rents, or are of "dainty modes and habits of living" (*Ross* v. *Butler*, 19 N. J. Eq. 194); but the injury must be real and substantial, and such as impairs the ordinary enjoyment, physically, of the property within its sphere (*Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. Eq. 201); not measured by the standard incident to a dainty and luxurious mode of living, but according "to plain and simple

plaintiff can ask for an injunction restraining the defendant from using his own land or property in a way in which he would be

modes and habits" incident to persons of ordinary tastes and sensibilities: *Walter* v. *Selfe*, 4 Eng. Law & Eq. 20.

Necessarily, each case must stand upon its own special circumstances, and no definite rule can be given that is applicable in all cases; but when an appreciable interference with the ordinary enjoyment of property, physically, is clearly made out, as the result of a nuisance, a court of equity will never refuse to interfere, even though the actual injury resulting to the most injured is small, while the damage to the party complained of will be great by having his business stopped. Courts do not stop to balance conveniences if a substantial legal right is invaded by the unlawful exercise of a trade or use of property by another; the smallness of the damage on the one side or its magnitude on the other is not a fact ordinarily of any special weight, but if the right and its violation is clear, an injunction will issue regardless of consequences: *Webb* v. *Portland Manufacturing Co.*, 3 Sum. (U. S.) 334; *Reid* v. *Gifford*, Hopkins' Ch. (N. Y.) 225.

A person cannot go on and build extensive works and make heavy expenditures of money for the exercise of a trade or business that will invade the premises of another with smoke, noxious vapours, or noisome smells, to an unwarrantable or unlawful extent, and then, when called upon to desist, turn round and claim immunity for his trade or business, on the ground that to stop it would involve him in ruin (*Attorney-General* v. *Leeds*, L. R., 5 Ch. 583; *Tipping* v. *St. Helen's Smelting Co.*, 6 B. & S. 608; *Attorney-General* v. *Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 143); nor that it is a necessary result of carrying on his trade at all, and that he has adopted the most improved methods known to science, or which human skill has devised nor that his trade is a useful one (*Ryland* v. *Fletcher*, L. R., 1 Ex. 169), and beneficial to the community (*Beardmore* v. *Treadwell*, 7 L. T. (N. S.) 207), or to the nation (*Poynton* v. *Gill*, 1 Rolle's Abr. 140); or that, by bringing a large number of workmen into the neighbourhood, it has enhanced the value of the plaintiff's property (*Gile* v. *Stevens*, 13 Gray, 146; *Francis* v. *Schoellkoppf*, 53 N. Y. 156); for, although his trade may be a lawful one, and conducted with the highest regard to producing as little injury as possible: while it may be that the injury produced from it is a necessary incident to the exercise of the trade at all, and while to stop it may be injurious to him—may involve him in ruin even—yet these facts cannot protect him; if the plaintiff's rights are clear, and the nuisance conclusively established, his works must be stopped, regardless of consequences to him, "for he ought to have established his trade in great commons or waste places, away from great cities and human habitations." Neither will the fact that when he erected his works no houses were near, but that the plaintiff has come to his works, in any measure operate to protect him (*Rex* v. *Neil*, C. & P. 485; *Brady* v. *Weeks*, 3 Barb. (N. Y.) 156; *Catlin* v. *Valentine*, 9 Paige (N. Y.) 575), for he should have taken the precaution to purchase enough of the surrounding property when he built his works to prevent the possibility of such results. By setting up his trade in the suburbs of a town, away from human habitations, he could not preclude others from coming there to occupy their lands for any of the ordinary or lawful purposes to which they might desire to devote it, and he, by neglecting to purchase enough of the surrounding property to protect him from such contingencies, must take the consequences of his folly, and move his works still further into uninhabited districts: *Brady* v. *Weeks*, 3 Barb. (N. Y.) 156; *Catlin* v. *Valentine*, 9 Paige (N. Y.) 575.

While, in determining the question of nuisance, the fact that the locality is in a measure given up to noxious trades will not deprive a party of his remedy either at law or in equity against one whose works are an actual nuisance (*Cleveland* v. *Citizens' Gas Light Co.*, 20 N. Y. 201; *McKeon* v. *See*, 4 Robt. (N. Y.) 449; *Milligan* v. *Etias*, 19 Abb. Pr. N. S. (N. Y.)), yet, if the locality is wholly or principally given up to trades of a noxious character, and the plaintiff has himself devoted a part of his premises to business purposes, which in a measure contribute to the nuisance, he cannot, by using a portion of his building for a dwelling, acquire any superior right over other property owners in the neighbourhood: *Gilbert* v. *Showerman*, 23 Mich. 448; *Doellner* v. *Tynan*, 31 How. Pr. (N. Y.) 176. The locality is always to be considered as well as the uses to which it is devoted, but it in no measure operates as a defence, unless it has been given up to noxious trades for the prescriptive period (*Huckenstine's Appeal*, 70 Penn. St. 415; 10 Am. Rep. 170); nor then, if the owner of the nuisance complained of has not acquired a prescriptive right to carry on the trade there, if it sensibly, or appreciably, increases the nuisance existing in the locality: *Huckenstine's Appeal*, 70 Penn. St. 415; *Robinson* v. *Baugh*, 31 Mich. 291. Neither does a prescriptive right

clearly entitled to use it, but for some dominant right on the part
392 of the plaintiff, the latter must establish such last-named right,

to carry on a noxious trade warrant an increase of the business so as to increase the nuisance: *Bankhardt* v. *Houghton*, 27 Beav. 425; *Lawlor* v. *Potter*, 1 Hannay (N. B.) 328; *Tipping* v. *St. Helen's Smelting Co.*, 6 B. & S. 608. The right is only commensurate with the use, and though a noxious trade has been carried on for a century, in a given locality, which was productive of no special injury, yet if, by reason of an increase of the business or a change in its character or use, it comes to produce injury, or becomes a nuisance, the party is liable for all excess of injury beyond his right, and equity to that extent will enjoin him.

A party may, by laches, deprive himself of an equitable remedy against a nuisance. Thus, if a party sleeps on his rights and allows a nuisance to go on without remonstrance, or rather without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief, particularly until the right has first been settled at law: *Carlisle* v. *Cooper*, 20 N. J. Eq. 599; *Morris, &c. Railroad Co.* v. *Prudden, id.* 530; *Goodwin* v. *Canal Co.*, 18 Ohio St. 169. And where the delay is also coupled with an acquiescence, he will be deprived of all equitable relief (*Bankhardt* v. *Houghton*, 27 Beav. 425), and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law, or even to prevent the recovery of a judgment obtained therefor in a court of law: *Houghton* v. *Bankhardt, ante; Hentz* v. *Long Island Railroad Co.*, 13 Barb. (N. Y.) 647; *Haines* v. *Taylor*, 2 Ph. 209; *Society* v. *Low*, 17 N. J. Eq. 19; *Gray* v. *Railroad Co.*, 1 Grant's Cas. (Penn.) 412; *Swaine* v. *Seamens*, 9 Wall. (U. S.) 254; *Irvine* v. *Irvine, id.* 618.

A party affected by a nuisance cannot sleep upon his rights, and delay, and temporize, and excuse himself upon the ground that he expected some one else, affected by the nuisance, to move in the matter. It is his business to protect and look out for his own rights: *Morris* v. *Prudden*, 20 N. J. Eq. 530; *Attorney-General* v. *Railroad Co.*, 24 N. Y. 49. But the party will not be estopped from ultimate relief in a court of equity by mere delay after his rights have been settled at law, if he has done nothing amounting to active acquiescence in the nuisance: *Meigs* v. *Lester*, 23 N. J. Eq. 199.

As to what constitutes an acquiescence in a nuisance which will deprive a person of equitable relief, as well as to constitute an equitable estoppel, so that a court of equity will restrain a party from proceeding at law to recover damages arising from a nuisance, it may be said that mere delay for several years in bringing an action will not of itself constitute an acquiescence. Neither will an actual assent to the erection of the nuisance, and active participation in its erection, unless the party had reason to suppose that the erection would be a nuisance. The acquiescence must be such that, to allow the party to proceed to recover damages for the nuisance would operate as a fraud upon the defendant. The mere standing by and seeing the works going on without objection is not sufficient. The business must be such that, in its very nature, it is a nuisance. If it is only a business which may or may not become a nuisance, acquiescence is no estoppel: *Bankhardt* v. *Houghton*, 27 Beav. 430; *Meigs* v. *Lester*, 20 N. J. Eq. 199; *Carlisle, &c.* v. *Cooper*, 20 *id.* 599; *Heiskell* v. *Gross*, 7 Phila. (Penn.) 317. Nor where the erection is, in fact, a nuisance, if it has been productive of no damage: *Heiskell* v. *Gross, ante; Corning* v. *Troy Nail, &c. Co.*, 34 Barb. (N. Y.) 485; 40 N. Y. 191. But if the thing or erection is, of itself, or in the use of which it is to be devoted, in its nature a nuisance, assent thereto or active acquiescence therein is such an acquiescence as will deprive a party of an equitable remedy (*Helms* v. *McFadden*, 18 Wis. 191); and, after the erection is completed, and by its use has become a nuisance, if the party, without taking measures to stop the nuisance by suit, allows the owner to go on and make large additions thereto, or expend money upon the same in its repair, this will operate as an equitable estoppel, which will warrant a court of equity in restraining proceedings at law for damages arising from the nuisance: *Attorney-General* v. *R. R. Co.*, 24 N. J. Eq. 49; *Heiskell* v. *Gross*, 7 Phila. (Penn.) 317. But in order to constitute such an estoppel there must be "wrong on one side and freedom from blame on the other:" *Batchelder* v. *Sanborn*, 4 Foster (N. H.) 474. A person who acts in ignorance of his rights will not generally be prejudiced thereby: *Lewis* v. *San Antonio*, 7 Tex. 288; *Dickson* v. *Green*, 24 Miss. 612; *Calhoun* v. *Richardson*, 30 Conn. 210; *Mitchell* v. *Leavett, id.* 587. The acts of the party affected by the nuisance must have been such as to make any attempt on his part to stop the nuisance or recover damages therefrom a positive fraud. Therefore, the thing must, in its very nature, have been a nuisance, and of such a charac-

and show to the satisfaction of the court that it has been infringed, and that he has sustained such injury therefrom as would entitle

ter that the party assenting was charged with notice of the full extent of its noxious character, and the probable injury that would arise therefrom. If the thing was something which might or might not become a nuisance, according to the circumstances of its use, he would not be estopped unless he knew the precise method of its use, and was fairly chargeable with notice of its results. So, too, if the party making the erection has done or said anything in reference to his use of the property, and its results, that has misled the party, no estoppel can be asserted, or if the trade or business has been carried on in a small way, without injurious results, a neglect to remonstrate against an enlargement of the works will not amount to an estoppel, unless the party was fairly chargeable with knowledge that their use as enlarged would result in an actual nuisance. So, too, if the only acquiescence claimed is in allowing the party to go on and make expenditures in his business without expenditures in erections or repair of the same, the courts will not generally treat that as such an acquiescence as deprives a party of equitable relief after the right has been determined at law.

A party must not sleep upon his rights, when such delay operates as an acquiescence in a wrongful act injurious to him, particularly when, by reason of such delay, the other party goes on and expends money in his erections and about his business, and is thus subjected to loss that proper and timely action on the part of the plaintiff would have prevented. If he does, when he goes into a court of equity he will be told that he has come too late, and is without equitable relief: *Attorney-General* v. *R. R. Co.*, 24 N. J. Eq. 49; *Meigs* v. *Lester*, 20 N. J. Eq. 199. But mere delay, so long as the parties remain *in statu quo*, will not deprive a party of equitable relief: *Carlisle* v. *Cooper*, 20 N. J. Eq. 599; *Heinkell* v. *Gross*, 7 Phil. (Penn.) 317; 3 Phil. (Penn.) 363. The question as to whether a delay, long or short, will operate to estop an assertion of a right, depends entirely upon what has been done by the parties, whether the delay has changed their status.

In this country unless the party has done something to deprive himself of an equitable remedy to restrain a continuous nuisance, after the question of nuisance has been determined in a court of law, an injunction will be granted, even though no actual damage results therefrom: *Webb* v. *Portland Manufacturing Co.*, 3 Sum. (U. S.) 485; *Reid* v. *Gifford*, Hopkins' Ch. (N. Y.) 416; *Goodson* v. *Richardson*, L. R., 9 Ch. App. 225; *Wilts* v. *Waterworks Co.*, *id.* 465; *Bassett* v. *Company*, 43 N. H. 578. But if the injury is trifling, and the nuisance temporary, and the party has an adequate remedy at law, the courts will sometimes refuse to interfere when the inconvenience and damage resulting to the defendant will be much greater by its interference than the injury to the plaintiff will be if the remedy is denied: *Richards* v. *Phœnix Co.*, 57 Penn. St. 294; *Huckenstine's Appeal*, 70 *id.* 190; *Cooke* v. *Forbes*, 5 L. R. 166. But, if the nuisance is a constantly-recurring grievance, the court will interfere, as a matter of course, to prevent interminable litigation and a multiplicity of suits: *Parker* v. *Winnepisogee Co.*, 2 Black. (U. S.) 565; *Reid* v. *Gifford*, Hopkins' Ch. (N. Y.) 146; *Pollitt* v. *Long*, 58 Barb. (N. Y.) 20; *Gardner* v. *Newburgh*, 2 Jones, Ch. (N. Y.) 162; *Case* v. *Haight*, 3 Wend. (N. Y.) 632; *Arthur* v. *Case*, 1 Paige's Ch. (N. Y.) 417; *Belknap* v. *Trimble*, 3 *id.* 577; *Corning* v. *Troy Nail, &c. Co.*, 40 N. Y. 191; 34 Barb. (N. Y.) 485.

The acts of several persons acting separately and without concert, and entirely independent of each other, may together constitute a nuisance when the acts of either one alone would not create it, and such parties may be joined as defendants in a bill for an injunction: *Chipman* v. *Palmer*, 77 N. Y. 51.

It would be impossible to give all the instances in which courts of equity have interfered or refused in cases of nuisance. It is enough to say that when the right is clear, and the nuisance established, a court of equity will always interfere, if the nuisance results from an unlawful act (*Rochester* v. *Curtis*, Clarke's Ch. (N. Y.) 336), is continuous in its nature (*Pollitt* v. *Long*, 58 Barb. (N. Y.) 20; *Corning* v. *Troy Nail, &c. Co.*, 40 N. Y. 191), or if only temporary, if it is not adequately compensable in damages: *Reid* v. *Gifford*, 8 Hopkins' Ch. (N. Y.) 146. Injunctions have been granted to prevent the erection of slaughter-houses in the vicinity of dwellings, even where the neighbourhood had been in a measure given up to trades of a noxious character (*Kelt* v. *Lindsay*, 17 F. C. (Sc.) 677; *Davidson* v. *Oliphant*, *id.* 491); to prevent the continuance of the business of slaughtering cattle in the vicinity of dwellings, even when the slaughter-house was erected before any dwellings were erected in the vicinity (*Brady* v. *Weeks*, 3 Barb. (N. Y.) 156; *Catlin* v. *Valentine*, 9 Paige's Ch. (N. Y.) 575); to restrain the erection of glue works (*Charity* v. *Riddle*, 14 F. C. (Sc.) 237); of works for the preparation of blood as

an ingredient for Prussian blue (*Jamieson* v. *Hillcote*, 12 F. C. (Sc.) 424); of melting-houses and fat boiling establishments (*Peck* v. *Elder*, 3 Sandf. (N. Y.) 126); bone boiling establishments (*Meigs* v. *Lester*, 20 N. J. 199); establishments for the preparation of tripe (*Farquhar* v. *Watson*, 17 F. C. (Sc.) 692); for the manufacture of gas (*Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. 201; *Broadbent* v. *Imperial Gas Co.*, 7 D. G. & M. 700); cattle yards (*Babcock* v. *N. J. Stock Yard Co.*, 20 N. J. 296); the burning of bricks near dwellings (*Fusilier* v. *Spalding*, 2 La. 773); planing mills emitting dense volumes of smoke (*Duncan* v. *Hayes*, 22 N. J. 23); potteries (*Ross* v. *Butler*, 20 N. J. 294); the use of mineral coal as fuel (*Campbell* v. *Seaman*, 63 N. Y. 568); the burning of lime kilns (*Hutchins* v. *Smith*, 63 Barb. (N. Y.) 282); the maintenance of livery stables near dwellings, impairing their comfort by noxious stenches, noise and drawing flies to the vicinity (*Aldrich* v. *Howard*, 4 Ames (R. I.) 93); a turpentine distillery (*Simpson* v. *Justice*, 8 Ired. (N. C.) 115); the carrying on of noisy trades near a dwelling at unreasonable hours (*Dennis* v. *Eckhardt*, 54 Penn. St. 274); or so as to impair its comfortable enjoyment (*Ball* v. *Ray*, L. R., 8 Ch. 467); or so as, by agitating and varying sounds and motions, to produce actual injury to property (*McKeon* v. *See*, 51 N. Y. 571); or the performance of brass bands in the vicinity of dwellings, collecting crowds and impairing the comfortable enjoyment of property (*Walker* v. *Brewster*, L. R., 5 Eq. 25; *Inchbald* v. *Barrington*, L. R., 4 Ch. 388); or a regatta near a dwelling collecting a crowd (*Bostock* v. *North Staffordshire R. R. Co.*, 19 Eng. Law & Eq. 449); or running railroad cars near a church on the Sabbath, and letting off steam, blowing the whistle and ringing the bell so as to disturb divine worship there, and injure the value of the property for church purposes (*First Baptist Church, &c.* v. *R. R. Co.*, 5 Barb. (N. Y.) 79); the pollution of water (*Holsman* v. *Boiling Spring Bleaching Co.*, 1 McCarter (N. J.) 342) so as to impair its use for domestic purposes (*Vedder* v. *Vedder*, 1 Den. (N. Y.) 357), or manufacturing purposes (*Carhart* v. *Auburn Gas Light Co.*, 23 Barb. (N. Y.) 497), or so as to cause the emission of noxious smells (*Attorney-General* v. *Stewart*, 20 N. J. Eq. 415; *Babcock* v. *N. J. Stock Yard Co.*, 20 N. J. 296), or so as to destroy it for the purpose of furnishing it for domestic use (*Goldsmith* v. *Tunbridge Wells*, L. R., 1 Ch. App. 161); or so as to injure the navigability of the stream (*Philadelphia* v. *Gilmartin*, 71 Penn. St. 140), or so as to impair the value of wharf property (*Hudson R. R. Co.* v. *Loeb*, 7 Robt. (N. Y.) 415); and, in fact, it may be said that a court of equity has concurrent jurisdiction with a court of law in all cases of actual nuisance, and whatever is regarded as a legal nuisance, producing injury to property or rights, will, in a proper case for equitable relief, be restrained by it: *Hudson R. R. Co.* v. *Loeb*, 7 Robt. (N. Y.) 415. To enumerate all the special instances would be an endless as well as utterly useless task, for the fact that a nuisance has been restrained in one case furnishes no reason why it should be refused or granted in another, as each case must stand upon its own facts, circumstances, and equities, and no definite or precise standard can be given. But in all cases where the right is clear, the nuisance established, and there is nothing in the conduct of a party that disentitles him to relief, and there is not a complete and perfectly adequate remedy at law, a party may always apply to a court of equity with the fullest confidence of receiving all the relief which, under the circumstances of the case, it can afford: *Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. 201.

The same jurisdiction is exercised over nuisances relating to interferences with rights to water as to other nuisances, and a court of equity will interfere to restrain the diversion of water from a mill (*Webb* v. *Portland Manufacturing Co.*, 3 Sumner (U. S.) 334; *Reid* v. *Gifford*, Hopkins' Ch. (N. Y.) 146, *Cott* v. *Lewiston*, 36 N. Y. 217; *Crocker* v. *Bragg*, 10 Wend. (N. Y.) 260; *Gardner* v. *Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Corning* v. *Troy Nail, &c. Co.*, 34 Barb. (N. Y.) 488), or from the lands of another (*Crocker* v. *Bragg*, 10 Wend. (N. Y.) 260), or to prevent an unlawful or excessive use of water (*Marble and Slate Co.* v. *Adams et al.*, 46 Vt. 434; *Lyon* v. *McLaughlin*, 32 *id.* 423; *Coe* v. *Winnepiseogee Lake Co.*, 37 N. H. 255; *Wright* v. *Moore*, 38 Ala. 593; but *contra*, see *Sprague* v. *Rhodes*, 4 R. I. 301), or to prevent its wrongful detention (*Pollitt* v. *Long*, 58 Barb. (N. Y.) 55), or to prevent its unnatural and improper discharge upon lower lands (*Bemis* v. *Upham*, 13 Pick. (Mass.) 169; *Ballou* v. *Inhabitants*, 4 Gray (Mass.) 324; *Potier* v. *Burden*, 38 Ala. 593), or to prevent its being raised so as to flood another's land (*White* v. *Forbes*, Walk. (Mich.) 112), or so as to cut off the drainage of his lands (*Bassett* v. *Company*, 43 N. H. 578), or so as to destroy his wells or springs, or so as to make his land wet and spongy (*Bassett* v. *Company*, 43 N. H. 578), or so as to cause water to percolate into his cellar (*Wilson* v. *City of New Bedford*, 108 Mass. 261), or so as to impair the quality of the water for manufacturing or other purposes (*Carhart* v. *Auburn Gas Light Co.*, 22 Barb. (N. Y.) 497), and, generally, in all cases where by the use of

water a legal right is invaded, which is of a continuous nature, or threatens to be continuous, and the injury is irreparable, or there is no proper and adequate redress in a court of law, equity will interfere, not only to settle the rights, but to restrain the wrong, and fix the damages resulting from the nuisance: *Lyons* v. *McLaughlin*, 32 Vt. 423. But where there is an ample remedy at law, equitable jurisdiction will not be exercised until after verdict: *Laney* v. *Jasper*, 39 Ill. 46. But because he has a remedy at law for a nuisance, he will not necessarily be denied an injunction to restrain its continuance: *McGinness* v. *Adriatic Mills*, 116 Mass. 177.

So, too, equity will restrain excavations in the adjoining soil of another, so as to prevent the falling away of another's soil (*Dent* v. *Auction Mart Co.*, 35 L. J. Ch. 555), where no burdens that materially increase the lateral pressure have been placed thereon (*Richardson* v. *Vermont Central Railroad Co.*, 25 Vt. 438; *Hunt* v. *Peake*, Johns. Ch. (Eng.) 710), and will interfere even where buildings are standing upon the land if it appears that they do not sensibly add to the lateral pressure. So, too, where land is directly or indirectly dependent upon other land for support equity will prevent excavations that will cause that land to subside so as to injure lands lying adjoining thereto: *Farrand* v. *Marshall*, 19 Barb. (N. Y.) 380. But where the soil has been removed adjoining the lands of another, and replaced by an artificial support, no right exists for the support of such artificial structure or wall; and a court of equity will not, except where the right is given by contract, express or implied, or by grant, interfere to prevent excavations in the adjoining soil that threaten even the destruction of such wall or artificial support, or the buildings erected thereon: *Panton* v. *Holland*, 17 Johns. (N. Y.) 92; *La Sala* v. *Holbrook*, 4 Paige, Ch. (N. Y.) 163. So a court of equity will interfere to prevent a removal of minerals that will cause a subsidence of or injury to the surface, even though there are buildings thereon, when they do not sensibly increase the vertical pressure, unless the right is expressly given by deed. But if the party owning the surface has erected buildings thereon that sensibly increase the pressure, he is not entitled to relief as to them. So, too, where buildings adjoining each other have leaned upon each other for support for the prescriptive period to the knowledge of the parties, either party will be restrained. So where houses have been erected by the same owner, mutually dependent upon each other for support, and neither capable of standing without the aid of the other, and the houses are sold to different persons, either party will, so long as the walls are sufficient for that purpose, be restrained from pulling down his house to the injury of the other. But when the houses or walls fall into decay and cease to yield proper support or to be suitable for that purpose, the easement ceases: *Partridge* v. *Gilbert*, 15 N. Y. 601.

So, too, equity will interfere to prevent any unreasonable or unwarrantable use of or interference with party-walls by one owner to the injury and detriment of the other, where such use or interference weakens the wall or renders it in any measure less safe than formerly, or from devoting it to a use, or making such alterations therein or additions thereto as conflict with the rights of the other owner, and as he has no right to make, when the damage so inflicted is not properly compensable at law: *Phillips* v. *Boardman*, 4 Allen (Mass.) 147.

Equity will interfere to protect a special franchise conferred by the legislature or acquired by prescription, and will prevent individuals or corporations from doing any act that violates in any measure the privileges conferred by the franchise. And as such privileges are not susceptible of actual valuation in money, and as their value is principally dependent upon exclusive and uninterrupted exercise, courts will always interfere by injunction for their protection, when the act complained of is an actual invasion or violation of the rights covered by the franchise: *Enfield* v. *Hartford*, 17 Conn. 40; *Lucas* v. *McBlair*, 12 Gill. & J. (Md.) 1; *Boston* v. *Salem*, 2 Gray (Mass.) 1; *McRoberts* v. *Washburne*, 10 Minn. 23; *Livingston* v. *Ogden*, 4 Johns. Ch. (N. Y.) 48. The right need not be first settled at law, as the legislative grant is to be respected, and the only question is whether its provisions have been interfered with: *Piscataqua Bridge Co.* v. *New Hampshire, &c.*, 7 N. H. 35.

Thus, the owner of a ferry (*McRoberts* v. *Washburne*, 10 Minn. 23; *Beckley* v. *Learn*, 3 Oregon, 470; also *id.* 544; *Piatt* v. *Covington Br. Co.*, 8 Bush (Ky.) 31; *Broadway Ferry Co.* v. *Hankey*, 31 Md. 346), a toll bridge (*Enfield Br. Co.* v. *Hartford Br. Co.*, 17 Conn. 40; *Charles River Br. Co.* v. *Warren Br. Co.*, 6 Pick. (Mass.) 376), a turnpike (*Newburgh* v. *Miller*, 5 Johns. Ch. (N. Y.) 101; *Croton* v. *Ryder*, 1 *id.* 611; *Auburn* v. *Douglass*, 12 Barb. (N. Y.) 553), a railroad (*N. Y. & H. R. Co.* v. *42nd St. R. R. Co.*, 50 Barb. (N. Y.) 235; *South Carolina R. R. Co.* v. *Columbia R. R. Co.*, 13 Rich. (S. C.) 339; *Brooklyn R. R.* v. *Coney Island R. R. Co.*, 35 Barb. (N. Y.) 364), or any other special franchise conferring special privileges and franchises, is at all times entitled to equitable protection when those special rights or privileges are invaded by the unlawful act of another; and a court of equity will always exercise jurisdiction over such cases and determine both the

him to substantial damages (*i*). The court will not interfere to protect a dry, strict, legal title, merely because the legal right has been infringed. It must be shown that some actual damage has been done or threatened, in order to lay a ground for relief (*k*).

The courts will, by injunction, prevent the continuance of a nuisance on one man's land to the injury or annoyance of another (*l*). An injunction will be granted, in certain cases, to prevent the fouling of a stream by pouring into it the contents of sewers, and the refuse of dye-houses and manufactories (*m*); or to prevent a nuisance caused by the fouling of a canal by taking water from a stream polluted by sewage, although the pollution of the stream was not caused by the proprietors of the canal (*n*); also to prevent the burning of bricks (*o*), the erection of coke-ovens (*p*) and densely-

question of right, invasion and damage: *Gates* v. *McDaniel*, 2 Stew. (Ala.) 211; *Livingston* v. *Van Ingen*, 9 Johns. (N. Y.) 507.

So, too, courts of equity will always exercise jurisdiction in cases of natural franchise, or special franchise acquired by long user. Thus, the owner of lands upon a navigable stream, whose title extends to low-water mark, is regarded as possessed of a natural franchise, a special privilege over that portion of the stream covered by his title, subject only to the easement of navigation. By virtue of this privilege, he may erect wharves for his own use, or for his own profit, taking care not to materially obstruct navigation; and in the exercise of this right he will be protected against the unlawful interference of others by injunction: *Del. & Hud. Canal Co.* v. *Lawrence*, 16 Hun. 154. So, too, a person, by long exercise of the exclusive right of fishery in a public river, may acquire a right to fish there of which he cannot be deprived, and in the exercise of which he will be protected. So, too, on public streams, where the owner of the banks owns also the bed of the stream, unless otherwise provided by special law, he has the exclusive right of fishing in that portion of the river, and this is a right which a court of equity will protect: *Chapman* v. *Oshkosh R. R. Co.*, 33 Wis. 639.

Generally, when the answer denies the nuisance, and all the equities of the plaintiff's bill, the court will dissolve the preliminary injunction: *Finnegan* v. *Lee*, 18 How. Pr. (N. Y.) 186; *Gould* v. *Jacobson*, *id.* 158; *Manhattan Gas Light Co.* v. *Barker*, 7 Robt. (N. Y.) 156; *Middletown* v. *Roundbout R. R. Co.*, 43 How. Pr. (N. Y.) 481; *Rhea* v. *Forsyth*, 37 Penn. St. 503; *Rayle* v. *Indianapolis R. R. Co.*, 32 Ind. 269; *Conolly* v. *Conger*, 40 Ga. 229; *De Godey*, 39 *id.* 157; *Winslow* v. *Hudson*, 21 N. J. 172; *Youngs* v. *Shepard*, 44 Ala. 315; *Miller* v. *McDougall*, 44 Miss. 682; *New* v. *Wright*, *id.* 202; *Brown* v. *Haskins*, 45 *id.* 183; *Edwards* v. *Banksmith*, 35 Ga. 213; *Johnson* v. *Allen*, *id.* 252; *Murray* v. *Elston*, 23 N. J. 27; *Peterson* v. *Parrott*, 4 W. Va. 44; but this is not necessarily the case, as if the court is satisfied that a nuisance is being, or is likely to be, committed, which will produce irreparable injury to the plaintiff if allowed to go on, and which is likely to be consummated before a hearing upon the merits can be had (*Coker* v. *Birge*, 9 Ga. 425), or if the act complained of will operate a total or even partial destruction of the plaintiff's right (*R. R. Co.* v. *R. R. Co.*, 49 Me. 392; *Smith* v. *Fitzgerald*, 24 Ind. 316; *Van Bergen* v. *Van Bergen*, 3 Johns. Ch. (N. Y.) 282), or if the act, if in fact a nuisance, will, if allowed to go on, involve the defendant in serious pecuniary loss, the court will retain the injunction until final hearing for the protection of the right.

(*i*) *Elmhirst* v. *Spencer*, 2 Mac. & G. 51. *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 238; 35 L. J., Ch. 555.

(*k*) *Wandsworth Board of Works* v. *London and South Western Rail. Co.*, 31 L. J., Ch. 855. See *Lingwood* v. *Stowmarket Paper Co.*, L. R., 1 Eq. 77.

(*l*) *Oldacre* v. *Hunt*, 19 Beav. 489. *Inchbald* v. *Robinson*, and *Inchbald* v. *Barrington*, L. R., 4 Ch. 388.

(*m*) *Wood* v. *Sutcliffe*, 2 Sim., N. S. 163. *Att.-Gen.* v. *Borough of Birmingham*, 4 K. & J. 528.

(*n*) *Att.-Gen.* v. *Bradford Canal*, L. R., 2 Eq. 71. And see *Att.-Gen.* v. *Richmond*, *ib.* 306; 35 L. J., Ch. 597.

(*o*) *Walter* v. *Selfe*, 4 De G. & S. 321; 20 L. J., Ch. 433.

(*p*) *Semple* v. *London and Birmingham Rail. Co.*, 1 Rail. Ca. 120.

smoking chimneys (*q*), and the carrying on of gas-making or any noisome trade, so as seriously and materially to interfere with the ordinary comfort and enjoyment of a neighbouring dwelling-house; or to injure the trees or vegetation of the neighbouring fields (*r*); to prevent the use of such heavy steam-rollers on a road as to crush or damage gas-pipes lawfully laid under the road, there being no statutable authority for the use of such rollers (*s*). But the court will not interfere in any case, unless some serious inconvenience has been sustained, or some actual damage done or threatened (*t*). For, it must be shown either that there is imminent danger of a substantial kind, or that the injury that is apprehended would be irreparable (*u*). Nor will the court interfere where the injury, in itself trifling, will shortly be abated by the operation of an Act of Parliament (*x*). If the injury is accidental, or temporary and occasional only, and not likely to become more frequent, or to be

393 exceptional in amount, such as arises from the storage of inflammable materials, the person complaining will be left to his action for damages (*y*). It is no answer that the removal of the nuisance is a task of great difficulty, though that may be ground for suspending the injunction for a period (*z*). The injunction will be enforced by sequestration, if necessary (*a*).

Remedy by injunction—Injunction against local boards to prevent nuisances.—A local board, under the Public Health Act, 1875, causing a nuisance by any act which, apart from the statute, would have given a cause of action to any person, may be restrained by injunction, unless they can justify under the statute, but if they do not act but merely neglect to perform their duty of providing proper drainage, the only remedy is *mandamus* (*b*); nor can the local board be compelled by injunction to restrain third parties from committing a nuisance. But where a third party had entered into an agreement with a local board by which he was allowed to use certain pipes for the purpose of passing surface water, and he allowed sewage to pass through, it was held that an

(*q*) *Sampson* v. *Smith*, 8 Sim. 272.
(*r*) *Imperial Gas, &c. Co.* v. *Broadbent*, 7 H. L. C. 600. *Haines* v. *Taylor*, 10 Beav. 75. *Crump* v. *Lambert*, L. R., 3 Eq. 409.
(*s*) *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbotts, Kensington*, 15 Q. B. D. 1; 54 L. J., Q. B. 414.
(*t*) *Wandsworth Board of Works* v. *London and South Western Rail. Co., supra.* As to prospective damage, see *Goldsmid* v. *Tunbridge Wells Commissioners*, L. R., 1 Ch. 349; 35 L. J., Ch. 382.
(*u*) *Fletcher* v. *Bealey*, 28 Ch. D. 688; 54 L. J., Ch. 424.
(*x*) *Att.-Gen.* v. *Gee*, L. R., 10 Eq. 131.
(*y*) *Cooke* v. *Forbes*, L. R., 5 Eq. 166. *Swaine* v. *Great Northern Rail. Co.*, 4 De G., J. & S. 211.
(*z*) *Att.-Gen.* v. *Colney Hatch Asylum*, L. R., 4 Ch. 146; 38 L. J., Ch. 265.
(*a*) *Spokes* v. *Banbury Board of Health*, L. R., 1 Eq. 42; 35 L. J., Ch. 105.
(*b*) *Glossop* v. *Heston and Isleworth Local Board*, 12 Ch. D. 102; 49 L. J., Ch. 89. *Att.-Gen.* v. *Dorking Guardians*, 20 Ch. D. 595; 51 L. J., Ch. 585. See also *Att.-Gen.* v. *Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108.

injunction would lie against the local board, since they could stop the pipes if they wished (*c*).

Remedy by injunction to prevent nuisances—Acquiescence precluding relief.—In some cases it has been held to be the duty of a person seeing a nuisance in progress, and having the power of abating it and stopping it, to give notice to the person erecting the nuisance of his intention to object; and it is clear that a person may so encourage that which he afterwards complains of as a nuisance, as to preclude him from any claim to an injunction (*d*). If a person sees a building in progress of erection which, when completed, must necessarily darken his windows, and nevertheless allows the building to be completed, and finished and decorated at great expense, without making any protest or complaint, or taking any proceedings against the wrong-doer, the court will not interfere by injunction to compel the pulling down of the building, but will leave the complainant to his remedy in damages (*e*). But acquiescence in the erection of injurious buildings, or of noxious works, while they produce little injury, will not deprive the person so acquiescing of his right to an

394 injunction if the nuisance is increased and becomes productive of more serious damage; otherwise it would follow that a partial obscuration of ancient lights might be followed by their total destruction, and that an easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable and natural consequence of the use of the easement. Nor can a prescriptive right be claimed, it seems, in such a case—at all events, unless there has been a continuance of sensible damage for the requisite period (*f*).

If a person has acquiesced in the erection of chemical or smelting works, in ignorance of the nuisance that will arise from them when they are put into operation, the acquiescence in the erection is no acquiescence in the nuisance arising from them, and will not pre-

(*c*) *Charles* v. *Finchley Local Board*, 23 Ch. D. 767; 52 L. J., Ch. 554. See *post*, ABATEMENT OF NUISANCES, p. 397.

(*d*) *Williams* v. *Earl of Jersey*, 1 Cr. & Ph. 97. See Wood on Nuisances, pp. 374—385, 677; also *Radenhurst* v. *Coates*, 6 Grant's Ch. (Ont.) 146. If a person labouring under a misapprehension as to the effect of an act, has consented thereto, he may at once, upon discovery of the actual effects, revoke the licence, and thereafter the person to whom the licence was given will be liable for the damages resulting therefrom: *Brown* v. *Bowen*, 30 N. Y. 519; *Druse* v. *Wheeler*, 22 Mich. 439; *Dempsey* v. *Kipp*, 62 Barb. (N. Y.) 311; *Freeman* v. *Hadley*, 33 N. J. L. 523; *Smith* v. *Scott*, 1 Kerr (N. B.) 1; *Allen* v. *Fiske*, 42 Vt. 462; *Estes* v. *China*, 56 Me. 407; *Dodge* v. *McClintock*, 47 N. H. 383; *Rhodes* v. *Otis*, 33 Ala. 578; *Giles* v. *Simonds*, 15 Gray (Mass.) 441; *Hamilton* v. *Windolf*, 3 Md. 301; *Mayo* v. *Tappan*, 23 Cal. 306. But as to all that has been done under the licence before revocation, the licence is a full defence, unless it has been exceeded. And in some instances a court of equity will restrain a revocation, and decree a specific performance: *Cook* v. *Prigden*, 45 Ga. 331; *R. R. Co.* v. *McLanahan*, 59 Penn. St. 23.

(*e*) *Cooper* v. *Hubbuck*, 30 Beav. 160; 31 L. J., Ch. 123. *Cotching* v. *Basset*, 32 Beav. 101; 32 L. J., Ch. 286.

(*f*) *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. 161; 1 Ch. 349; 35 L. J., Ch. 382. *Crossley* v. *Lightowler*, *infra*.

clude him from the remedy by injunction (*g*); and if the person injured has refrained from taking any active steps to abate or put an end to a nuisance, in consequence of assurances he has received from the person creating the nuisance that measures would be taken to put a stop to it, there is no *laches* on his part, and no such acquiescence as will deprive him of his right to an injunction (*h*). Nor will the fact that the plaintiff has purchased the land with full knowledge of the nuisance disentitle him to relief (*i*). Nor the fact that the plaintiff is much more injured by many other people, provided a definite injury can be traced to the defendant (*k*).

Remedy by injunction—Obstructions to the free access of light to windows.—If a building has been commenced which, when carried up and finished, will cause a serious (*l*) obstruction to the passage of light and air to ancient windows, the owner of the windows may obtain an injunction to restrain the erection of the building (*m*); and there is no distinction in this respect between houses in a town and in the country (*n*). But the court will not, upon an *ex parte* application for an injunction, order a building which is in course of erection to be pulled down, as that might do irreparable injury to the person erecting it, if on the final hearing of the matter it should be found that the right was with him. The proper order will be for the building not to be further proceeded with, until the rights of the parties have been decided (*o*).

395 "Whenever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with (*p*), and, still more, where he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore, so that substantial damages would be recovered, there is sufficient ground for the interference of the court" (*q*); and there is no rule which prevents the court from interfering on the ground that the injury sought to be restrained has been completed before the commencement of the action (*r*). It depends, however, upon all the circumstances of the case whether the court will grant a

(*g*) *Bankart* v. *Houghton*, 27 Beav. 431; 28 L. J., Ch. 473.
(*h*) *Att.-Gen.* v. *Birmingham*, 4 Kay & J. 546. *Davies* v. *Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61.
(*i*) *Tipping* v. *St. Helen's Smelting Co.*, L. R., 1 Ch. 66.
(*k*) *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. C. 642; 35 L. J., Q. B. 66. *Crossley* v. *Lightowler*, L. R., 3 Eq. 296; 2 Ch. 478; 36 L. J., Ch. 584.
(*l*) *Robson* v. *Whittingham*, L. R., 1 Ch. 442; 35 L. J., Ch. 227.
(*m*) *Arcedeckne* v. *Kelk*, 2 Giff. 683. *Back* v. *Stacy*, 2 Russ. 121. *Sutton* v. *Ld. Montfort*, 4 Sim. 559.
(*n*) *Martin* v. *Headon*, L. R., 2 Eq. 425; 35 L. J., Ch. 602.
(*o*) *Ryder* v. *Bentham*, 1 Ves. sen. 543. *Wynstanley* v. *Lee*, 2 Swanst. 333.
(*p*) *Kelk* v. *Pearson*, L. R., 6 Ch. 809.
(*q*) Per Kindersley, V.-C., *Martin* v. *Headon*, L. R., 2 Eq. 434; 35 L. J., Ch. 602. *Aynsley* v. *Glover*, L. R., 18 Eq. 544; 10 Ch. 283; 44 L. J., Ch. 523.
(*r*) *Durell* v. *Pritchard*, L. R., 1 Ch. 244. *Smith* v. *Smith*, L. R., 20 Eq. 500; 44 L. J., Ch. 630.

mandatory injunction, or only give damages (*s*); and it has been held that the court will not, as a rule, grant an injunction against the erection of a building the height of which above an ancient light is not greater than its distance from the light (*t*). But there is no conclusion in law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than 45°. The question of the amount of obstruction is a question of fact in each case (*u*).

A person does not lose his right to an injunction merely because he has himself erected buildings which deprive him of a certain amount of light and air (*x*), nor because he happens to be then carrying on a business which, as a matter of fact, requires a subdued light (*y*); and, where the court grants an injunction against the obstruction of ancient lights, it will not impose on the plaintiff the condition of blocking up windows which he has newly opened (*z*).

Remedy by injunction—Injunction to prevent obstructions to right of way.—The court will grant an injunction to restrain a person from obstructing the right of way of another (*a*), and where the plaintiff has established his right to a perpetual injunction the court will not, in general, compel him against his will to accept damages in lieu of an injunction under Cairns' Act (*b*).

Remedy by entry.—A rightful owner who is out of possession may, as we have seen (*c*), enter upon his land and retake possession if he

396 can do so peaceably. But an entry under a lease from, or by the leave of, the party previously in possession will not entitle the person so entering to deny the title of his lessor or licensor, and to set up title in himself. The person so let into possession, must first give up possession to the party by whom he was let in; and then, if he has a title *aliunde*, he may assert it by making an entry in the ordinary way, or bringing an action to recover the possession (*d*).

Remedy by abatement.—A man cannot, at the common law, enter upon his neighbour's land, to prevent the commission of an

(*s*) *Senior* v. *Pawson*, L. R., 3 Eq. 330. *Stanley* (*Lady*) v. *Shrewsbury* (*Earl of*), L. R., 19 Eq. 616; 44 L. J., Ch. 839. *Holland* v. *Worley*, 26 Ch. D. 578; 50 L. T. 526. This last case was not followed in *Greenwood* v. *Hornsey*, 33 Ch. D. 471.

(*t*) *Beadel* v. *Perry*, L. R., 3 Eq. 465. *Hackett* v. *Baiss*, L. R., 20 Eq. 494; 45 L. J., Ch. 13.

(*u*) *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 283; 49 L. T. 318. See *ante*, p. 380.

(*x*) *Aredeckne* v. *Kelk*, 2 Giff. 683.

(*y*) *Yates* v. *Jack*, L. R., 1 Ch. 295. *Dent* v. *Auction Mart Co.*, L. R., 2 Eq. 235, 249; 35 L. J., Ch. 355.

(*z*) *Aynsley* v. *Glover*, L. R., 10 Ch. 283; 44 L. J., Ch. 523.

(*a*) *Thorpe* v. *Brumfitt*, L. R., 8 Ch. 650. *Cannon* v. *Villars*, 8 Ch. D. 415; 47 L. J., Ch. 597.

(*b*) *Krehl* v. *Burrell*, 11 Ch. D. 146; 48 L. J., Ch. 252. See *Holland* v. *Worley*, 26 Ch. D. 578; 21 & 22 Vict. c. 27, s. 2.

(*c*) *Ante*, p. 380.

(*d*) *Doe* d. *Knight* v. *Lady Smythe*, 4 M. & S. 347. *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & E. 188.

apprehended nuisance; but he may justify a peaceable entry for the purpose of abating and putting a stop to an existing nuisance. Thus, where the plaintiff had set up poles on his own land, in order to build a house which, when erected, would be a nuisance to the adjoining dwelling-house of the defendant, and the latter entered upon the plaintiff's land and prostrated the poles, to prevent the nuisance, it was held that the entry was wholly unjustifiable (*e*). But, if *A* builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may, after previous notice and request to remove the building, enter upon the owner's soil and pull it down, provided the whole house is a nuisance. If part only of the house obstructs my lights and creates a nuisance, I am not justified in pulling down the whole building (*f*).

Before an entry is made upon the land of another for the purpose of abating a nuisance, notice should be given to the occupier of the land of the existence of the nuisance, and he should be required to abate it himself (*g*); and, if he neglects or refuses to do it, the party injured may enter upon the land and abate it himself, using no more violence than is necessary for the purpose (*h*).

A distinction has been taken between nuisances of commission and nuisances of omission; and it is said that, if the plaintiff was the original wrong-doer, and himself created the nuisance, it may be abated without notice; but, if the nuisance was created by another, and the plaintiff succeeded to the possession of the *locus in quo* afterwards, then notice to remove it must be given in order to make out a justification (*i*). "There is no decided case," observes Best, J., "which sanctions the abatement by an individual of nui-

397 sances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The security of lives and property may, however, sometimes require so speedy a remedy, as not to allow time to call on the person on whose property the mischief has arisen to remedy it; and, in such cases, an individual would be justified in abating a nuisance from an omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a court of justice" (*k*).

(*e*) *Norris* v. *Baker*, 1 Roll. Rep. 393, pl. 15. See Wood on Nuisances, pp. 976—980.

(*f*) *R.* v. *Rosewell*, 2 Salk. 459.

(*g*) *Perry* v. *Fitzhowe*, 8 Q. B. 776. *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506.

(*h*) *Davies* v. *Williams*, 16 Q. B. 556; qualifying *Perry* v. *Fitzhowe*, 8 Q. B. 757.

(*i*) *Jones* v. *Williams*, 11 M. & W. 176. *Penruddock's case*, 5 Co. 205. *Winsmore* v. *Greenbank*, Willes, 583

(*k*) *Lonsdale* v. *Nelson*, 2 B. & C. 311.

A notice to abate or remove a nuisance, delivered at the premises to which it relates, to the occupier for the time being, will bind a subsequent occupier (*l*).

Remedy—Abatement of nuisances upon commons.—Where an encroachment had been made on a common, and a house built which obstructed the exercise of the right of common, it was held that the commoner might, after notice and request to the wrong-doer to remove the house, pull it down, though the latter was at the time actually present in the house with his family (*m*). The commoner has a right to pull down and remove a hedge, a gate, or a wall, which obstructs or abridges the exercise of his right (*n*); but he cannot destroy beasts of warren, such as deer or rabbits, although they have increased to such an extent as to destroy all the herbage (*o*). Where fences are wrongfully erected upon land subject to a right of common, the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the common, but may remove the whole of the fences, so as to restore to himself the full and unrestricted exercise of his right (*p*).

Remedy—Abatement of nuisances arising from the exercise in excess of limited rights.—Where a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits. "Thus, if a man," observes Alderson, B., "has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty" (*q*).

398 If a riparian proprietor having a prescriptive right to obstruct the flow of a stream with a dam or weir of a certain height, for the purpose of watering his meadows, exceeds his right by enlarging his dam or weir, to the prejudice of another riparian proprietor, the latter may, after notice, remove the enlarged portion of the structure, but cannot lawfully remove the whole dam. Thus, where the plaintiff, being possessed of land, the occupiers whereof from time immemorial enjoyed the right of penning back the water of a stream, by means of a dam or weir made with a loose board kept in its place with large stones, fastened the board down with stakes

(*l*) *Salmon* v. *Bensley*, R. & M. 189.
(*m*) *Davies* v. *Williams*, 16 Q. B. 546. But see *Jones* v. *Jones*, 1 H. & C. 1; 31 L. J., Ex. 506; *ante*, p. 381.
(*n*) *Mason* v. *Cæsar*, 2 Mod. 66.
(*o*) *Cooper* v. *Marshall*, 1 Burr. 226; 1 Roll. Abr. 406.
(*p*) *Arlett* v. *Ellis*, 7 B. & C. 346.
(*q*) *Cawkwell* v. *Russell*, 26 L. J., Ex. 34, cited with approval by Pearson, J., in *Charles* v. *Finchley Local Board*, 23 Ch. D. 767, 775; 52 L. J., Ch. 554.

driven into the bed of the stream, and the defendant, who had rights on the same stream, thinking the stakes unauthorized by the plaintiff's ancient right, pulled up both the stakes and the board, it was held that this was an unjustifiable trespass; for, assuming he had a right to remove the stakes, he had no right to remove the board also (*r*).

The removal of obstructions in watercourses on the land of a third person, by those who have a right to the watercourse, and conversely the stoppage, on another's land, of a watercourse which would otherwise flow wrongfully on to the land of the person who stops it, must be effected with the least possible damage to the owner of the servient tenement, whether the method adopted (if there are alternative methods of effecting the object) is more onerous to the wrong-doer or not (*s*).

Remedy—Distress damage feasant.—Every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his land, and to detain them until he is tendered or paid a fair compensation for the injury. The distress must be taken at the time the damage is done; for, if the damage was done yesterday, and the distress taken to-day, that would be illegal (*t*). If, therefore, a man coming to distrain beasts *damage feasant* sees the beasts on his ground, and the owner of the beasts, or his servant, chases them out before the distress is taken, though it is done purposely to prevent the distress, yet the owner of the soil cannot distrain them; and, if he does, the owner of the cattle may rescue them; for the beasts must be *damage feasant* at the time of the distress. A man may, therefore, distrain cattle *damage feasant* in the night; for otherwise, perhaps, the cattle will be gone before he can take them. If a man takes my cattle and puts them into the land of another man, the tenant of the land may take these cattle *damage feasant*, though I, who am the owner, was not privy

399 to the cattle's being *damage feasant;* and he may keep them against me until he has obtained satisfaction of the damages.

A commoner may justify the taking of the cattle of a stranger upon the land *damage feasant;* and if a man has a right of common for ten cattle, and he puts in more, the surplusage above the ten may be distrained *damage feasant.* Where there is a colour of right to put beasts upon a common, one commoner cannot distrain the cattle of another, because it would be judging for himself in a question that depends upon a more competent inquiry. If there is no colour of right, he may; and, therefore, he may distrain the

(*r*) *Greenslade* v. *Halliday*, 6 Bing. 379.
(*s*) *Roberts* v. *Rose*, L. R., 1 Ex. 82; 33 L. J., Ex. 1; 35 *ib.* 62.
(*t*) *Wormer* v. *Biggs*, 2 C. & K. 31. *Lindon* v. *Hooper*, Cowp. 416.

beasts of a stranger. In the case of levancy and couchancy, one commoner cannot distrain another's cattle for a surcharge, but must try by a jury the number accommodated to the land; and, where any admeasurement lies between commoners to ascertain what quantity of land the commoner has, one cannot distrain the cattle of the other (*u*). Nor can the cattle of the commoner be distrained, where there is common *par cause de vicinage* (*x*). But this general rule may be superseded, and a right to distrain given, by an agreement between commoners to restrain the exercise of their privilege to certain specified portions of the common field (*y*). If many cattle are doing damage, a man cannot take one of them as a distress for the whole damage; but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest (*z*). If cattle get out of the close before the party coming to distrain has got into it, they cannot be followed and distrained when off the land (*a*).

The lord may distrain in respect of injuries done to his soil, and to his hedges, fences, and trees, although he has no interest in the herbage (*b*).

Remedy by distress—Right to distrain animals trespassing and doing damage on unfenced lands adjoining public highways.—If the owner of lands adjoining a highway is bound by statute or prescription to fence against the highway, and he neglects to do so, and cattle, whilst passing along the highway under the care of the owner or his servants, stray therefrom into the adjoining land, and do damage there, the owner of such adjoining land, who has brought the mischief on himself by neglecting to fence, has no right to distrain the cattle, unless they are abandoned and left there by the owner or his servants an unreasonable time. So, if a man who has land adjoining a highway plants tempting green crops close beside

400 the highway, and neglects to fence them off therefrom, so that cattle being driven along the public thoroughfare are irresistibly invited to trespass on the adjoining land through the operation of the tempting food upon their natural instincts, the owner of such adjoining land who has so neglected to fence has no right to distrain the trespassing animals, unless the drovers who have charge of them fail in their duty in endeavouring to prevent them from trespassing and from continuing on the adjoining land (*c*).

Whilst cattle are lawfully passing along a highway, the owners

(*u*) *Hall* v. *Harding*, 1 W. Bl. 674; 4 Burr. 2426.
(*x*) *Cape* v. *Scott*, L. R., 9 Q. B. 269; 43 L. J., Q. B. 65.
(*y*) *Whiteman* v. *King*, 2 H. Bl. 4.
(*z*) Gilbert on Distress, 4th ed. p. 22; Co. Litt. 161 a. Bac. Abr. DISTRESS, F.
(*a*) *Clement* v. *Milner*, 3 Esp. 95. *Wormer* v. *Biggs*, 2 C. & K. 33.
(*b*) *Hoskins* v. *Robins*, 2 Wms. Saund. 327 a.
(*c*) *Goodwyn* v. *Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298. See *ante*, p. 380.

of the cattle are using the highway according to the dedication of the owner of the soil, and, being there with his consent, they are occupying the highway; but, if the cattle have strayed into the high road, and have passed therefrom into the adjoining close, they may be distrained there *damage feasant*, notwithstanding the owner of that close was bound to repair the fence between his close and the road, because the cattle were wrongfully on the road, and the owners were not occupying it so as to cast any obligation to repair the fence upon the distrainor, who is not bound to fence against trespassers (*d*).

If a landowner neglects to repair and maintain a fence which he is by law bound to repair, and by reason thereof his neighbour's cattle stray into his land, he has no right to distrain them *damage feasant*, as he is himself the occasion of the injury (*e*).

Remedy by distress—What things may be distrained damage feasant.—The right of the owner or occupier of land to seize and detain animals and chattels trespassing upon and doing damage to his land is restricted to such animals and chattels as are not in the actual possession and use, and under the personal care, of some human being (*f*). If a man rides upon my corn, I cannot take his horse *damage feasant*, for that would lead to a breach of the peace (*g*); neither can I take a horse and cart away from a man who is actually driving it, nor a horse or a dog which a man is leading by a string, nor any animal which is under the immediate control of the owner (*h*). It is not enough, however, to exempt a dog from seizure *damage feasant*, to allege that the dog was in the possession and under the personal care of the plaintiff; for that may be so, and yet the dog may be running about trespassing, and may not be under his immediate control. Where, therefore, to a plea justifying the seizure of a dog *damage feasant*, the plaintiff replied that

401 the dog when taken was in the actual possession of the servant of the plaintiff, and was then under his personal care, and was being used by him, it was held that these allegations as applied to a dog were insufficient to establish such a possession and user as would exempt the dog from seizure. "The allegations," observes Patteson, J., "would be satisfied by proof that the dog was within sound of the servant's whistle, though the servant was out of sight" (*i*).

Shocks of corn may be taken *damage feasant*. If turves lie

(*d*) *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Wallis*, 14 C. B. 213; 23 L. J., C. P. 85.

(*e*) *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J., Ex. 17.

(*f*) Gilbert on Distress, 4th ed. p. 21.

(*g*) 9 Vin. Abr. 121, DISTRESS, A., pl. 4.

(*h*) *Field* v. *Adames*, 12 Ad. & E. 649.

(*i*) *Bunch* v. *Kennington*, 1 Q. B. 680.

upon a common, *damage feasant*, a commoner may distrain them; but he cannot burn them. A greyhound may be distrained running after conies in a warren; and so may a ferret brought into a warren. If a man brings gins and nets through my warren, I cannot take them out of his hand; but, if men are rowing upon my water, and endeavouring with their nets to catch fish in my several fishery, I may take their oars and nets, and detain them as *damage feasant*, to stop their further fishing (*k*). If domestic pigeons come upon land sown with corn, and eat up the corn, the occupier of the land is justified in shooting them, as he has no other means of taking them *damage feasant* (*l*).

All railway companies have a common law right to distrain engines and carriages encumbering their railway and obstructing the right of passage along the line; and the provisions of the Railways Clauses Consolidation Act, with respect to the introduction of engines upon the railway and the removal of improperly constructed engines, do not control or qualify this right, but give a cumulative remedy (*m*).

Remedy by distress—Tender of amends.—If the owner of the land or his bailiff comes to distrain beasts *damage feasant*, and before the distress the owner of the beasts tenders sufficient amends, and the distrainor refuses it, the latter becomes a wrong-doer if he then distrains. Tender before the distress makes the distress tortious. Tender after the distress, and before the impounding, makes the detainer and not the taking wrongful (*n*). Tender after the impounding is of no avail, as the distress taken is then in the custody of the law (*o*).

The hazard of the sufficiency of the tender rests upon the wrong-doer whose cattle have trespassed, and not upon the party who has suffered by the trespass. If the latter, therefore, demands

402 an exorbitant sum for compensation, that will not dispense with the necessity of a tender of a proper compensation, and will not relieve the owner of the trespassing cattle from the obligation of estimating and tendering at his own risk the proper amount of damage (*p*); for, being the original wrong-doer by suffering his cattle to trespass, he is bound to tender the sum which he maintains to be sufficient, before he is in a position to complain of the exorbitant amount of compensation claimed.

The 2 W. & M. c. 5, which enables landlords to sell things dis-

(*k*) Bac. Abr. DISTRESS, F.

(*l*) *Dewell* v. *Sanders*, Cro. Jac. 490. Bayley, J., *Hannam* v. *Mockett*, 2 B. & C. 939.

(*m*) *Ambergate, &c. Rail. Co.* v. *Midland Rail. Co.*, 2 El. & Bl. 793.

(*n*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 L. J., Ex. 128.

(*o*) *Singleton* v. *Williamson*, 7 H. & N. 747; 31 L. J., Ex. 287. *Thomas* v. *Harries*, 1 M. & G. 695; 1 Sc. N. R. 524.

(*p*) *Gulliver* v. *Cosens*, 1 C. B. 795.

trained for rent, does not extend to distresses *damage feasant*. Consequently they remain as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*, unless the sale was necessary to cover the expense of finding food and water for the animals distrained, and can be justified under the 17 & 18 Vict. c. 60.

The distrainor must at his peril find a proper pound. Generally, the manor pound would be the proper place; but, if that is not in a fit state, he must find another. He cannot impound so as to injure or destroy the subject-matter of the distress (*q*). And where he impounds on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good; and if the distrainor demands and obtains an excessive sum to release the animal, the sum so paid may be recovered in an action for money had and received (*r*).

Remedy by distress—Sale of impounded animals.—By the 12 & 13 Vict. c. 92, s. 5, it is enacted, that every person (*s*) who shall impound or confine any animal in any pound or receptacle of the like nature shall provide it with food and water; and by the 17 & 18 Vict. c. 60, s. 1, it is further enacted, that every person who has supplied such animal with food and water, shall be at liberty, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly in the public market, after having given three clear days' public printed notice thereof, and to apply the produce of the sale in discharge of the value of such food and nourishment and the expenses of the sale, rendering the overplus to the owner of the animal. Where several beasts have been distrained and impounded *damage feasant*, the distrainor cannot justify the sale of each beast individually in discharge of the cost of

403 its food and the expenses. Parties availing themselves of the statute must show that it was necessary to sell the number they did sell, or that they sold one, and that it did not produce enough, and then that they sold more. "The power is measured by the necessity of the case; and, if the distrainor is obliged to keep the distress for an indefinite period, there is nothing to prevent him from selling from time to time to defray the expenses" (*t*). To enable a person to avail himself of the power to sell impounded animals given by this statute, it must be shown that the animals had been impounded by

(*q*) *Wilder* v. *Speer*, 8 Ad. & E. 547. *Bignell* v. *Clarke*, 5 H. & N. 485; 29 L. J., Ex. 257. By the Roman law, he who took the cattle of another person feeding in his ground, or doing any other damage, was responsible for any violence doing hurt to the cattle, or for driving them in any other manner than he would his own; and, if he caused any damage to the cattle, he was bound to make it good. Domat, liv. 2, tit. 8, s. 2, § 6.

(*r*) *Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J., Q. B. 435.

(*s*) This does not extend to the pound keeper. *Dargan* v. *Davies*, 2 Q. B. D. 118; 46 L. J., M. C. 122.

(*t*) *Layton* v. *Hurry*, 8 Q. B. 819; 15 L. J., Q. B. 244.

some person in the exercise or intended exercise of a right to distrain. The word "confined" in the 12 & 13 Vict. c. 92, s. 5, does not apply to all takings and confinement of animals under all circumstances (*u*).

Remedy by distress—Duties of pound-keepers.—It has been held that, if an officer charged with the performance of certain public duties does that which belongs to his office, and intermeddles no further, he shall not be liable for any precedent tortious act of which he could know nothing. A pound-keeper, therefore, who only does the duties of his office by impounding things brought to him, does not by detaining them in the pound render himself responsible for the unlawfulness of the distress. The pound-keeper is bound to take and keep whatever is brought to him, at the peril of the person who brings it, without any judgment, discretion, examination, or warrant; and, if the things have been wrongfully taken, the person bringing them to the pound, and not the pound-keeper, is responsible for the wrong. "It would be terrible," observes Lord Mansfield, "if a pound-keeper were liable to an action for refusing to take cattle in, and were also liable to another action for not letting them go" (*x*).

Division of rights over land in respect of their quantity.—The highest interest in land known to the law is that of a tenant in fee simple in possession; but this interest may be divided amongst two or more persons, of whom one may be entitled to the present use and enjoyment, for a longer or shorter period, while the other is entitled to the use and enjoyment of the land upon the determination of the interest of the first; of these, the first is said to have the possession of the land, and the other the reversion; and this division of the right to land into the right to the possession, and the right to the reversion, is one of great importance in the law of torts. The right to land, again, may belong to one person, or may be shared between two or more as joint tenants or tenants in common.

404 *Division of rights—Possession.*—A person may be entitled to the actual use and enjoyment of land for a period dependent upon the will of the reversioner (tenant at will), or for a term of years (termor or lessee), or for life (tenant for life). Whatever the duration of his interest, he may, as the actual occupier, maintain an action for wrongful acts interfering with the beneficial use and enjoyment of the property and diminishing the value of his possessory interest; but the amount of the damages he will be entitled to recover will depend upon the quantity of his interest. If the soil

(*u*) *Machell* v. *Ellis*, 1 C. & K. 685. *Mason* v. *Newland*, 9 C. & P. 575.

(*x*) *Badkin* v. *Powell*, Cowp. 478.

and freehold of the *locus in quo* are proved to be in the plaintiff, the possession is also presumed to be in him, unless there is some evidence to the contrary (*y*); for possession follows the property when there is no actual possession in another person (*z*).

Actual or constructive possession, without proof of any title to the soil and freehold, is quite sufficient to support an action against a wrong-doer; for he who commits a trespass upon the possession of another, being himself a wrong-doer, has no right to put the other party to proof of title (*a*). A lessee of the vesture or herbage, or a purchaser of growing crops, who has a right to the use of the land for bringing the crops to maturity, and has, consequently, an interest in the soil, may maintain an action for a trespass upon his close or land against any person who wrongfully comes upon the land, or interferes in any way with the growing crops (*b*); but a purchaser of crops arrived at maturity, who has bought them with a view to their immediate severance as chattels, and has no interest in the soil, cannot maintain an action for a trespass upon the land, but must confine his cause of action to a claim for damages for an injury to goods and chattels (*c*).

Very slight evidence of possession is sufficient to establish a *primâ facie* title to sue for an injury to realty, such as the occupation of the soil with stones and rubbish, which have been placed thereon by order of the plaintiff, and kept there for some short time without molestation; or the building of a wall, or a dam, mound, or fence, which goes on for some weeks without interruption, and is then knocked down (*d*); or the inclosure or cultivation of a piece of waste ground, the mowing of the grass thereof, or the pasturing of a cow thereon; for mere occupancy

405 of land, however recent, gives a good title to the occupier, whereon he may recover as against all who cannot prove an older and better title in themselves (*e*). The digging of pits in a common, and throwing out heaps of earth, are *primâ facie* proof of ownership of the heaps cast out, so as to support an action against a wrong-doer for carting away the heaps (*f*).

To maintain the action, however, there must in all cases be proof, either of title, or of actual or constructive possession by the

(*y*) Parke, B., *Hebbert* v. *Thomas*, 1 C. M. & R. 864.

(*z*) *R.* v. *Mayor, &c. of London*, 4 T. R. 26.

(*a*) *Harper* v. *Charlesworth*, 4 B. & C. 589. *Asher* v. *Whitlock*, L. R., 1 Q. B. 1; 35 L. J., Q. B. 17.

(*b*) *Crosby* v. *Wadsworth*, 6 East, 609. See *Roads* v. *Overseers of Trumpington*, L. R., 6 Q. B. 64; 40 L. J., M. C. 35.

(*c*) *Parker* v. *Staniland*, 11 East, 366. *Evans* v. *Roberts*, 5 B. & C. 837.

(*d*) *Every* v. *Smith*, 26 L. J., Ex. 345. *Dyson* v. *Collick*, 5 B. & Ald. 600; 1 D. & R. 225.

(*e*) *Catteris* v. *Cowper*, 4 Taunt. 547. *Matson* v. *Cooke*, 4 Bing. N. C. 392; 8 Sc. 184.

(*f*) *Northam* v. *Bowden*, 11 Exch. 72; 24 L. J., Ex. 238.

plaintiff at the time the wrong was committed (*g*). Where, therefore, the plaintiff held some marsh-land under a tenant for life, so that his interest ceased on the death of the tenant for life, and at the time of the determination of the life interest, and down to the time of the commission of the trespass and the commencement of the action, the plaintiff had no servants, or cattle, or anything upon the land to show that he continued in possession of it, it was held that there was no proof that he was possessed of the land, and that his action was not maintainable (*h*). Where certain commissioners of sewers placed a dam in a public navigable river, the soil or bed of which was not vested in them, it was held that they had no such possession of the dam as would enable them to maintain an action against a wrong-doer for pulling it down (*i*). But, if it is proved that contractors or commissioners of public works have got the permission of the owner of the soil for the erection of their works, or if it is shown that they and their servants were in the actual possession of the works at the time of the commission of the trespass, this will be sufficient to enable them to maintain the action (*k*). Where a landowner gave the plaintiff licence or permission to build a bridge on his land, for the use of the public, and the plaintiff built the bridge, and the defendant afterwards removed the parapets and carried away the stones, it was held that, on the severance of the stones from the land they became chattels, the property in which was vested in the plaintiff, and that he was entitled to maintain an action against the defendant for carrying them away (*l*).

Navigation commissioners authorized by statute to make a river navigable and form towing-paths, on making compensation to the adjoining landowners, have no such possession of the soil of the towing-path, or of the artificial river-banks formed by deepening the river and throwing out the soil from the bed to the

406 sides of the stream, as will enable them to maintain an action for a trespass for cutting down trees growing in the soil of the towing-path or the banks, although they may have been in the habit of repairing, mowing, and trimming the banks, and exercising acts of ownership over them (*m*).

Proof of the possession of the key of a building is no proof of the possession of the building itself (*n*).

If the plaintiff has come into the possession of the land after

(*g*) *Harrison* v. *Blackburn*, 17 C. B., N. S. 678; 34 L. J., C. P. 109.

(*h*) *Brown* v. *Notley*, 3 Exch. 221; 18 L. J., Ex. 39.

(*i*) *Duke of Newcastle* v. *Clark*, 8 Taunt. 621.

(*k*) *Dyson* v. *Collick*, 5 B. & Ald. 600; 1 D. & R. 225.

(*l*) *Harrison* v. *Parker*, 6 East, 154.

(*m*) *Hollis* v. *Goldfinch*, 1 B. & C. 218. *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383.

(*n*) *Revett* v. *Brown*, 5 Bing. 7.

the trespass was committed, the trespass is not a trespass against him; and he cannot maintain an action in respect of it (*o*), unless it is a continuing trespass (*p*).

Division of rights—Disseisin and re-entry.—If one disseises me, and during the disseisin he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him for the trees, grass, corn, &c.; for, after my regress, the law, as to the disseisor and his servants, supposes the freehold always continued in me (*q*). By his re-entry the disseisee is remitted to his first possession, as if he had never been out of possession (*r*). A person, therefore, who has the freehold and a right to the possession of land may, by a peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for a trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land (*s*). It is not necessary that the person who makes the entry should declare that he enters to take possession. It is sufficient if he does any act to show his intention, and, having regained constructive possession by his peaceable entry upon the unlawful possession of the occupier, and being entitled to treat the latter as a trespasser, all those who come upon the land without title, after such vesting of possession, are trespassers, and liable to be sued as such. If a landlord, having a right to the possession of land on the expiration of a lease, sends his agent to the land to demand possession, and the agent enters and makes the demand, this is a sufficient entry to clothe the landlord with the constructive possession, so as to enable him to sue in trespass all persons who subsequently come upon the land by the authority of the tenant (*t*). As soon as a person is entitled to possession, and enters in the assertion of that title, the law vests the actual

407 possession in him. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, the person who has the title is in actual possession, and the other person is a trespasser (*u*).

Division of rights—Tenant and reversioner.—The actual occupier of real property is always entitled to maintain an action for unjustifiable trespasses thereon; but the owner, who has parted with the possession in favour of a tenant or lessee, can only maintain an action if an injury is done to his reversionary estate. If a

(*o*) *Pilgrim* v. *Southampton, &c. Rail. Co.*, 8 C. B. 25; 18 L. J., C. P. 332.
(*p*) *Holmes* v. *Wilson*, 10 Ad. & E. 503.
(*q*) *Liford's case*, 11 Co. Rep. 51 a.
(*r*) *Holcome* v. *Rawlins*, Moore, 461.
(*s*) *Butcher* v. *Butcher*, 7 B. & C. 402; 1 M. & R. 220. *Litchfield* v. *Ready*, 5 Exch. 939.
(*t*) *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; 8 Sc. 168.
(*u*) *Jones* v. *Chapman*, 2 Exch. 821.

house or land is occupied merely by the servant of the owner, the occupation of the servant is the occupation of the owner (*x*); and the latter, being then the occupier as well as the owner, may sue for any temporary trespass or injury, rendering his occupation less profitable or commodious; but, where the land has been demised to a lessee, who has entered thereon, and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for a trespass upon the property, unless the wrongful act complained of imports a damage to the reversionary estate (*y*). Where the injury is of a permanent nature, and deteriorates the marketable value of the property, so that, if the landlord or reversioner were to sell it, it would fetch less money in the market, there is a damage to the reversionary estate, in respect of which the reversioner may maintain an action (*z*). Thus, if *A* is seised in fee of the reversion of a close, expectant upon a term for years, and *B* is possessed of another close adjoining thereto, through which close there runs a rivulet, and *B* stops it, *per quod* the close of *A* is surrounded, so that the timber-trees, &c., become rotten, *A*, in respect of the prejudice to the reversion, and the termor, in respect of the injury to the possession, and the loss of the shade, shelter, &c., of the trees, may each have an action; and satisfaction given to one is no bar to the other (*a*). So, where the subject of complaint was, that the defendant had fixed a spout to the eaves of his house, which poured rain-water into the plaintiff's yard and made it damp, it was held that this was an injury of a permanent nature, which entitled the plaintiff to damages, although the yard was in the occupation of a tenant (*b*). "The removal of the smallest portion of soil must, in general, be esteemed an injury to the reversion, because it tends to alter the evidence of title" (*c*). But a presumed intention to continue the injury is not sufficient,

408 even where there is evidence that the premises will sell for less if the injury is continued (*d*).

Where a public street was improperly used as a stable-yard, it was held that the nuisance to the neighbouring houses was not so permanent as to entitle the reversioner to sue (*e*). Nor can a reversioner sue for a nuisance caused by the noise of machinery in adjacent premises (*f*), or by the erection of a furnace and smoky

(*x*) *Ante*, p. 263.
(*y*) *Dobson* v. *Blackmore*, 9 Q. B. 991.
(*z*) *Jackson* v. *Pesked*, 1 M. & S. 234. *Jesser* v. *Gifford*, 4 Burr. 2141; 3 Leon. 209. As to injuries from the removal of fixtures, see *Hare* v. *Horton*, 5 B. & Ad. 727; 2 N. & M. 428.
(*a*) *Bedingfield* v. *Onslow*, 3 Lev. 209.
(*b*) *Tucker* v. *Newman*, 11 Ad. & E. 41.
(*c*) *Alston* v. *Scales*, 4 Bing. 4; 9 *ib.* 3; 2 M. & Sc. 6.
(*d*) *Mumford* v. *Oxford, Worcester & Wolverhampton Rail. Co.*, 1 H. & N. 34; 25 L. J., Ex. 265. *Simpson* v. *Savage*, 1 C. B., N. S. 347; 26 L. J., C. P. 50.
(*e*) *Mott* v. *Shoolbred*, L. R., 20 Eq. 22; 44 L. J., Ch. 380.
(*f*) *Jones* v. *Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 658.

chimney in close contiguity to dwelling-houses in the occupation of his tenants, although the noise and the smoke render the houses uninhabitable, and the tenants give notice to leave; for the occupiers of the workshop and the furnace may be compelled, by proceedings on the part of the tenants, to discontinue the nuisance. "The action," observes Bramwell, B., "should be brought by the tenant. It is said that the noises diminished the value of the premises. I do not agree to that. If the tenant is damaged by them to the value of 10*l.*, he will get 10*l.* compensation." "In order to give a right of action to the reversioner," further observes Pollock, C. B., "the injury must be of a permanent nature. Here the hammering and noises may be stopped and the nuisance removed at any time" (*g*). If, however, the tenant actually leaves the premises, and the reversioner comes into possession, then an immediate injury accrues to him, in respect of which he has an immediate right of action.

In the case of permanent injuries to buildings, from trespasses or acts of negligence by strangers, the tenant is entitled to sue in respect of the immediate residential injury, and the reversioner in respect of the diminished saleable value of the property (*h*). Where trees have been injured by a stranger, the lessor and the lessee may both sue in respect thereof; the lessor for the damage done to the body of the tree, the lessee for the loss of the shade and fruit (*i*). So may the copyholder and the lord (*k*). But the reversioner cannot maintain an action against a stranger for entering upon land in the occupation of his lessee, and with carts and horses trampling down the soil and grass, though the entry is made in the exercise of an alleged right of way, as the act is not attended with any permanent injury to the reversion. "Such an act," observes Parke, J., "done while the premises were out on lease, would not be evidence of any right as against the rever-

409 sioner" (*l*). Where a house has been burned down, or destroyed by culpable negligence, and there are several persons interested in the property, viz., tenant for life, tenant in tail, and reversioner in fee, the tenant for life can recover only such damages as are commensurate with his life estate (*m*). Where a house demised to a tenant has been set on fire, or thrown down through the negligence of a neighbour, the damages are apportionable between the landlord and tenant. The tenant is entitled to recover in respect of the value of his possessory interest and unexpired term in the premises,

(*g*) *Mumford* v. *Oxford, Worcester & Wolverhampton Rail. Co.*, 1 H. & N. 35. *Simpson* v. *Savage*, 1 C. B., N. S. 347; 26 L. J., C. P. 50.

(*h*) *Hosking* v. *Phillips*, 3 Exch. 168.

(*i*) *Bedingfield* v. *Onslow*, 3 Lev. 209.

(*k*) *Jefferson* v. *Jefferson*, *ib.* 131.

(*l*) *Baxter* v. *Taylor*, 4 B. & Ad. 75.

(*m*) *Evelyn* v. *Raddish*, Holt, N. P. C. 543.

and the landlord in respect of the injury to his reversion (*n*). But, if the tenant is bound by covenant to keep the house in repair, the substantial injury will then accrue to the tenant, and the tenant will be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new (*o*). The tenant, moreover, will be entitled to damages in respect of the loss he has sustained in being obliged to seek out and pay for another residence; but he cannot recover the full value of the house (*p*).

An obstruction to the exercise of a private right of way appurtenant to lands or tenements which, if allowed to continue unopposed, would be evidence against the enjoyment of the right, is, of course, an injury to the reversioner, in respect of which an action for damages is maintainable (*q*). "The erection of a wall," observes Maule, J., "across a way—assuming, of course, that there was no contract as between the tenant and the defendant—would be an injury to the reversion, although such wall might be pulled down before the plaintiff became entitled to the actual possession of the land; and there might be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall" (*r*). But a reversioner cannot maintain an action against a stranger for merely entering upon his land held by a tenant on lease, though the entry is made in the exercise of an alleged right of way, such an act during the existence of the tenancy not being necessarily injurious to the reversion. Neither can he maintain an action in respect of an obstruction of a public way leading to his property, unless he can show, either that the obstruction is of a permanent character, or that it would afford evidence against the existence of the right, if it was allowed to continue unopposed. For the public injury the landlord has a remedy, as one of the public, by indictment; and he is not

410 himself personally damnified merely by his tenant's being temporarily prevented from enjoying his house in so ample a manner as he might otherwise have done. But, if the obstruction appears to be of a permanent character, or professes, either by notice affixed, or in any other way, to deny the public right, and so lead to an opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which an action might be maintained by the reversioner (*s*).

(*n*) *Panton* v. *Isham*, 3 Lev. 359; 1 Salk. 19.
(*o*) *Lukin* v. *Godsall*, 2 Peake, 15.
(*p*) *Hosking* v. *Phillips*, 3 Exch. 182.
(*q*) *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290.
(*r*) *Kidgill* v. *Moor*, 9 C. B. 378.
(*s*) *Dobson* v. *Blackmore*, 9 Q. B. 1004;

An action is also maintainable by the reversioner of a mill demised to a tenant, for the diversion by a stranger of water from the mill-head; for, if the diversion were allowed to continue with the knowledge of the reversioner, and without interruption from him or his tenant, it might eventually be made the foundation of a legal right to divert the water, to the serious injury of the inheritance. Where permanent damage has been done to property, let on lease, by the erection of a wall or hoarding obstructing ancient lights, and lessening the value of the property in the market, there is an injury to the reversion, in respect of which the reversioner is entitled to maintain an action (*t*), as well as an injury to the possession, in respect of which the occupier may sue. A wooden hoarding of an unsubstantial character may cause permanent injury to the property, by the obstruction it offers to the passage of light and air, and may be an injury to the reversioner (*u*).

If the windows of a house occupied by the servant of the owner have been unlawfully darkened or obstructed, the owner may sue for the immediate injury as the occupier of the house, the occupation of the servant being the occupation of the master (*x*); but, if the house is in the possession of a lessee paying rent, the action should be brought in respect of the injury to the reversion (*y*).

Proof of possession of land and pernancy of the rents is *primâ facie* evidence of a seisin in fee of the person possessed, the presumption being in favour of the fee and not of any less estate (*z*), unless it is rebutted by a contrary presumption arising from the surrounding circumstances. If, therefore, a person is shown to be in receipt of rent, he is presumed to be entitled to the reversion in fee of the land in respect of which the rent is received, unless the

411 rent is so disproportioned to the annual value of the property, as to lead to the presumption of its being a mere quit rent (*a*). Thus, in an action on the case for an injury to the plaintiff's reversion in cutting down trees on land in the possession of his tenant, proof of payment of rent by the latter to the plaintiff is *primâ facie* evidence of the plaintiff being the reversioner, and of the trees being his property (*b*).

Tenant and reversioner—Rights against strangers—Damages.—If

16 L. J., Q. B. 233. *Hopwood* v. *Schofield*, 2 M. & Rob. 34. *Kidgill* v. *Moor*, 9 C. B. 379.

(*t*) *Jesser* v. *Gifford*, 4 Burr. 2141; 3 Leon. 209. *Shadwell* v. *Hutchinson*, M. & M. 350.

(*u*) *Metropolitan Association* v. *Petch*, 5 C. B., N. S. 504; 27 L. J., C. P. 332.

(*x*) *Bertie* v. *Beaumont*, 16 East, 33.

(*y*) And if there is a lease in writing, it must be produced. *Cotterill* v. *Hobby*, 4 B. & C. 465.

(*z*) *Jayne* v. *Price*, 5 Taunt. 326. *Doe* v. *Penfold*, 8 C. & P. 537.

(*a*) *Doe* v. *Johnson*, Gow, 173. *Reynolds* v. *Reynolds*, 12 Ir. Eq. Rep. 181.

(*b*) *Daintry* v. *Brocklehurst*, 3 Exch. 209.

the plaintiff is only tenant on sufferance or tenant at will, the damages may be merely nominal. Where a trespass, of which the plaintiff complained, consisted in pulling down a wall between the close of the plaintiff and an adjoining close of the defendant, in doing which a few bricks and some mortar fell upon the plaintiff's land, and no evidence was given as to the nature of the plaintiff's interest in the premises, and the jury gave 1*s.* damages, it was held that, as the plaintiff had not proved that he had any interest in the land beyond that which results from the bare possession, he had not shown himself to be entitled to any greater damages than the jury had given (*c*). But, where the plaintiff proves that he is in the actual occupation and possession of the land and crops growing thereon, he will be entitled to recover exemplary damages from trespassers who wrongfully enter upon the land, and trample down and injure the crops, although he is only tenant at will; for, if a stranger subverts land leased at will, the lessee may bring an action against him and have damages for the profits; and the lessor may have another action, and recover damages for the destruction of the land (*d*). But, as the injury consists of two parts, an injury to a temporary right in the lessee and to the permanent freehold of the lessor, the damages must be assessed with reference to their several interests; for, where different persons have distinct rights in the subject-matter of a trespass, the compensation must be to each in proportion to the injury he has received. One of them cannot claim that part of the compensation which belongs to another; nor can the satisfaction made to one be a bar to an action brought by the other (*e*).

In an action for an injury to the plaintiff's reversionary interest, by pulling down a house in the occupation of the plaintiff's yearly tenant, it was held that the diminution in the saleable value of the premises was the true criterion of damage, and that the jury should consider how much less the land was worth in consequence of the loss of the house (*f*). But where

412 an action is brought by a reversioner to recover damages in respect of an injury to his reversionary estate in certain lands and premises, by reason of a nuisance committed by the defendant, the diminution in the saleable value of the premises is not the true criterion of damage, because every day that the defendant persists in continuing the nuisance, he renders himself liable to another action. Nominal damages are generally given in the first action; and then, if the defendant persists in con-

(*c*) *Twynam* v. *Knowles*, 13 C. B. 224.
(*d*) 2 Roll. Abr. 551.
(*e*) Chambre, J., *Attersoll* v. *Stevens*, 1 Taunt. 194.
(*f*) *Hosking* v. *Phillips*, 3 Exch. 168.

tinuing the nuisance, and another action is brought, and a verdict is obtained against him for continuing the nuisance, the jury generally give exemplary damages, to compel an abatement of the nuisance (*g*). If, however, the jury choose to give substantial damages in the first instance, there is nothing to prevent them from so doing (*h*).

Wherever the nuisance was, in its commencement, an injury to the reversion, on any ground whatever, the continuance of the nuisance must be so likewise; and an action is maintainable by the reversioner, *toties quoties*, until the nuisance is abated (*i*).

Tenant and reversioner—Rights against strangers—Injunction.—The courts will interfere to protect by injunction the proprietary rights of a reversioner, as well as the enjoyment by the tenant or occupier (*k*). But, where the injury is of a temporary nature, not likely to last long, nor to deteriorate the marketable value of the property, the reversioner has no claim to the interference of the court (*l*).

Tenant and reversioner—Rights against each other—Waste.—"Waste," observes Blackstone, "is a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Tenant for life or term of years was not by the common law responsible for waste; nor was waste punishable in any tenant, excepting guardian in chivalry, tenant in dower, and tenant by the curtesy. And the reason of the diversity was, that the estate of these three tenants was created by the act of the law itself, which, therefore, gave a remedy against them; but tenant for life, or for years

413 came in by the demise and lease of the owner of the fee; and, therefore, he might have provided against the committing of waste by his lessee; and, if he did not, it was his own default" (*m*). But, for the benefit of reversioners, it was provided by the statutes of Marlbridge (*n*), and of Gloucester (*o*), that every man from thenceforth should have a writ of waste in the

(*g*) *Hopwood* v. *Schofield*, 2 M. & Rob. 35. *Battishill* v. *Reed*, 18 C. B. 714; 25 L. J., C. P. 290.

(*h*) Cresswell, J., *Battishill* v. *Reed*, *supra*.

(*i*) *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97.

(*k*) *Wilson* v. *Townend*, 1 Dr. & Sm. 324; 30 L. J., Ch. 25. *Herz* v. *Union Bank*, 2 Giff. 686.

(*l*) *Cleeve* v. *Mahany*, 9 W. R. 882.

(*m*) 2 Bl. Com. ch. 18, s. 6.

(*n*) 52 Hen. 3, c. 23.

(*o*) 6 Edw. 1, c. 5, repealed. See 42 & 43 Vict. c. 59.

chancery against him that holds for term of life or years, or a woman in dower; and for waste made in the time of wardship it shall be done as is contained in the great charter, &c. Since the passing of these statutes, therefore, all tenants for life or term of years have been liable in damages for waste, unless their leases have been made to them without impeachment of waste. All tenants, whatever their term or interest, are liable for commissive waste; but a mere tenant at will, or from year to year, is not responsible for permissive waste (*p*).

Commissive, or, as it is more frequently termed, wilful waste, consists, amongst other things, in the doing by a tenant of some wilful injury to the premises demised to him, such as pulling down houses and buildings, prostrating walls, removing landlord's fixtures, breaking windows, or tiles and slates, and uncovering the roofs of houses, digging or ploughing up, or destroying the surface of ancient pasture land, and sowing the land with pernicious crops (*q*), digging and carrying away brick-earth (*r*), or stones (*s*), opening mines or quarries (*t*), abusing a limited right to dig for and carry away stone (*u*), cutting turf (*x*), timber (*y*), or underwood of insufficient growth (*z*), or pulling down fences and buildings, and carrying away the materials (*a*).

Tenant for life not made unimpeachable for waste by the person creating the tenancy is, by the statute of Gloucester (*b*), put upon the same footing, with regard to waste, as tenant for a term of years, and is responsible for permissive as well as commissive waste, so that, if he fails to keep up and maintain buildings, walls, and fences, he will be liable to an action for dilapidations. If the roofs of houses are uncovered by the wind, he must, in convenient time, repair them; but, if buildings are blown down by a violent

414 tempest, or destroyed by lightning, he is not bound to rebuild; and, if a house was uncovered and ruinous when he came into possession of it, it is then no waste to suffer it to fall down, as he is not bound to keep up and maintain a mere ruin (*c*). He is entitled to all such trees felled by the wind as he would have been entitled himself to fell, and also to all proper thinnings of planta-

(*p*) *Harnett* v. *Maitland*, 16 M. & W. 257 *Redfern* v. *Smith*, 1 Bing. 382. Tenants for life under the Settled Land Act, 1882, are protected as regards waste in making improvements, s. 29.

(*q*) *Worsley* v. *Stuart*, 4 Bro. P. C. 377. *Drury* v. *Molins*, 6 Ves. 323. *Pratt* v. *Brett*, 2 Madd. 62.

(*r*) *London* (*Bishop of*) v. *Web*, 1 P. Wms. 528. *Viner* v. *Vaughan*, 2 Beav. 466.

(*s*) *Cowper* v. *Baker*, 17 Ves. 128.

(*t*) *Gibson* v. *Smith*, 2 Atk. 182. Under the Settled Land Act, 1882, s. 11, part of the mining rent is to be set aside as capital under a mining lease.

(*u*) *Thomas* v. *Oakley*, 18 Ves. 184.

(*x*) *Coppinger* v. *Gubbins*, 9 Ir. Eq. Rep. 310.

(*y*) *Perrot* v. *Perrot*, 3 Atk. 94. *Packington's case*, 3 Atk. 215. *Morris* v. *Morris*, 15 Sim. 509.

(*z*) *Brydges* v. *Stephens*, 6 Madd. 279.

(*a*) *London* (*Mayor of*) v. *Hedger*, 18 Ves. 355.

(*b*) 6 Ed. 1, c. 5.

(*c*) 2 Roll. Abr. WASTE, C. Co. Litt. 53. Bac. Abr. WASTE.

tions, &c., as well as to all coppices and osier beds out in the nature of crops; but it seems to be doubted whether he has a right to cut poles (*d*). He may properly work an open mine, *i.e.*, a mine which has been worked within a few years of his coming into possession; but he cannot open a new mine and search for and carry away minerals (*e*).

Tenant and reversioner—Rights against each other—Waste in trees.—Tenant for life not made unimpeachable for waste may not cut timber. The question of what is timber depends, first, on general law; and, secondly, on the custom of the locality. By the general law, timber trees are those which serve for the building or reparation of houses, such as oak, ash, and elm (*f*), provided they are of the age of twenty years and upwards, and provided they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, it has been said, to make a good post. But the kind of tree which may be called timber may be varied by local custom. In some localities beech trees are considered timber, in others birches (*g*), in others hornbeam, and even white-thorn and black-thorn, and many other trees. Again, in certain localities, arising probably from the nature of the soil, trees of twenty years old are not necessarily timber; and, in other places, the test of when a tree becomes timber, is not its age but its girth. In the case of estates which are cultivated merely for the produce of saleable timber, which is cut periodically, it is not waste to cut the timber in accordance with the usual course, because in such a case the timber so cut down is looked upon as the annual profits of the estate. The tenant for life cannot cut ornamental trees, or destroy "germins," or stools of underwood (*h*), nor can he destroy trees planted for the protection of banks. But, with these and some similar exceptions, he may cut all trees which are not timber, except such trees as, being under twenty years of age, would become timber if they were allowed to grow to the requisite age (*i*); these last, however, may be cut down, provided it is done

415 for the purpose of allowing the proper development and growth of other timber which is in the same wood or plantation (*k*).

The property in timber wrongfully cut down by the tenant for life or anybody else, or blown down by a storm, if it is timber properly so called, belongs to the owner of the first vested estate

(*d*) *Bateman* v. *Hotchkin*, 32 L. J., Ch. 6.

(*e*) *Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J., Ch. 116. This applies to quarries as well as mines. *Elias* v. *Griffith*, 8 Ch. D. 521; 48 L. J., Ch. 203.

(*f*) 1 Cruise's Dig. 116.

(*g*) *Aubrey* v. *Fisher*, 10 East, 446. Larch trees appear not to be timber, per Baggallay, L. J., in *Harrison* v. *Harrison*, 28 Ch. D. 227; 54 L. J., Ch. 617.

(*h*) 2 Roll. Abr. 815, 817. *Gage* v. *Smith*, Godb. 210, pl. 298; 1 Inst. 53 a.

(*i*) 2 Roll. Abr. 815, 817.

(*k*) *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 43 L. J., Ch. 654.

of inheritance (*l*), unless he has colluded with the tenant for life to induce him to cut it down, in which case the court will interfere, and not allow him to get the benefit of his own wrong (*m*). If the timber so cut or blown down is not timber properly so called, it belongs to the tenant for life, unless he has himself cut it down wrongfully, in which case also the court would probably interfere, and not permit him to take the benefit of his own wrong (*m*²). If timber is decaying from age, or if for any special reason, as from its injuring other timber, it is proper that it should be cut down, but the tenant for life has no power to do so, an order of the court may be obtained, in a suit properly constituted, to have it cut down, unless it is for the defence and shelter or ornament of a mansion house (*n*); and in that case the court will dispose of the proceeds on equitable principles, and make them follow the interests in the estate, that is to say, the proceeds are invested, and the income given to the successive owners of the estate, until it comes into the possession of the owner of the first absolute estate of inheritance, who thereupon becomes entitled to the fund (*o*). But it is not sufficient, it seems, that the timber is merely ripe; it must be for the benefit of the remainderman that it should be cut, as where it is decaying, or injuring the growth of other trees, otherwise no order will be made (*p*). Where timber fit to be cut is felled by the tenant for life for the benefit of the estate, the person next in remainder may elect to treat the timber as lawfully cut, and require the value of it to be invested in land, and held as part of the estate, the tenant for life taking the interest of the fund, and the first owner of the inheritance, or tenant for life without impeachment for waste, taking the capital (*q*). If the tenant for life cuts the timber without the authority of the court, that is a wrongful act; and the Statute of Limitations will run against the

416 remainderman in fee from the time when the timber was cut, and not from the death of the tenant for life (*r*).

The tenant is, in general, entitled to take sufficient wood for necessary repairs to buildings and fences, to enable him to keep them up in the same state as he found them in, but not for the

(*l*) *Bewick* v. *Whitfield*, 3 P. Wms. 268. *Whitfield* v. *Bewick*, 2 *ib.* 241. See *post*, p. 445.

(*m*) *Powlett* v. *Bolton* (*Duchess of*), 3 Ves. 377. *Tullit* v. *Tullit*, Ambl. 370. *Dare* v. *Hopkins*, 2 Cox, 110.

(*m*²) *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 43 L. J., Ch. 654.

(*n*) *Burges* v. *Lamb*, 16 Ves. 182. *Bewick* v. *Whitfield*, 3 P. Wms. 267. *Field* v. *Brown*, 27 Beav. 90.

(*o*) *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 43 L. J., Ch. 652. See *Harrison* v. *Harrison*, 28 Ch. D. 220; 54 L. J., Ch. 617.

(*p*) *Seagram* v. *Knight*, L. R., 2 Ch. 628; 36 L. J., Ch. 918.

(*q*) *Phillips* v. *Barlow*, 14 Sim. 263. *Gent* v. *Harrison*, Johns. & H. 519; 29 L. J., Ch. 68. *Bagot* v. *Bagot*, 32 Beav. 509; 33 L. J., Ch. 116. *Lowndes* v. *Norton*, 6 Ch. D. 139; 46 L. J., Ch. 613.

(*r*) *Seagram* v. *Knight*, L. R., 3 Eq. 398; 2 Ch. 628; 36 L. J., Ch. 918. *Higginbotham* v. *Hawkins*, L. R., 7 Ch. 676; 41 L. J., Ch. 828.

purpose of making new buildings or fences, where none before existed (*s*).

Tenant and reversioner—Rights against each other—Waste by taming and reclaiming deer.—In the old books, the feeding of deer is declared to be waste where the deer have always been kept on the estate in a wild state; for wild deer go with the land to the heir-at-law, whereas, if they are fed and reclaimed, they cease to be animals *feræ naturæ*, and become personal property, and are severed from the freehold, and go to the executor; and it is this alteration in the nature of the property which makes the taming of the wild animal waste. But wild deer which have never been fed are seldom to be met with in England at the present time (*t*).

Tenant and reversioner—Rights against each other—Equitable waste.—Where tenant for life held without impeachment for waste, he might, nevertheless, have been restrained from committing what is termed equitable waste, which consists in doing acts of destructive injury to the property, to the detriment of the persons entitled in remainder; and, by the Judicature Act, 1873 (*u*), an estate for life without impeachment of waste will not confer upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating the estate. The term "without impeachment of waste," contained in a deed or will creating a life estate in land, does not enable the life tenant to deal with the property as if he were the absolute owner thereof in fee simple. He may cut down timber and growing trees fit for timber (*x*), and convert them to his own use (*y*), and open new mines, and work them for his own benefit; but he cannot dig and carry off brick-earth, and destroy a field, to the prejudice of the inheritance (*z*); and he will be restrained from committing wanton and malicious waste, such as damaging and destroying buildings, pulling down ancient boundary walls and fences (*a*), and cutting

(*s*) 1 Inst. 53 b. *Foley* v. *Wilson*, 11 East, 56.

(*t*) *Ford* v. *Tynte*, 2 Johns. & H. 150; 31 L. J., Ch. 177.

(*u*) Sect. 25, sub-sect. 3.

(*x*) *Smythe* v. *Smythe*, 2 Swanst. 251. *Gordon* v. *Woodford*, 29 L. J., Ch. 222. A tenant for life is entitled to all trees and timber which have fallen, and may cut such as are necessary for the purposes of fuel or repair (*Houghton* v. *Cooper*, 6 B. Mon. (Ky.) 287; *Shultz* v. *Barker*, 12 S. & R. (Penn.) 272; *Harris* v. *Godin*, 3 Har. (Del.) 19; *Moers* v. *Wait*, 3 Wend. (N. Y.) 104); and may, when necessary, cut trees to sell, to buy boards, to make repairs (*Loomis* v. *Wilber*, 5 Mass. (U. S.) 13), or cut timber from one lot to repair fences on another. *Owens* v. *Hyde*, 6 Yeng. (Tenn.) 334. Where it is the custom of the country to do so, he may sell hay from the farm (*Sarles* v. *Sarles*, 3 Sandf. Ch. (N. Y.) 601); so he may work mines and quarries which are open (*Carr* v. *Carr*, 4 D. & B. (N. C.) 170; *Loomis' Appeal*, 51 Penn. St. 44); but he may not open new mines. *Hill* v. *Taylor*, 22 Cal 191; *United States* v. *Parrott*, 1 McAll. (U. S. C. C.) 271.

(*y*) *Pyne* v. *Por*, 1 T. R. 56.

(*z*) *London* (*Bishop of*) v. *Web*, 1 P. Wms. 528.

(*a*) *Aston* v. *Aston*, 1 Ves. sen. 265. *Vane* v. *Lord Barnard*, 2 Vern. 739; Co. Litt. 220 a. *Duke of Leeds* v. *Lord Amherst*, 14 Sim. 357.

417 down thriving wood unfit for timber, and the felling of which would be destructive to the property (*b*); also from cutting down trees which were either planted or left standing for the shelter or ornament of a mansion-house (*c*). He may, however, cut such ornamental timber as the court would direct to be cut for the preservation of the rest, and will be entitled to the proceeds of it (*d*). But he is not responsible, although he allows a mansion-house and buildings to go to wreck and ruin for want of timely repairs to the roof and windows (*e*); nor if he pulls down a ruinous structure, and uses up the materials in rebuilding it (*f*).

A tenant in fee simple subject to an executory devise over will also be restrained from committing that sort of destructive injury to property which is called equitable or malicious waste; but he is entitled to commit ordinary waste, such as cutting timber, not being ornamental timber, unless he is restrained by the will creating his estate from cutting down timber of any kind (*g*).

A lessee for a term of years without impeachment of waste may be restrained at the instance of the reversioner from digging and carrying away brick-earth, as it destroys the field and causes lasting injury to the inheritance (*h*).

Tenant and reversioner—Rights against each other—Waste by trustees.—The words "without impeachment of waste," as applied to trustees of a term for special purposes, have a very different sense from the same words annexed to a tenancy for life. The court will not permit trustees so holding to execute their trust by cutting down timber (*i*). The court will also grant an injunction to prevent trustees from cutting down ornamental timber; and, if trees are felled by their orders, without the consent of the persons interested in the property, the trustees are bound to show that the cutting of them was absolutely necessary (*k*). When the legal estate in land is vested in trustees, and the equitable tenant for life is in possession of the land, it is the duty of the trustees to exercise their legal powers for the prevention of waste (*l*); but the court never holds trustees responsible for suffering permissive waste for want of repairs. "I can foresee," observes Wood, V.-C., "no end to the demand which would be made upon trustees by

(*b*) *Chamberlayne* v. *Dummer*, 1 Bro. Ch. C. 160; 3 *ib.* 548.

(*c*) *Micklethwaite* v. *Micklethwaite*, 26 L. J., Ch. 721. *Wellesley* v. *Wellesley*, 6 Sim. 497. *Burges* v. *Lamb*, 16 Ves. 174. See *Bubb* v. *Yelverton*, L. R., 10 Eq. 465; 40 L. J., Ch. 38.

(*d*) *Baker* v. *Sebright*, 13 Ch. D. 179; 49 L. J., Ch. 165.

(*e*) *Powys* v. *Blagrave*, 4 De G., M. & G. 448. *Lansdowne* v. *Lansdowne*, 1 Jac. & Walk. 522, overruling *Parteriche* v. *Powlett*, 2 Atk. 383.

(*f*) *Morris* v. *Morris*, 3 De Gex & J. 323.

(*g*) *Blake* v. *Peters*, 31 L. J., Ch. 889. *Turner* v. *Wright*, Johns. 740; 2 De G., F. & J. 234; 29 L. J., Ch. 470.

(*h*) *Bishop of London* v. *Web*, *ante*, p. 416.

(*i*) *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 115.

(*k*) *Campbell* v. *Allgood*, 17 Beav. 627.

(*l*) *Pugh* v. *Vaughan*, 12 Beav. 517.

418 remainder-men coming into possession of the trust property who might not think it sufficiently repaired, if they might say to the trustees, 'It was your duty to look after the tenant for life; you had the legal estate, and it was your business to see that he was doing all necessary repairs; and, as you have not done so, we shall fix you with the liability'" (*m*).

Tenant and reversioner—Rights against each other—Ecclesiastical dilapidations.—By the common law, the incumbent of a living is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them when necessary; for the revenues of the benefice are given as a provision, not merely for the clergyman himself personally, but for keeping up a suitable residence for the incumbent, and also for the maintenance of the chancel; and if, by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund for obtaining the means of replacing them. But the liability of the incumbent to repair and rebuild extends only to that which is useful; he is not bound to restore or replace anything in the nature of ornament, such as whitewashing, papering, and painting, except where painting is necessary to preserve exposed timbers from decay. His liability, therefore, in respect of the preservation and maintenance of buildings, extends further than that of a tenant for term of years, who is not bound to rebuild where he does not hold under a covenant to repair (*n*). His power and dominion over the property, also, extend further than that of a tenant for a term of years; for an action for dilapidations cannot be maintained against him for pulling down old buildings, and erecting new structures, provided they are found by a jury to be more convenient and beneficial to the living, and it appears that the evidence of title is in nowise impaired, and that no increased burthen is imposed upon the property (*o*).

An action lies at the suit of the successor against the preceding incumbent or his representatives for dilapidations of the house, the chancel, or other buildings or fences of the benefice (*p*), but not for any other kind of waste (*q*), nor for mismanagement or miscultivation of the glebe (*r*). But, although no action for dilapidations will lie, yet the incumbent may be restrained from committing other kinds of waste. As regards the cultivation and management of the glebe land of the living, that which would be waste when committed by a tenant for life, or a lessee for a term of years, will

(*m*) *Powys* v. *Blagrave*, Kay, 506; 4 De G., M. & G. 448.
(*n*) *Radcliffe* v. *D'Oyly*, 2 T. R. 630. *Wise* v. *Metcalfe*, 10 B. & C. 313; 1 Saund. 216 a, note (*a*).
(*o*) *Huntley* v. *Russell*, 13 Q. B. 572.
(*p*) *Radcliffe* v. *D'Oyly*, 2 T. R. 630.
(*q*) *Rose* v. *Adcock*, L. R., 3 C. P. 655; 37 L. J., C. P. 290.
(*r*) *Bird* v. *Relph*, 4 B. & Ad. 830.

419 not be so considered in the case of the incumbent of a living; for, if you apply to a parson's glebe the same law that prevails between lessor and lessee, and tenant for life and reversioner, the course of husbandry and cultivation must remain the same for all time. What is once arable or pasture must always continue so; and no rector or vicar could effect agricultural improvements by employing any part of his glebe in any other manner than that in which he found it employed. The court, therefore, will not restrain an incumbent from ploughing up meadow land, when it is shown that a great improvement will be thereby effected, and that the permanent value of the rectory, in a pecuniary point of view, will be thereby increased (*s*).

A rector may cut down timber for the repairs of the parsonage-house or the chancel, but not for any common purpose. If it is the custom of the country, he may cut down underwood for any purpose; but, if he grubs it up, except in furtherance of a manifest improvement, it is waste. He may cut down timber, likewise, for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage. But he cannot cut down timber except in these instances (*t*); nor can he open mines without the consent of the patron and ordinary (*u*); although he may work mines which were open and in existence at the time he came into possession of the property, and formed part of the annual profits thereof.

The law, however, of ecclesiastical dilapidations has been placed on an entirely new footing, so far as buildings are concerned, by the Ecclesiastical Dilapidations Act, 1871 (*x*), which provides (s. 53), that no sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of the Act, and to which the Act shall be applicable (*i. e.*, *semble*, in no case but that of wilful waste), unless the claim for such sum is founded on an order made under the provisions of the Act. The Act accordingly provides for the appointment of diocesan surveyors (s. 8), on whose recommendation all repairs to buildings, which the incumbent would be bound to repair, are to be made; and on the completion of such repairs, the liability of the incumbent or his personal representatives to any claim for dilapidations will cease for a period of five years from the date of the certificate by the surveyor of the due execution of the prescribed works, except in cases of wilful waste, or damage by fire against which the incumbent shall not have insured (ss. 46, 47). Similar provisions are made in respect

(*s*) *Duke of St. Albans* v. *Skipwith*, 8 Beav. 354.

(*t*) *Strachy* v. *Francis*, 2 Atk. 217. *Duke of Marlborough* v. *St. John*, 5 De G. & Sm. 179. *Sowerby* v. *Fryer*, L. R., 8 Eq. 417; 38 L. J., Ch. 617.

(*u*) *Holden* v. *Weekes*, 1 Johns. & Hem. 278; 30 L. J., Ch. 35.

(*x*) 34 & 35 Vict. c. 43. See also 35 & 36 Vict. c. 96; and 44 & 45 Vict. c. 25.

420 of the residences, &c., of archbishops, bishops, deans, canons, &c., on their employment, for the purpose of inspection and repair, of a surveyor approved by the Ecclesiastical Commissioners (ss. 25—28). The duty of executing the prescribed repairs, however, still rests on the incumbent (s. 19), who may borrow from the Governors of Queen Anne's Bounty the whole or any part of the sum required, and charge the same upon the benefice (s. 17). The incumbent may, if he prefers it, execute all necessary repairs himself, without the intervention of the surveyor (s. 22). But he would not, it seems, in such a case be entitled to the exemption from liability mentioned above; and provision is made by ss. 23 and 45, for the execution of the repairs, if the incumbent refuses or neglects to execute them.

It will be seen from the above provisions that the Act contemplates, in effect, a quinquennial inspection and repair of all ecclesiastical buildings which the incumbent would be bound to repair. But, should this not be done, it further provides that, on the vacancy of any benefice, the bishop shall direct the surveyor to report upon the dilapidations, and, after hearing the objections to such report, if any, shall make a final order stating the repairs and their cost, for which the late incumbent or his personal representatives are liable, which sum shall be a debt due from the late incumbent or his personal representatives to the new incumbent, and recoverable as such (ss. 29—36). Where a living is under sequestration at the death of the incumbent, the executor or administrator of the late incumbent, and not the sequestrator, is liable for the dilapidations (*y*).

Tenant and reversioner—Rights against each other—Waste by copyholders.—By the general custom of copyholds, if a copyholder commits waste, it is a forfeiture of his estate (*z*); and, as such penal consequences are attached to this description of tort, the law requires clear proof of some invasion on the part of the tenant of the lord's property, or some act or neglect which tends materially to deteriorate the tenement, or to destroy the evidence of its identity (*a*). The pulling down of an old ruinous barn by a copyholder, without the licence of the lord, is, in strictness of law, waste, and works a forfeiture of the copyhold estate; but, if no real injury has thereby been done to the inheritance, the penal consequences of waste do not attach, and there is no authority for saying that any act can be waste, so as to work a forfeiture, which is not injurious to the inheritance, either by diminishing the value

(*y*) *Jones* v. *Dangerfield*, 1 Ch. D. 438; 45 L. J., Ch. 161.

(*z*) *Salisbury* (*Marquis of*) v. *Gladstone*, 6 H. & N. 129; 9 H. L. C. 692; 34 L. J., C. P. 222.

(*a*) Burton's Real Property, 7th ed. p. 1335.

421 of the estate, or by increasing the burden upon it, or by impairing the evidence of title (*b*).

Tenant and reversioner—Rights against each other—Remedies for waste.—An action for waste in houses and buildings must, in general, be brought by the person entitled to the immediate estate in remainder; but, if the tenant for life commits waste, and the first remainder-man dies, the person next entitled may sue for the damage (*c*), if he had a vested interest in remainder at the time the waste was done (*d*). Where the husband and wife were seised of a messuage for their joint lives and the life of the survivor, and all the estate and interest of the husband became vested in the defendant, who permitted waste during the lifetime of the husband, it was held that the wife, who survived her husband, could not maintain an action against the defendant in respect of such waste (*e*). When the person next in remainder has only a life interest, his right to recover damages is, of course, confined to the injury done to his limited interest (*f*). In an action by a reversioner against the tenant, the true measure of damages is the diminution in the value of the reversion, and not the sum which it cost to restore the property, unless there are circumstances which call for vindictive damages (*g*). Where timber has been unlawfully felled on an estate by a tenant for life, or a person having a limited interest, the first tenant for life without impeachment of waste, or, if there is no such interest, the first owner of the inheritance, is entitled to maintain an action for the conversion of the timber as a chattel severed from the inheritance, passing over all the intermediate limited estates (*h*); for, as the property in the timber must be in some one as soon as the wrongful act is done, the law vests it in the first person in whom the right to fell the trees would have vested (*i*).

Tenant and reversioner—Rights against each other—Prevention of commissive or wilful waste by injunction.—The courts will interfere

(*b*) *Grubb* v. *Earl of Burlington*, 5 B. & Ad. 517.

(*c*) *Bray* v. *Tracy*, Cro. Jac. 688. *Paget's case*, 5 Co. 76 b.

(*d*) *Bacon* v. *Smith*, 1 Q. B. 348.

(*e*) *Ib.* 345.

(*f*) *Evelyn* v. *Raddish*, Holt, N. P. C. 543. The writ of prohibition for waste was anciently a common law remedy, grantable only at the instance of the person injured; but, by the statute of Westminster the second (13 Edw. 1, c. 14), now repealed, this writ was taken away, and a writ of summons substituted in its place; "and, although it is said by Lord Coke, when treating of prohibition at the common law, that it may be used at this day, those words, if true at all, can only apply to that very ineffectual writ directed to the sheriff, empowering him to take the *posse comitatus* to prevent the commission of intended waste." *Jefferson* v. *Bishop of Durham*, 1 B. & P. 121. The real action for waste, in which the land or tenement itself was recovered, with thrice as much as the waste was taxed at, has been abolished by the 3 & 4 Will. 4, c. 27, s. 36; and the remedy is now by action, in which the actual damage sustained may be recovered, and an injunction obtained to prevent the continuance or repetition of the mischief.

(*g*) *Whitham* v. *Kershaw*, 16 Q. B. D. 613.

(*h*) *Bowles's case*, 11 Rep. 79 b.

(*i*) *Gent* v. *Harrison*, Johns. & H. 524; 29 L. J., Ch. 68. By Order XVI. r. 37, in actions for the prevention of waste one person may sue on behalf of himself and all persons having the same interest.

422 by injunction to restrain tenants for life, and persons having a limited interest in land, from committing waste thereon to the injury of the reversioner (*k*), unless the wrongful act works a forfeiture of the estate, and the reversioner has an immediate right of entry, and fails to exercise the right by bringing an ejectment (*l*).

Where there is a tenancy for life subject to waste, a remainder for life dispunishable for waste, and a remainder in fee, the court will not suffer an agreement between the two tenants for life to commit waste to take effect against the remainder-man, before the time comes when the second tenant for life's power commences (*m*). So, where there is a tenancy for life, with remainder for life, and remainder in fee, the court, on the application of the remainder-man in fee to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction.

The court will also restrain, by injunction, a lessee for lives renewable for ever from committing waste on the demised premises (*n*).

The patron of a living may also have an injunction against the incumbent to stay waste; and a bishop may be restrained from felling timber for sale at the instance of the Attorney-General, on behalf of the crown, the patron of bishoprics (*o*). The patron is the proper person to institute a suit to restrain the opening and working of new mines; and he is the only person who can interfere, unless it be the ordinary, in the event of collusion between the patron and the incumbent (*p*).

An injunction to restrain waste will be granted to protect the interest of a child in *ventre sa mère*, or of a contingent remainder-man or executory devisee (*q*).

The court does not now treat questions of destructive damage to property exactly as it did forty or fifty years back; its protection in such respect being more largely afforded than it then generally was (*r*). "The arm of the court," it has been said, "is long enough to reach clear cases of destructive waste, even where the party committing such waste is in possession, and the party seeking to restrain the acts of waste is out of possession, and his title is denied by the defendant" (*s*). Where, therefore, an action

(*k*) Bac. Abr. WASTE, N.

(*l*) *Lathropp* v. *Marsh*, 5 Ves. 259.

(*m*) *Robinson* v. *Litton*, 3 Atk. 210. See *Birch-Wolfe* v. *Birch*, L. R., 9 Eq. 683; 39 L. J., Ch. 345.

(*n*) *Purcell* v. *Nash*, 1 Jones, 625.

(*o*) *Knight* v. *Mosely*, Amb. 176. *Wither* v. *Dean, &c. of Winchester*, 3 Mer. 427. *Duke of Marlborough* v. *St. John*, 5 De G. & S. 179.

(*p*) *Holden* v. *Weekes*, 1 J. & H. 278; 30 L. J., Ch. 35.

(*q*) *Robinson* v. *Litton*, 3 Atk. 211.

(*r*) *Haigh* v. *Jaggar*, 2 Coll. Ch. C. 231.

(*s*) V.-C. Wood, *Talbot* (*Earl of*) v. *Scott*, 4 Kay & J. 108. And see the Judicature Act, 1873, sect. 25 (8).

423 to recover possession has been brought, the court will, at the instance of the plaintiff in the action, restrain the person in possession of the property from recklessly cutting down vast quantities of timber, or denuding the estate of trees, or committing acts of waste and destruction inconsistent with any fair or reasonable exercise of acts of ownership (*t*); and, where waste is committed by a stranger in collusion with the tenant, the court will, at the instance of the landlord, grant an injunction against such stranger, as well as against the tenant (*u*). But "the court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in the case of wilful waste" (*x*).

An injunction will be granted against waste, when it is done only in a slight degree, or when threatened; but not on the principle that it will do no harm to the defendant, if he does not intend to commit the prohibited act (*y*).

Tenant and reversioner—Rights against each other—Waste—Effect of lâches or delay in seeking a remedy.—Where an expectant tenant for life in remainder sees a tenant for life in possession improperly cut timber, and not only takes no step to prevent it during his life, but allows a long period of time to elapse after his death without seeking redress, the court will not, after this long lapse of time, charge the estate of the prior tenant for life with the burthen of making good the value of the timber so cut by him; for the courts are averse to the assertion of stale demands (*z*).

Division of rights—Joint tenants and tenants-in-common.—Where two persons are tenants-in-common of land, the one is answerable to the other for any act by which the latter is ousted, actually or constructively, from the enjoyment of the common property. Thus one tenant-in-common may sue his co-tenant-in-common for turning him or his servants off the land or out of the house held in common. But the putting of a lock upon a gate by one tenant-in-common is not sufficient evidence of an ouster to sustain an action (*a*). So long as a tenant-in-common is only exercising lawfully the rights he has as tenant-in-common, no action will lie against him by his co-tenant; but, where there has been a direct and positive exclusion of the co-tenant-in-common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights, or where something has been done by one of the co-tenants which has destroyed the common property, there is a good cause of action (*b*). If one

(*t*) *Neale* v. *Cripps*, 4 K. & J. 472.

(*u*) *Norway* v. *Rowe*, cited 1 Myl. & Cr. 522.

(*x*) *Powys* v. *Blagrave*, 4 De Gex, M. & G. 448.

(*y*) *Coffin* v. *Coffin*, Jacob, 70; and under s. 25 (8) of the Judicature Act, 1873, the court will interfere to prevent threatened waste, *ante*, p. 390.

(*z*) *Harcourt* v. *White*, 28 Beav. 311; 30 L. J., Ch. 681.

(*a*) *Jacobs* v. *Seward*, L. R., 5 H. L. 464; 41 L. J., C. P. 221.

(*b*) *Jacobs* v. *Seward*, L. R., 5 H. L. 464, 474; 41 L. J., C. P. 221.

424 tenant-in-common misuses that which he has in common with another, he is answerable to the other in an action as for misfeasance (*c*). He is responsible to his co-tenant-in-common for cutting down trees, or pulling down walls, or doing any act tending to the lasting injury of the common property (*d*). So an action of trespass is maintainable by one tenant-in-common against his co-tenant-in-common, or the licensee of the latter, for digging and carrying away the soil of the close, as brick-earth or turf, as it destroys the subject-matter of the tenancy-in-common, and amounts in contemplation of law to an actual ouster (*e*).

If one tenant-in-common of a wall destroys the wall which is the subject of the tenancy-in-common, that is an actual ouster and expulsion of the one by the other, so that the party expelled and injured may maintain an action against the wrong-doer for the recovery of damages; but, if the wall is pulled down for the mere purpose of rebuilding it, and providing a better and stronger wall, no action is, it seems, maintainable (*f*). If an improper addition is made to the height of the wall by one tenant-in-common to the injury of the other, the latter may remove the heightened portion of the wall (*g*). Where a building is placed against the wall by one of two tenants-in-common of the wall, and the wall is heightened and carried up into a chimney, this is evidence of an ouster of the other tenant-in-common, as the altered wall and the old wall are not identical things, and the nature of the property is substantially changed (*h*). So, if two several owners of houses have a river or stream in common, and one of them corrupts it, the other shall have an action against him for damages. If there are two tenants-in-common of a wood, and one of them leases his part to the other, who cuts down young timber trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted: but one tenant-in-common cannot maintain an action in the nature of waste against the other, for cutting down trees of a proper age and proper growth; for this is no injury to the inheritance. So, if there are two tenants-in-common of a close, one cannot maintain an action of tort against the other for cutting the grass and making it into hay (*i*); or, if there are two tenants-in-common of a coal mine, one cannot sue

(*c*) Ld. Kenyon, C. J., *Martyn* v. *Knowllys*, 8 T. R. 145.

(*d*) Holt, C. J., *Waterman* v. *Soper*, 1 Ld. Raym. 737. *Cubitt* v. *Porter*, 8 B. & C. 257.

(*e*) *Wilkinson* v. *Haygarth*, 12 Q. B. 845.

(*f*) *Cubitt* v. *Porter*, 8 B. & C. 257. This common law right is modified in the metropolis by the provisions of the Metropolitan Building Act (18 & 19 Vict. c. 122). *Standard Bank of British South America* v. *Stokes*, 9 Ch. D. 68; 47 L. J., Ch. 554.

(*g*) *Cubitt* v. *Porter*, 8 B. & C. 257. *Murray* v. *Hall*, 7 C. B. 441. *Murly* v. *M'Dermott*, 8 Ad. & E. 138.

(*h*) *Stedman* v. *Smith*, 8 El. & Bl. 1; 26 L. J., Q. B. 315.

(*i*) *Jacobs* v. *Seward*, L. R., 5 H. L. 464; 41 L. J., C. P. 221.

425 the other or his licensee for working the coal (*k*). But, in either of the three last-mentioned cases, he is entitled to recover a moiety of the value of the tree, hay, or coal (*l*).

By the common law, indeed, joint tenants and tenants-in-common had no remedy against each other where only one received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion, unless he actually made him so. But by the 4 Anne, c. 16, s. 27, it is provided, that joint tenants and tenants-in-common, and their executors and administrators, may have an account against the others as bailiffs, for receiving more than their just share or proportion (*m*).

Where a tenant-in-common continues in occupation as tenant at sufferance, after the expiration of a lease to him by his co-tenant, he will be liable in an action for use and occupation at the suit of the latter. One tenant-in-common who expends money on ordinary repairs has no right of action against his co-tenant for contribution (*n*).

Joint tenants and tenants-in-common—Ruinous party-walls.—If injury results from the non-repair of a party-wall, of which the plaintiff and defendant are tenants-in-common, and there has been a neglect of the duty to repair on the part of the plaintiff, as well as on the part of the defendant, the plaintiff cannot recover damages (*o*). Where the plaintiff and the defendant being jointly interested in the pulling down and rebuilding of a party-wall between their respective houses, each appointed an agent to superintend the execution of the work, and the work was negligently done, and the plaintiff's house was much injured from the want of proper support during the execution of the work, it was held that he could not maintain an action for damages against the defendant, as the blame was the common blame of both. "Since the wall," observes Lord Ellenborough, "was taken down by both, neither could impute negligence to the other" (*p*).

But where *A* and *B* were adjoining owners, and *A* employed a contractor to pull down and rebuild his house, which involved an

(*k*) *Job* v. *Potton*, L. R., 20 Eq. 84; 44 L. J., Ch. 262.

(*l*) *Martyn* v. *Knowllys*, 8 T. R. 145.

(*m*) See *Jacobs* v. *Seward*, L. R., 5 H. L. 464; 41 L. J., C. P. 221.

(*n*) *Leigh* v. *Dickeson*, 15 Q. B. D. 60; 54 L. J., Q. B. 18.

(*o*) See *Chauntler* v. *Robinson*, 4 Exch. 163. In Fitzherbert's Abridgment we read that, "where there are three tenants-in-common or joint tenants of a mill or house which falls to decay, and one will repair, but the others will not repair the same, he shall have a writ *de reparatione faciendâ* against them, and the writ is such, &c. And so, if a man has a house adjoining to my house, and he suffers his house to lie in decay to the annoyance of my house, I shall have a writ against him to repair his house in such form: 'Command A. that, &c., he cause to be repaired his certain house in N., which threatens destruction to the nuisance of the freehold of B., in the same town, which he ought and hath been used to repair.'" Fitz. Nat. Brev. 127. Co. Litt. 56 b. This writ was abolished by the 3 & 4 Wm. 4, c. 27, s. 36.

(*p*) *Hill* v. *Warren*, 2 Stark. 378.

426 interference with the party wall likely to cause damage, and *B's* house was injured, it was held that *A* was liable for the negligent acts of his contractor (*q*).

Rights of the survivor of two joint tenants or tenants-in-common.—In case of the death of one of two joint tenants of lands or chattels, the whole interest in the property passes to the survivor; but, in the case of the death of one of two tenants-in-common of real property, the share and interest of the deceased passes to his heir-at-law, and, in the case of a tenancy-in-common of chattels, to the personal representatives of the deceased. Joint disseisors are joint tenants and not tenants-in-common; and so are persons who continue to hold land after their title has expired (*r*).

Joint tenants and tenants-in-common—Remedy by injunction.—The court will, by injunction, prevent one tenant-in-common from wilfully destroying the common property (*s*); but, where a railway company obtained a lease from five out of six tenants-in-common, and laid down a railway on the land in spite of the opposition of the sixth, the court refused to grant an injunction to prevent the latter from tearing up the rails (*t*). If one tenant-in-common thinks proper, by agreement with the other, to hold the common property as occupying tenant, and thereby excludes his co-tenant-in-common from all right of entry upon the land held in common, an injunction will be granted to restrain him from dealing with the land otherwise than as an ordinary occupying tenant (*u*). But, if there is no tenancy, the tenant-in-common in occupation of the land cannot be restrained from acts which are merely contrary to good husbandry and the custom of the country, but which do not amount to the destruction or waste of the common property (*x*).

Rights of property in special cases—Ownership of minerals.—*Primâ facie* the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ;* and those who claim the property in the minerals below, or any interest in them, must do so by some grant or conveyance by him, or his predecessors in title, or, it may be, from the Crown. The rights of the grantee to the minerals, by whomsoever granted, must depend on the terms of the deed by which they are conveyed, or by which they are reserved when the surface is conveyed. *Primâ facie* it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must be also granted or reserved as a necessary incident, on the principle that, *Quando aliquid conceditur, conceditur et id sine quo*

(*q*) *Hughes* v. *Percival*, 8 App. Cas. 443. And see *Dalton* v. *Angus* and *Bower* v. *Peate*, *ante*, p. 106.
(*r*) *Ward* v. *Ward*, L. R., 6 Ch. 789.
(*s*) *Hole* v. *Thomas*, 7 Ves. 589.
(*t*) *Durham and Sunderland Rail. Co.* v. *Wawen*, 3 Beav. 119.
(*u*) *Twort* v. *Twort*, 16 Ves. 128.
(*x*) *Bailey* v. *Hobson*, L. R., 5 Ch. 180; 39 L. J., Ch. 270.

427 *res ipsa esse non potest* (*y*). A reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to give it a more limited meaning (*z*). Where the owner of a manor and of the demesne lands thereof, granted away the manor and all his estate and interest therein, "except and always reserved" to the grantor, his heirs and assigns, *all* the coal in any of the said lands, it was held that this reservation gave to the grantor an absolute and perpetual right in fee simple to the coals (*a*).

Support from the subsoil.—The owner of the surface is entitled of common right to the support of the adjacent strata, so that the owner of the subsoil and minerals cannot lawfully remove them without leaving support sufficient to maintain the surface in its natural state (*b*). This is a rule of law founded on natural justice, and is a restraint on the exercise of dominion over property essential to the beneficial occupation and enjoyment of the soil. If land not granted expressly for building purposes is weighted with buildings, the owner of the surface has no right to the additional support necessary for the maintenance of the buildings until he has acquired the right by grant or prescription; so that, if the owner of the subsoil in working mines leaves sufficient support for the surface, but the land sinks in consequence of the weight of the buildings that have been placed upon it, the owner of the subsoil is not responsible for the damage done (*c*). But if the weight of the buildings has in no way caused the sinking of the land, and the land would have fallen in whether buildings had been erected on it or not, the building on the land becomes quite immaterial, and the defendant is responsible in damages to the extent of the injury done to both houses and land (*d*). Thus, if I grant a meadow to another, retaining the minerals under it, and also the adjoining land, I am bound so to work my mines and to dig my

(*y*) Sheppard's Touchstone, ch. 5, p. 89. *Rowbotham* v. *Wilson*, 8 H. L. C. 348, 360; 30 L. J., Q. B. 965. *Wilkinson* v. *Proud*, 11 M. & W. 33.

(*z*) *Hext* v. *Gill*, L. R., 7 Ch. 699; 41 L. J., Ch. 761. *Atty.-Gen. for the Isle of Man* v. *Mylchreest*, L. R., 4 App. Cas. 294. *Bell* v. *Wilson*, L. R., 1 Ch. 303; 35 L. J., Ch. 337. Therefore the lord of the manor, who is entitled to all minerals, is entitled to coprolites. *Atty.-Gen.* v. *Tomline*, 5 Ch. D. 750; 46 L. J., Ch. 654. But not to the remains of a prehistoric boat. See *Elwes* v. *Brigg Gas. Co.*, 33 Ch. D. 566.

(*a*) *Cardigan* (*Earl of*) v. *Armitage*, 2 B. & C. 197. As to the rights of the grantor's licensees, see *Metcalfe* v. *Westaway*, 34 L. J., C. P. 113.

(*b*) *Humphries* v. *Brogden*, 12 Q. B. 739. *Smart* v. *Morton*, 5 El. & Bl. 47; 24 L. J., Q. B. 260. *Roberts* v. *Haines*, 7 El. & Bl. 625; 27 L. J., Ex. 49. *Dixon* v. *White*, 8 App. Cas. 833. As to copyhold allotted under an Inclosure Act, see *Wakefield* v. *Duke of Buccleuch*, L. R., 4 Eq. 613; 4 H. L. 377; 36 L. J., Ch. 768.

(*c*) *Backhouse* v. *Bonomi*, 9 H. L. C. 503; affirming *Bonomi* v. *Backhouse*, El., Bl. & El. 622; 28 L. J., Q. B. 378.

(*d*) *Brown* v. *Robins*, 4 H. & N. 191; 28 L. J., Ex. 250. *Rogers* v. *Taylor*, 2 H. & N. 828; 27 L. J., Ex. 175. *Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J., Ex. 102. *Hunt* v. *Peake*, 1 Johns. 712; 29 L. J., Ch. 785.

428 adjoining lands as not to cause the meadow to sink or fall over. But, if I do this, and the grantee thinks fit to build a house on the land he has acquired, he cannot complain of my workings and diggings, if, by reason of the additional weight he has put on the land they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied grant and warranty of support, subjacent and adjacent, as if the house had already existed (*e*); and, if the additional weight of the building has in nowise caused the surface to sink, and the land would have sunk if no building had been put upon it, the excavator or miner is responsible for the damage done both to the land and buildings (*f*).

Upon the demise of mineral or other subjacent strata to a lessee to be worked, the general rule prevails, and the lessor retains his right of support, unless it appears from express words in the lease, or by necessary implication therefrom, that he has waived or qualified his right (*g*). If the owner of land with subjacent mines grants away the mines, together with the power of raising the minerals, without regard to any injury done thereby to the surface, such a grant will, it seems, be good, and will bind the inheritance; and his estate in the surface will pass to his assigns, abridged to that extent of the right of support from the minerals. Hence it seems to follow, that it is competent for the owner of the surface of land effectually to curtail by grant, in favour of the owner of subjacent mines, the right to support therefrom. Where land had been allotted under a local enclosure Act, the effect of which was to vest the surface in the allottee, and the minerals in the lord of the manor, it was held, under the words of the Act, that the latter could not be restrained from working the mines, although by so doing he let down the surface, even to the extent of destroying it, and that there was no difference for this purpose between lands allotted under the General Enclosure Act (41 Geo. 3, c. 109, s. 32), and lands sold to pay the expenses of the enclosure (*h*).

If the owner of the subsoil excavates it without leaving proper support for the surface, the owner of the surface has no right of action until some actual damage has been sustained by him. "If

(*e*) *Caledonian Rail. Co.* v. *Sprot*, 2 Macq. 452. *North Eastern Rail. Co.* v. *Elliott*, 10 H. L. C. 333; 32 L. J., Ch. 402. *North Eastern Rail. Co.* v. *Crosland*, 2 Johns. & Hem. 565; 32 L. J., Ch. 353. *Harris* v. *Ryding*, 5 M. & W. 60. *Roberts* v. *Haines*, 7 El. & Bl. 625; 27 L. J., Ex. 49.

(*f*) *Ante*, p. 427.

(*g*) *Dixon* v. *White*, 8 App. Cas. 833. *Davis* v. *Treharne*, 6 *ib.* 460. *Love* v. *Bell*, 9 *ib.* 287; 53 L. J., Q. B. 257.

(*h*) *Rowbotham* v. *Wilson*, 8 El. & Bl. 123; 8 H. L. C. 359; 30 L. J., Q. B. 49. *Aspden* v. *Seddon*, L. R., 10 Ch. 394; 44 L. J., Ch. 359. As to what words will amount to a grant of a right to destroy the surface, see *Hext* v. *Gill*, L. R., 7 Ch. 699; 41 L. J., Ch. 761. *Taylor* v. *Shafto*, 8 B. & S. 228.

429 that were not so, the owner of the subjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action, though, before any damage had actually occurred, he had, by substituting other means of support, removed all danger of injury to the plaintiff's property. This would be wholly inconsistent with the right of the proprietor to use his property as he pleases, provided he does not injure that of his neighbour" (*i*).

Injunction to restrain a disturbance of the right to support.—Where there are separate owners of surface and subsoil, and the owner of the subsoil begins to excavate so as to deprive the owner of the surface of his natural right to the support of the subsoil, the court will interfere by injunction to prevent any further excavation of the subsoil interfering with the use and enjoyment of the surface (*k*). When a millowner or riparian proprietor is entitled to the benefit of the natural flow of water through a mill-stream, or through a natural watercourse, the court will by injunction restrain the owner of the subsoil or minerals from excavating or mining beneath the stream so as to endanger the existence of the watercourse or the loss of the water; but the person seeking relief must show that some injury has actually happened, or that it will inevitably result from the prosecution of the mining operations (*l*).

Injuries from unguarded wells and mining-shafts.—Where the surface of land is in the possession of one man, and the subsoil and minerals in the possession of another, and the mineral-owner sinks a mining-shaft to enable him to work the minerals, it is his duty to fence the shaft so as to prevent injury to the cattle and sheep depasturing upon the surface (*m*). If a man hires a meadow, and turns his cattle therein, and they fall down the disused shaft of a mine, the person to whom the shaft belongs, and who has the dominion and control over it, will be responsible for the damage done (*n*).

If the owner of land has parted with the vesture and herbage and right to the surface of the land, retaining only an interest in the subsoil, he cannot maintain an action for trespasses upon the surface (*o*); but, if any person digs holes through the surface, and trespasses upon the subsoil, he is then entitled to an action for damages (*p*). If land is demised generally to a lessee, who enters

(*i*) Per Wightman, J., *Bonomi* v. *Backhouse*, El., Bl. & El. 637—646; 28 L. J., Q. B. 378.

(*k*) *Hunt* v. *Peake*, 1 Johns. 708; 29 L. J., Ch. 785.

(*l*) *Elwell* v. *Crowther*, 31 Beav. 163; 31 L. J., Ch. 763.

(*m*) *Williams* v. *Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 237. But the owner of lands is not liable for an injury arising from an unguarded excavation made by a stranger: *Mercer* v. *Carroll*, 46 Md. 193.

(*n*) *Sybray* v. *White*, 1 M. & W. 435. As to fencing disused mines, see the 35 & 36 Vict. c. 76, ss. 41, 51; c. 77, ss. 13, 23; 44 & 45 Vict. c. 26; and see Public Health Act, 1875, s. 313.

(*o*) *Cox* v. *Mousley*, 5 C. B. 549.

(*p*) *Cox* v. *Glue*, *ib.* 549, 553; 17 L. J., C. P. 162.

430 under the lease, he is in possession of both the surface and the minerals; but he has no right to work the minerals without the licence of the lessor; neither can the lessor work them without the permission of the lessee. If the adjoining occupier sinks a mine in his own land, and makes lateral excavations, trespassing upon the minerals of the lessee without disturbing the surface of the land in his occupation, the lessee may, nevertheless, maintain an action for the trespass and injury to his possessory interest, and the lessor may maintain an action for the injury to his reversionary estate. If the surface and minerals have been dissevered in title, and have become separate tenements, then the grantee or owner of the minerals is the only person entitled to sue in respect of trespasses upon them (*q*).

Of the right to search for minerals under lands weighted by railways and canals.—By the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), it is enacted (s. 77) in the case of the purchase of lands by any company constituted under that Act, that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except such part thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased, and that all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby; and by s. 78 it is enacted that, if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, &c., shall give notice in writing to the company of his intention; and, if it appears to the company that the working of the mines is likely to damage the works of the railway, the company may, by giving compensation in the mode provided by the statute, prevent the working of the mines. But, if, within thirty days after the receipt of the notice, the company do not state their willingness to treat for the payment of compensation, the owner of the mines may work them in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working mines in the district, making good damage done to the railway or works by improper working. Similar provisions have been inserted in various Acts of Parliament incorporating canal companies, and enabling them to purchase lands for the formation of a canal;

(*q*) *Keyse* v. *Powell*, 2 El. & Bl. 144; 22 L. J., Q. B. 305. *Lewis* v. *Branthwaite*, 2 B. & Ad. 437. See *Hamilton* (*Duke of*) v. *Graham*, L. R., 2 Sc. App. 166.

431 and the effect of them is to deprive the company of the right to support for the railway or canal from coal, ironstone, slate, or minerals lying beneath the surface of the adjoining land, within the purchasing distance, or beneath land over which the railway or canal is carried, unless they have purchased the slate or minerals, or compensation has been given in the manner prescribed by the statute (*r*).

The defendant was the owner of the minerals lying under a triangular piece of land, surrounded by three lines of railway belonging to the plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface but not the minerals. The defendant, in April, 1885, gave the company notice, under sect. 78 of the Railways Clauses Consolidation Act, 1845, of his intention to work the minerals under the triangular piece of land, and also under the lines of railway. The company gave the defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The defendant then gave the company notice that he intended to work the minerals under the triangular piece of land, and for that purpose to enter upon and across the line of railway. It was held, that such a mode of working would be a trespass, and that the defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals under the triangular piece of land, and that the company must compensate him for the extra expense of so working (*s*).

Under statutory provisions of this sort, the company do not, in the first instance, pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage, the minerals remaining the property of the owner of the soil; but, when he is desirous of getting them, the company have the option of purchasing them at a fair price, to be settled, in case of dispute, in the usual way. These provisions, it has been observed, are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of an intended railway or canal in the first instance, before it is constructed, and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really want to get them. When this happens, the company have an option, either to buy, in which case the landowner cannot get

(*r*) *Great Western Rail. Co.* v. *Bennett*, L. R., 2 H. L. 27. *Midland Rail. Co.* v. *Checkley*, L. R., 4 Eq. 19; 36 L. J., Ch. 380.

(*s*) *Midland Rail. Co.* v. *Miles*, 30 Ch. D. 334; 55 L. J., Ch. 251; followed by Stirling, J., 33 Ch. D. 632.

432 the minerals, but is fully compensated for the loss of that right, or not to buy, in which case he receives no compensation at all, but his right to get them remains as complete as if no railway had been made (*t*), and he may take every part of his coal in the same manner as he might have done before the Act passed, his former rights in that respect not having been taken away by the Act, which has only appropriated the surface of the land, and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c., to the owner, to be enjoyed in the same manner as before (*u*).

"The difficulty which arose upon the Dudley Canal Act was this, that the wording of the clause there, 'doing no damage,' was coupled with the power of the company to purchase, and it seemed, in the judgment of the court, to be a useless and frivolous clause, unless they gave a wider interpretation to the words 'working without doing damage;' because, they said, if it is to be a simple and absolute clause that no damage shall be done, it is a very idle thing to put the company upon the terms of purchasing" (*x*). But, where there is no clause in the Act requiring the railroad or canal proprietors to procure immunity from damage by purchasing the minerals, and authorising them to make the purchase, the mine-owner cannot work his mine so as to destroy or injure the railroad or canal (*y*). If a mine-owner, having worked up to the purchasing limits, gives notice to the company, and the company decline to purchase the minerals, and the mine-owner proceeds with the working of the mine under the railway, and the soil sinks, and the railway drains and drainage works become choked up or destroyed, and the surface-water from the railway percolates through the earth, and floods the mine, the railway company are, in general, bound by statute to make good the damage and rebuild the drains, and this from time to time, as the earth subsides through the working of the mine (*z*). But, if the coal-owner proceeds to get the coal in the ordinary and usual course of working, and, without any negligence on the part of the canal proprietors, the strata become dislocated and the water of the canal escapes through the cracks and floods the mine, they are not responsible to the coal-owner in an action, although he may, perhaps, be entitled to compensation (*a*).

(*t*) *Dudley Canal Navigation Co.* v. *Grazebrook*, 1 B. & Ad. 72. *Stourbridge Canal Co.* v. *Dudley* (*Earl of*), 3 El. & El. 409; 30 L. J., Q. B. 108. *London & North Western Rail. Co.* v. *Ackroyd*, 31 L. J., Ch. 588.

(*u*) *Wyrley Canal Co.* v. *Bradley*, 7 East, 371.

(*x*) Wood, V.-C., *North Eastern Rail. Co.* v. *Elliott*, 29 L. J., Ch. 811.

(*y*) *Reg.* v. *Aire & Calder Navigation Co.*, 30 L. J., Q. B. 337.

(*z*) *Bagnall* v. *London & North Western Rail. Co.*, 7 H. & N. 423; 1 H. & C. 544; 31 L. J., Ex. 121, 480.

(*a*) *Dunn* v. *Birmingham Canal Co.*, L. R., 8 Q. B. 42; 42 L. J., Q. B. 34.

433 These statutory provisions do not exclude the ordinary right of a purchaser to support from adjacent land situate beyond the purchasing limits; and, therefore, where a vendor has sold land to a railway company for the erection of a bridge or a viaduct, he cannot excavate his own adjoining land, situate beyond the purchasing limits, so as to deprive the bridge or viaduct of the necessary adjacent support (*b*).

Support where the separate floors of a building are granted to several different proprietors.—If the owner of a house conveys the upper story to a purchaser, there is an implied grant of support from the lower stories, so that the owner of the latter cannot interfere with the walls and beams upon which the upper story rests, and prevent them from affording proper support (*c*); and, if a man builds a house, and forms each story or flat into a separate dwelling, and sells or lets the different stories of the house to different individuals, there is an implied grant to every purchaser or hirer of the rooms of all such adjacent and subjacent support as may be necessary for the maintenance and enjoyment of each respective dwelling. When the different floors and flats of the same house are held as separate freeholds by different individuals, the owner of the lower rooms and foundations is, in general, bound to uphold and maintain the main walls and necessary supports of the rooms above (*d*).

"Where I have a chamber below, and another has a chamber above mine, as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber, for the salvation of his chamber above" (*e*). There is a writ in NATURA BREVIUM to a mayor, to command him that has the lower rooms to repair the foundation, and him that has a garret to repair the roof; and that is grounded upon a custom (*f*).

If the owner of a house grants the upper rooms to be holden and enjoyed for life or in fee, reserving to himself the lower rooms, he impliedly undertakes not to do anything which will derogate from his own grant. If, therefore, he were to remove the supports of the upper room, he would be liable to an action (*g*); and, if he conveys the house to another by deed, reserving a lower story to

434 himself, with powers of enlarging and altering such lower

(*b*) *Elliot* v. *North Eastern Rail. Co.*, 10 H. L. C. 333; 32 L. J., Ch. 402. *North Eastern Rail. Co.* v. *Crosland*, 2 Johns. & H. 565; 32 L. J., Ch. 353.

(*c*) *Caledonian Rail. Co.* v. *Sprot*, 2 Macq. 450.

(*d*) *Richards* v. *Rose*, 9 Exch. 221. *Humphries* v. *Brogden*, 12 Q. B. 747.

(*e*) *Anon.*, Keilw. 98, pl. 4. *Anon.*, 11 Mod. 8.

(*f*) *Tenant* v. *Goldwin*, 6 Mod. 314; 2 Ld. Raym. 1093; Fitz. Nat. Brev. 127.

(*g*) Parke, B., *Harris* v. *Ryding*, 5 M. & W. 71.

story, those powers must be exercised so as not to interfere with or endanger the necessary support to the rooms above, unless the right of support is expressly renounced by the grantee of the upper stories (*h*).

If one man overloads the floor of a warehouse with merchandise, so that the floor breaks and crushes the goods of another man in the floor underneath, the latter is entitled to an action for damages against the former. If the floor is ruinous, the occupier must take good care that he does not put upon such ruinous floor more than it can well bear; and, if it will not bear anything, he ought not to put anything upon it to the prejudice of another. Where the defendant, who was the lessee and occupier of a warehouse, underlet a cellar beneath the warehouse to the plaintiff, and the defendant so overburthened the floor of the warehouse with merchandise that the floor gave way, and crushed the plaintiff's wine in the cellar, it was held that the defendant was responsible for the injury, and that it was no answer to the action to say that the floor was ruinous, and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he puts into it at his peril, that it be not so much that another shall take any damage by it. But, if the floor had fallen of itself, without any weight upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, there the defendant shall be excused" (*i*). Where the destruction is caused by using the demised property in a reasonable and proper manner, no action will lie (*k*).

Title to the church, chancel, and churchyard.—Although the freehold of the church and chancel, as well as the freehold of the churchyard, is in the rector, whether spiritual or lay, yet the right of possession is in the incumbent, who is responsible to the ordinary for the celebration of divine service (*l*). Where there is a

(*h*) *Smart* v. *Morton*, 5 El. & Bl. 47; 24 L. J., Q. B. 260. By the French law, "when the different stories of a house belong to different proprietors, and the titles to the property do not regulate the mode of reparation and reconstruction, they must be made in the following manner:—The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto; the proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest." Cod. Civ. liv. 2, tit. 4, art. 664.

(*i*) *Edwards* v. *Halinder*, Poph. 46.

(*k*) *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J., C. P. 809.

(*l*) See *Rugg* v. *Bishop of Winchester*, L. R., 2 P. C. 223; 38 L. J., P. C. 23. As to the right to compensation if the churchyard is taken compulsorily under an Act of Parliament, see *Stebbing* v. *Metropolitan Board of Works*, L. R., 6 Q. B. 37; 40 L. J., Q. B. 1. See also *Campbell* v. *Mayor, &c., of Liverpool*, L. R., 9 Eq. 579. *Ex parte Rector of Liverpool*, L. R., 11 Eq. 15; 40 L. J., Ch. 65. *Ex parte Rector of St. Martin's, Birmingham*, L. R., 11 Eq. 23; 40 L. J., Ch. 69. The 20 & 21 Vict. c. 81, which authorizes the Queen in Council to prevent, by order, vaults or places of burial from becoming injurious to the public health, only applies to grounds used at the time of the order for the

435 spiritual rector he has, when inducted, corporeal possession of the church for the use of the parishioners. Where there is no spiritual rector, the vicar or the perpetual curate has upon induction the like possession for the like purposes (*m*). A lay rector, therefore, has no right as against the vicar to the possession of the church or chancel (*n*). He is, however, *primâ facie*, entitled to the freehold of the churchyard, and to the trees and herbage growing there; although, where the vicar has had the enjoyment of the pasturage for a long period, it will be presumed to be part of his original endowment. It is questionable, however, whether such a presumption would extend to a perpetual curate, although for spiritual purposes he has, like the vicar, uncontrolled possession of the church and churchyard (*o*). A churchwarden has no right, without a faculty, to remove portions of the soil and the bones of deceased persons from the churchyard; and, if a monition from the ecclesiastical court issues against him to replace them, it is no answer to say he has transferred the land on which they were placed to another (*p*). The immemorial occupation and repair of a private chapel or chancel attached to a church, will entitle the lord of a manor, by prescription, to its exclusive use, although the freehold may be in another, and although the estate or house to which the chapel or chancel is appendant may not be situate in the parish (*q*); and the immemorial repair of such a chapel in a parish church, coupled with other acts of ownership, is evidence of a right of freehold in it, which may be conveyed to a third person, and is not necessarily appendant to any house (*r*).

The rector is entitled to the keys of the church, although the **436** churchwardens have a right of access to it at proper seasons. The latter cannot remove ornaments which have been illegally placed in the parish church, except under the sanction of the ordinary (*s*).

purpose of burial, or which may again be so used as of right. An Order in Council, therefore, directing the churchwardens to enter upon what was formerly a burial ground, is invalid; and the parties acting under it will be trespassers. *Foster* v. *Dodd*, L. R., 1 Q. B. 475; 3 *Ib.* 67. The Act to amend the laws concerning the burial of the dead in the metropolis (15 & 16 Vict. c. 85), putting an end to the general right of burial therein, specially reserves permission for particular individuals having private rights to bury in the grounds which are within the provisions of the Act, provided they previously obtain the sanction of one of her Majesty's principal secretaries of state for the time being, for the purpose. The legislature, therefore, has in a qualified manner preserved these rights; and the interference of the court may be obtained for their protection against the acts of wrong-doers who seek to interfere with the graves or the soil of the burying ground. *Moreland* v. *Richardson*, 22 Beav. 596; 24 Beav. 33; 26 L. J., Ch. 690. As to right of access for all persons to burial service, see 43 & 44 Vict. c. 41, s. 6.

(*m*) *Griffin* v. *Dighton*, 5 B. & S. 930; 33 L. J., Q. B. 181.

(*n*) *Griffin* v. *Dighton*, *supra*.

(*o*) *Greenslade* v. *Darby*, L. R., 3 Q. B. 421; 37 L. J., Q. B. 137.

(*p*) *Adlam* v. *Colthurst*, L. R., 2 A. & E. 30; 36 L. J., Ecc. Cas. 14.

(*q*) *Churton* v. *Frewen*, L. R., 2 Eq. 634; 35 L. J., Ch. 692. As to the right to ring the church bells, see *Dunn* v. *Crocker*, L. R., 2 A. & E. 41; 37 L. J., Ecc. Cas. 1.

(*r*) *Chapman* v. *Jones*, L. R., 4 Ex. 273; 38 L. J., Ex. 169.

(*s*) *Ritchings* v. *Cordingley*, L. R., 3 A. & E. 113.

But they are entitled to the communion plate as against the rector, in case of its conversion by him (*t*).

A prescriptive right to a pew in a church, as appurtenant to an ancient messuage, may be established by immemorial use and enjoyment, from which a faculty is presumed; and there is no necessity that the house should be within the parish (*u*). But, if the plaintiff claims a prescriptive right, and shows the commencement of it in very modern times, his claim will fail (*x*).

The Prescription Act (3 & 4 Will. 4, c. 71), s. 2, does not apply to a claim by prescription to a pew, but, in order to establish a prescriptive right, it is necessary to show a user more or less extended, and also that any necessary repairs were undertaken in relief of the parish by the person claiming or his predecessors in title (*y*).

A pew in a chancel may belong to a person in respect to the ownership of an ancient house, and in that case the tenant of the owner will obtain a sufficient title by occupation to justify an action by him in the ecclesiastical court for perturbation of a pew (*z*). Where a pew is granted by a faculty to the owners and occupiers of a particular messuage exclusive of all other persons, if the house is subdivided, the different occupiers will all be entitled to use the pew (*a*). Where no faculty can be produced or be presumed to have existed, the churchwardens appropriate the pews in a church according to their discretion, unless they are restrained from doing so by the private Act of Parliament (if any) under which the church was built; but they are not justified in dispossessing anyone of a sitting in a pew which he has enjoyed for some time, without giving notice of their intention and offering an opportunity for objection and explanation (*b*).

The property in the tombstones in a churchyard is in the person who erects them; and he may recover damages from anyone who takes them up or defaces the inscriptions (*c*).

A sexton of a parish church, for the churchyard of which a burial ground has been substituted under the 15 & 16 Vict. c. 85,

437 is entitled to perform therein his duties as sexton in respect to the burial of parishioners, just as he would have been entitled to do in the old parish burying-ground, and may justify his entry on the burial-ground, by himself or his deputy, to perform such duties, in spite of the refusal of the Burial Board to admit him. He is

(*t*) *Turner* v. *Baynes*, 2 H. Bl. 559. *Wilkinson* v. *Verity*, L. R., 6 C. P. 206; 40 L. J., C. P. 141.

(*u*) *Lousley* v. *Hayward*, 1 Y. & J. 583.

(*x*) *Griffith* v. *Matthews*, 5 T. R. 296.

(*y*) *Crisp* v. *Martin*, 2 P. D. 15.

(*z*) *Parker* v. *Leach*, L. R., 1 P. C. 312; 36 L. J., P. C. 26.

(*a*) *Harris* v. *Drewe*, 2 B. & Ad. 164.

(*b*) *Horsfall* v. *Holland*, 6 Jur., N. S. 278.

(*c*) *Spooner* v. *Brewster*, 3 Bing. 139. *Frances* v. *Ley*, Cro. Jac. 367. As to tombstones in a private cemetery, see *Ashby* v. *Harris*, L. R., 3 C. P. 523; 37 L. J., M. C. 164. See the 31 & 32 Vict. c. 47.

entitled, for the same reasons, to toll the bell in the chapel at such burial (*d*).

Title to the sea-shore and bed of navigable rivers.—The sea is the property of the Crown; and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the Crown, or which he has exclusively used for so long a time as to confer on him a title by prescription (*e*). The sea-shore between high and low water-mark is *primâ facie* the property of the Crown (*f*), and is extra-parochial, unless it is shown by common reputation or otherwise to form part of an adjoining parish (*g*); and so is the bed of a tidal river between high and low water-mark (*h*). The soil may, however, be vested in a private individual, or in the lord of the manor, by ancient grant from the Crown, and may form part of the adjoining manor (*i*); and so of the bed of a navigable river, where the tide flows and reflows, and of all estuaries or arms of the sea. But, where a right is claimed to the bed of a navigable river, it must be subject to the common law right of navigation by the public, including that of anchorage. No anchorage dues, therefore, are claimable, although they have been submitted to from time immemorial, unless it can be shown (and slight evidence will be sufficient), that some service to navigation either is, or was originally, rendered in return for the grant, or the *locus in quo* forms part of a port (*k*).

438 Where a manor was held under an ancient grant from the Crown, which professed to grant the manor with wreck of the sea, several fishery, and other rights of an extensive description, but did not expressly purport to convey "*littus maris*," it was held that acts of dominion and ownership exclusively exercised by the lord, upon the adjoining sea-shore, between high and low water-

(*d*) *Burial Board of St. Margaret's, Rochester* v. *Thompson*, L. R., 6 C. P. 445; 40 L. J., C. P. 213.

(*e*) *Benest* v. *Pipon*, 1 Knapp, P. C. 60, 67.

(*f*) Hale, *De Jure Maris*, Hargrave's Law Tracts, pp. 25—37. *Att.-Gen.* v. *Chambers*, 4 De G. & J. 55; 4 De G., M. & G. 206.

(*g*) *Reg.* v. *Musson*, 8 El. & Bl. 900; 27 L. J., M. C. 100.

(*h*) *Duke of Bridgewater's Trustees* v. *Bootle-cum-Linacre*, L. R., 2 Q. B. 4; 36 L. J., Q. B. 41.

(*i*) *Whitstable* (*Free Fishers of*) v. *Gann*, 11 C. B., N. S. 387; 31 L. J., C. P. 372. See *Mace* v. *Philcox*, 15 C. B., N. S. 600; 33 L. J., C. P. 124. But proof that it does so ought to be strictly and rigidly required from all lords of manors who set up exclusive rights in the soil, in derogation of the free use and enjoyment of the sea-shore by the public. Where proof was given by the lord of the manor or territory of Gower of an ancient grant of the *terra de Gower* in the time of King John, and the limits of the manor, both on the land and the sea-side, were uncertain, common reputation, modern usage, and the exercise by the lord of acts of dominion over the sea-shore, were admitted in evidence to show the boundary of the manor on the sea-side. *Duke of Beaufort* v. *Mayor, &c., of Swansea*, 3 Exch. 413. See *Lestrange* v. *Rowe*, 4 F. & F. 1048, and *Brew* v. *Haren*, Ir. Rep., 9 C. L. 29. See Wood on Nuisances, Chapter XIV.

(*k*) *Gann* v. *Whitstable Free Fishers*, 11 H. L. C. 192; 35 L. J., C. P. 29. *Whitstable Free Fishers* v. *Foreman*, L. R., 2 C. P. 688; 3 *Ibid.* 578; 4 H. L. 266.

mark, and which acts would have been unlawful without a licence or grant from the Crown, such as the constant and exclusive digging and taking away of sand, stone, gravel, and sea-weed, might be called in aid of the grant to show that the sea-shore was parcel of the manor (*l*). But mere occasional acts of taking sand, gravel, shells, or sea-weed from the sea-shore, ought not of themselves, without proof of adverse and exclusive enjoyment on the part of the lord, to raise any presumption of a grant of the soil from the Crown (*m*). By a grant of the sea-shore, the Crown conveys not that which at the time of the grant is between high and low water-mark, but that which from time to time shall be between these two *termini*, so that the freehold shifts as the sea recedes or encroaches. The ordinary limit of the sea-shore is the line of the medium high tide between the springs and the neaps (*n*).

Different rights in the sea-shore may be vested in a subject, according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot (*o*). But the grantee of the Crown must take subject to such prescriptive rights as may have been acquired by subjects by immemorial usage and enjoyment (*p*), and to the common law right of navigation where the grant is of the soil of a navigable river (*q*). A possessory title, sufficient against a trespasser, may be shown by persons claiming foreshore without producing evidence sufficient to displace the Crown (*r*).

The owner of foreshore may be restrained by injunction from removing shingle therefrom to such an extent as to destroy the natural barrier of the sea, to the injury of a neighbouring landowner (*s*).

Of the title to waste uninclosed land adjoining the sea-shore.—All uninclosed waste land abutting on the sea-shore, and situate
439 above the high water-mark of ordinary spring-tides, belongs *primâ facie* to the owner of the adjoining property, although it is covered with beach and sea-weed, and overflowed by the waves at extraordinary spring-tides (*t*).

Title to the soil of rivers and fresh-water lakes.—The soil of

(*l*) *Calmady* v. *Rowe*, 6 C. B. 861. *Att.-Gen.* v. *Jones*, 2 H. & C. 347; 33 L. J., Ex. 249. And as to a tidal river, see *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

(*m*) *Livett* v. *Wilson*, 3 Bing. 115.

(*n*) *Att.-Gen.* v. *Chambers*, 4 De G., M. & G. 213.

(*o*) *Scratton* v. *Brown*, 4 B. & C. 497.

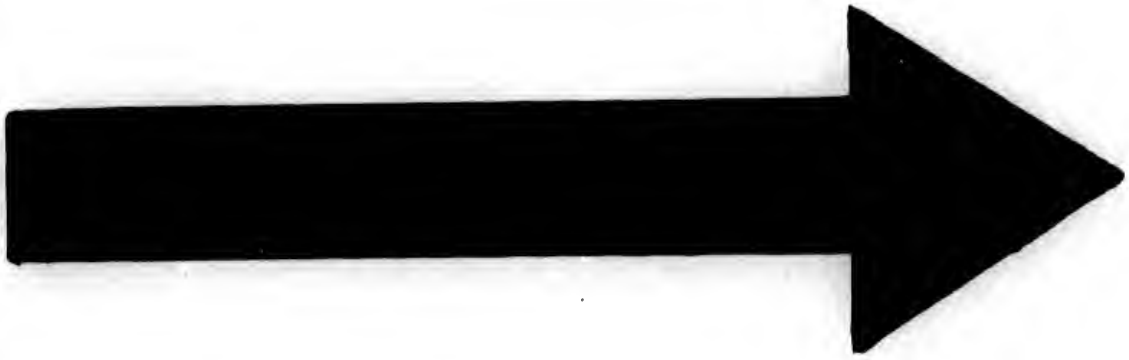
(*p*) Ld. Denman, C. J., *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

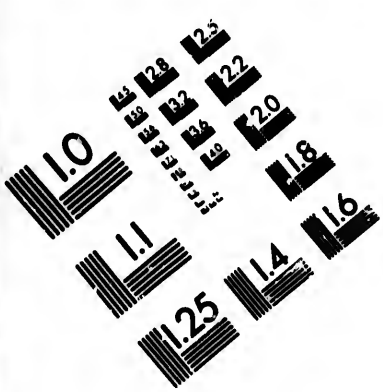
(*q*) *Gann* v. *Whitstable Free Fishers*, *supra*.

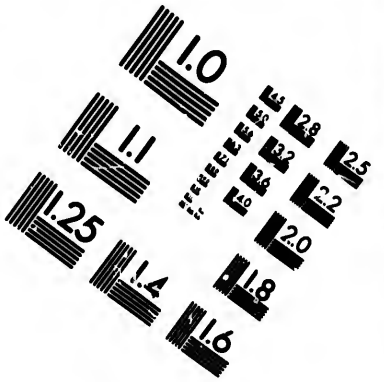
(*r*) *Corp. of Hastings* v. *Ivall*, 19 Eq. 558. See *Laird* v. *Briggs*, 19 Ch. D. 22.

(*s*) *Att.-Gen.* v. *Tomline*, 14 Ch. D. 58; 46 L. J. Ch. 654.

(*t*) *Lowe* v. *Govett*, 3 B. & Ad. 869. Hale, *De Jure Maris*, c. 4, p. 12. Harg. Law Tracts. As to land gained from the sea, see *Att.-Gen.* v. *Rees*, 4 De G. & J. 55.







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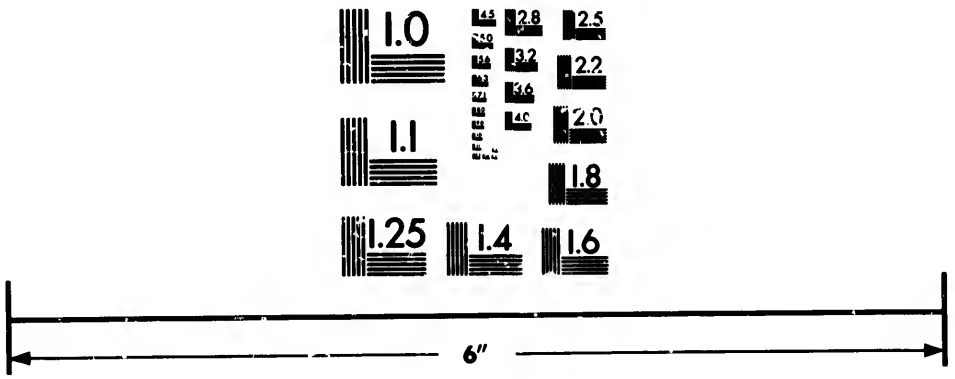

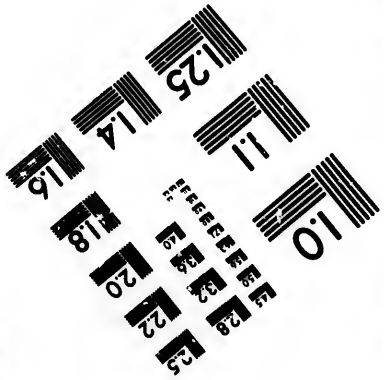

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the bed of a non-navigable river belongs *primâ facie* to the owners of the land or of the manors on either side in severalty *ad medium filum aquæ;* and on a conveyance of land bounded by a stream, half of the bed of the stream will pass to the grantee, although it may not actually be included in the conveyance (*u*). Neither, however, is entitled to use it, so as to interfere with the natural flow of the stream; hence an encroachment by one land-owner on his side of the stream is actionable at the suit of the other, although no special damage can be proved, if it is impossible to predicate that it will not produce serious damage in future (*x*). The same principle will apply, where the complaining party is not the proprietor of the bank opposite the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection in the bed of the stream alters the natural flow of the water on the complaining party's land. But an erection in the bed of a natural stream is not illegal *per se*, and consequently will give no right of action to a riparian owner who cannot by any possibility sustain damage from the erection (*y*).

The soil of freshwater lakes does not belong to the Crown in right of its prerogative. Where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property, it would seem that *primâ facie* the soil of the lake belongs to the owner of the adjoining property; but it is uncertain whether, where there are several adjoining proprietors, each is entitled *usque ad filum aquæ* (*z*). If a private individual is the owner of the soil forming the bed of a navigable lake, he will be entitled to sue any one who erects a pier running into the lake, or to knock down the pier; but, so long as it remains, the owners of land abutting on the lake have as against him a right to use it for the purpose of embarking and disembarking on the lake (*a*), and *á fortiori* this is so, when the owner of the soil of the lake has himself made and maintained the pier (*b*).

440 In the case of two proprietors on opposite banks of a stream, each is *primâ facie* entitled to fish from his own bank to the centre of the stream (*c*).

(*u*) *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; 2 Ch. 478; 36 L. J., Ch. 584; and see *Micklethwaite* v. *Newlay Bridge Co.*, 33 Ch. D. 133. In this country the owner of lands upon the banks of a freshwater navigable stream takes title to the centre thereof, and has full control over the same, subject to the right of the public to navigate the same: *Avery* v. *Fox*, 1 Abb. (N. S.) 246; *Commr.* v. *People*, 5 Wend. (N. Y.) 423; *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. (U. S.) 421; *Scott* v. *Wilson*, 3 N. H. 321; *Magnolia* v. *Marshall*, 39 Miss. 109; *Stuart* v. *Clark*, 2 Swan (Tenn.) 9; *Gray* v. *Bartlett*, 20 Pick. (Mass.) 186; *McCollough* v. *Wall*, 4 Rich. (S. C.) 68; *Hayes* v. *Bowman*, 1 Rand. (Va.) 417.

(*x*) *Bickett* v. *Morris*, L. R., 1 Sc. App. 47.

(*y*) Per Ld. Blackburn, *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 853.

(*z*) *Bristow* v. *Cormican*, 3 App. Cas. 641.

(*a*) *Marshall* v. *Ulleswater Steam Navigation Co.*, L. R., 7 Q. B. 166; 41 L. J., Q. B. 41.

(*b*) *Eastern Counties Rail. Co.* v. *Dorling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202.

(*c*) *Zetland* (*Earl of*) v. *Glover Incorporation of Perth*, L. R., 2 Sc. App. 70;

Right to the soil of turnpike roads and highways.—The soil of a turnpike road is not vested in the trustees of the road. The trustees have only the control of the highways, the ordinary rule being that the landowners on either side are entitled to the soil of the road, *usque ad medium filum viæ;* and, if a landowner owns the soil on both sides of the road, he is entitled to the soil of the whole road (*d*). This is a presumption of law founded on the assumption that in making a road for public convenience, the owners of the land on each side of the road have contributed a portion of their land towards the formation of the road (*e*). But this presumption exists only in the absence of evidence of ownership in other persons; and it may be shown, for instance, that a street in a town belongs to the lord of the manor, and not to the owners of the adjoining houses (*f*). Where the owner of two parcels of land on either side of a highway conveys them to a purchaser, the soil of the road passes by presumption of law, although the conveyance is silent as to the existence of the road, and although the particular measurement of each parcel of land is given which would exclude the road; but this presumption may be rebutted by circumstances showing that the grantor did not intend to transfer to the grantee his right of ownership in the soil of the highway. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the subject-matter of the grant; and, if lands abutting upon a highway are described in the grant as bounded by the highway, the right to the soil, *ad medium filum viæ*, will be impliedly included in the grant, unless the surrounding circumstances rebut the presumption (*g*). Even where the land intended to be conveyed is described by measurement and colour, on a plan annexed to, and forming part of, the conveyance, the soil of the highway *usque ad medium filum* passes by the conveyance, unless it is expressly excluded (*h*).

441 No legal presumption arises as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority, such as a board of commissioners for inclosing lands, acting under the powers of an Act of Parliament (*i*).

As to an island springing up in the channel of the stream, see *S. C.*

(*d*) *Davison* v. *Gill*, 1 East, 69. *Marquis of Salisbury* v. *Great Northern Rail. Co.*, 5 C. B., N. S. 208; 28 L. J., C. P. 53. See Wood on Nuisances, Chapter on "Highways."

(*e*) The same presumption applies to two conterminous parishes, where the boundary between them is a highway. *Reg.* v. *Strand Board of Works*, 4 B. & S. 526; 33 L. J., M. C. 33.

(*f*) *Beckett* v. *Corporation of Leeds*, L. R., 7 Ch. 421. As to how far streets vest in local boards, see *Coverdale* v. *Charlton*, 4 Q. B. D. 104; 48 L. J., Q. B. 128. *Rolls* v. *Vestry of St. George*, 14 Ch. D. 785. *Wandsworth Board* v. *United Telephone Co.*, 13 Q. B. D. 904.

(*g*) *Lord* v. *Commissioners of Sydney, &c.*, 12 Moore, P. C. 498.

(*h*) *Berridge* v. *Ward*, 10 C. B., N. S. 415; 30 L. J., C. P. 218. *Simpson* v. *Dendy*, 8 C. B., N. S. 433. *Dendy* v. *Simpson*, 7 Jur., N. S. 1058.

(*i*) *R.* v. *Hatfield*, 4 Ad. & E. 156.

By setting out a highway, and dedicating it to the use of the public, the owner of the land over which the right of way is granted does not thereby part with the property in the soil (*j*). The landlord, in such a case, has full dominion and control over the land subject to the easement, and may recover it in ejectment (*k*), or bring an action for a trespass against any person who deposits stones or rubbish upon the soil, or constructs a bridge over or upon any part of the highway, or infringes in anywise upon the ordinary proprietary rights of the owner of the soil (*l*). Nor do the Highway Acts or the Metropolis Local Management Acts interfere with this right, or the fact that the public have appropriated part of the highway to one kind of passage, viz., for carriages, and another part to another, *e.g.*, to foot-passengers. For the reasonable use and enjoyment, therefore, of his own premises the owner may make a carriage-way across the footway (*m*). The same rule prevails with regard to land over which any other privilege or easement has been granted to particular individuals, or to the public at large, such as a stall in a market (*n*).

The right of a man to step from his own land on to a highway is something quite different from the public right of using a highway (*o*). Where there is a public highway, the owners of land adjoining thereto have a right to go upon the highway from any spot adjoining their own land. They cannot, of course, pass over the soil of others without leave; but he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another (*p*). So, where there are two adjoining owners having a frontage to a highway or navigable river, each has a right of convenient access from his own land to the road or river, and *vice versâ;* and in the exercise of such right, each may for a reasonable time have carriages standing or vessels lying in front of his own premises, and even to some extent obstructing his neighbour's access, where he cannot otherwise enjoy a reasonable and usual mode of access to his own land (*q*).

442 *Of the title to waste land adjoining public highways.*—Waste land extending along a public highway is presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor (*r*); but this presumption prevails only so

(*j*) *Dovaston* v. *Payne*, 2 H. Bl. 527. *Reg.* v. *Pratt*, 4 El. & Bl. 860; 24 L. J., M. C. 113.

(*k*) *Goodtitle* v. *Alker*, 1 Burr. 133.

(*l*) 3 Com. Dig. CHIMIN. (A. 2), 27. *Lade* v. *Shepherd*, 2 Str. 1004. *Every* v. *Smith*, 26 L. J., Ex. 345.

(*m*) *St. Mary Newington* v. *Jacobs*, L. R., 7 Q. B. 47; 41 L. J., M. C. 72.

(*n*) *Mayor of Northampton* v. *Ward*, 1 Wils. 114.

(*o*) *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; 46 L. J., Ch. 68.

(*p*) *St. Mary Newington* v. *Jacobs*, L. R., 7 Q. B. 47; 41 L. J., M. C. 72.

(*q*) *Original Hartlepool Collieries Co.* v. *Gibbs*, 5 Ch. D. 713; 46 L. J., Ch. 311.

(*r*) *Doe* v. *Pearsey*, 7 B. & C. 307.

long as proof to the contrary is wanting (*s*). But the soil of highways within the district of an urban authority is, by the 38 & 39 Vict. c. 55, s. 149, vested in such authority to such an extent as to entitle them to demise the right of pasturage by the side of the highways (*t*). In remote and ancient times, when roads were frequently made through uninclosed lands, and when the same labour and expense were not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence—that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that, when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road, to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of waste left at the sides of roads: the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair (*u*).

But the ordinary presumption, that a narrow strip of land lying between the highway and the adjoining close belongs to the owner of the close, is either done away with or considerably narrowed, if the narrow strip is contiguous to, or communicates with, open commons or large portions of land; for the evidence of ownership which applies to the large portions, applies also to the narrow strip which communicates with them (*v*).

Right to the soil of accommodation-ways and private roads.—This depends upon the history of the premises and the evidence of acts **443** of ownership over the soil of the road. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, the jury may presume that the soil belongs half to the one and half to the other. But that presumption may be rebutted by evidence showing acts of ownership on the

(*s*) *Doe* v. *Hampson*, 4 C. B. 273. *Dendy* v. *Simpson*, 18 C. B. 831.

(*t*) *Coverdale* v. *Charlton*, 4 Q. B. D. 104; 48 L. J., Q. B. 128; *ante*, p. 440, note (*f*).

(*u*) *Steel* v. *Prickett*, 2 Stark. 469. *Headlam* v. *Hedley*, Holt, N. P. C. 462. *Doe* v. *Kemp*, 2 Bing. N. C. 102.

(*v*) *Grose* v. *West*, 7 Taunt. 42.

part of one only of such adjoining proprietors (*x*), or by proof of a reservation of the soil of the road by a grantor under whom the landowners on either side of the road claim title (*y*).

Right to the soil of towing-paths and the banks of rivers and canals.—Navigation companies authorised by statute to set out towing-paths, first giving satisfaction to the owners and proprietors of lands made use of for the purpose, do not, by forming a towing-path and giving satisfaction to the owner of the land over which the path is formed, acquire more than a right of way for towing, in the nature of a servitude or easement. Statutory powers of this sort do not enable them to acquire the soil itself. Landowners, therefore, whose lands abut upon a navigable river or canal, along which a towing path extends, have a right to form wharfs on the soil of the towing-path, and to cross the towing-path wherever they please, for the purpose of loading and unloading vessels, provided they do not interfere with the right of way along the towing-path (*z*). Acts of ownership on the part of the proprietors of a navigation company, exercised over the banks of a navigable river, afford no evidence of the ownership of the soil of such banks being vested in the proprietors of the navigation company. If the Act of Parliament under which the company are incorporated gives the company no power to purchase land, that is against their claim to be proprietors of the soil (*a*).

Right of property in boundary-walls and fences (*b*).—Evidence of a common user by two adjoining proprietors of a boundary-wall separating their two estates justifies the presumption, either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense, or that it had been agreed between them that the wall, and the land on which it stood, should be considered the property of both as tenants-in-common, so as to insure to each a continuance

444 of the use of the wall (*c*). "When a wall is common property, it may happen, either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties." But, "when-

(*x*) *Holmes* v. *Bellingham*, 7 C. B., N. S. 388; 29 L. J., M. C. 132.

(*y*) *Tottenham* v. *Byrne*, 12 Ir. C. L. R. 388.

(*z*) *Badger* v. *South Yorkshire Rail. Co.*, 1 El. & El. 347; 28 L. J., Q. B. 120. *Monmouth Canal and Rail. Co.* v. *Hill*, 4 H. & N. 427. A similar view has been taken with respect to commissioners of sewers. *Stracey* v. *Nelson*, 12 M. & W. 535.

(*a*) *Hollis* v. *Goldfinch*, 1 B. & C. 205. *Lea Conservancy Board* v. *Button*, 12 Ch. D. 383. Even where there is a power to purchase, if the Acts may be carried into effect without purchasing, the burden of proof is on the conservators to show that they have purchased. *Lea Conservancy Board* v. *Button*, 6 App. Cas. 685.

(*b*) As to an overhanging cornice, see *Whittaker* v. *Jackson*, 2 H. & C. 926; 33 L. J., Ex. 181.

(*c*) *Wiltshire* v. *Sidford*, 8 B. & C. 259 n.

ever the land on which a boundary-wall is intended to be built belongs on one side to one party, and on the other to the other party, and they between them agree to build the wall, it would be prudent," observes Bayley, J., "to make this bargain, that so long as there was to be a wall continuing on the property, the land on which it was built, and the wall which stood upon that land, should be taken to be the common property of the two, and that the owners of the estates on each side should be tenants-in-common in undivided moieties of that land and of the wall, with the power of adopting such remedies for partition as tenants-in-common may adopt; for, if the wall stood partly on one man's land, and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two" (*d*). If one adjoining owner erects a boundary-wall, which also forms the external wall of the house of his neighbour, and places an inscription on it stating that it is his wall, the owner of the house will not obtain a title to such wall by adverse possession, although no rent or acknowledgment has been paid for it for many years (*e*). A wall may be a party-wall up to part of its height, and may be an external wall, and the separate property of one of the owners, for the rest of its height (*f*).

The ordinary meaning of the term party-wall, is a wall of which two adjoining owners are tenants-in-common (*g*).

In general, where a boundary-wall is built at the joint expense of adjoining proprietors under the provisions of a Building Act, so that half the thickness of the wall stands on the ground of each proprietor, the two proprietors are not tenants-in-common of the wall, but each is entitled to the ordinary remedy for any injury done to the part of the wall which stands on his own land (*h*).

445 *Ownership of ditches and hedges.*—"The rule," observes Lawrence, J., "about ditching is this. No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land, and often, if he likes it,

(*d*) *Cubitt* v. *Porter*, 8 B. & C. 257.

(*e*) *Phillipson* v. *Gibbon*, L. R., 6 Ch. 428; 40 L. J., Ch. 406. It appeared, in this case, that the owner of the house had himself rebuilt the wall more than thirty years before the commencement of the suit, but had replaced the inscription.

(*f*) *Weston* v. *Arnold*, L. R., 8 Ch. 1084; 43 L. J., Ch. 123.

(*g*) *Watson* v. *Gray*, 14 Ch. D. 192; 49 L. J., Ch. 243.

(*h*) *Matts* v. *Hawkins*, 5 Taunt. 22. In the metropolis, party-walls are regulated by the Building Act, 18 & 19 Vict. c. 122. See *Hunt* v. *Harris*, 19 C. B., N. S. 13; 34 L. J., C. P. 249. *Knight* v. *Pursell*, 11 Ch. D. 412; 48 L. J., Ch. 395.

he plants a hedge on the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet and eight feet has anything to do with it" (*i*). A boundary-hedge, separating one estate from another, belongs, in general, to the occupier who has been in the habit of cutting and repairing the hedge. Proof of the exercise of acts of ownership over the hedge is *primâ facie* evidence of the property in the hedge being in the person who has exercised such acts. In some instances, the adjoining owners are tenants-in-common of the hedge separating their respective properties, so that each has a right to clip the hedge, but not to grub it up (*j*).

Right of property in trees and bushes.—According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant, although, if the tenant exceeds his right—as by grubbing up or destroying fences—he may be liable to an action of waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*k*).

The maxim "*quicquid plantatur solo, solo cedit*" applies to trees, so that if trees be blown down they belong to the personalty, if practically severed, but to the inheritance, if not severed (*l*).

Ownership of trees standing in boundary hedges.—In an old case, it is said that, "if a tree grows in a hedge which divides the land of *A* and *B*, and by the roots takes nourishment in the land of *A* and also of *B*, they are tenants-in-common of the tree; and so it was adjudged" (*m*). But this must be understood of fences of

446 which the adjoining owners are also tenants-in-common; for the general rule is, that the ownership of the tree follows the ownership of the hedge; and the tree will be held to belong to the party on whose land the trunk stands, without reference to the direction of the roots.

(*i*) *Vowles* v. *Miller*, 3 Taunt. 137.

(*j*) *Voyce* v. *Voyce*, Go· 201. By the French law, all ditches between two estates are presumed common, if there is no title or proof to the contrary. But it is proof that a ditch is not common, when the bank or earth thrown up is found only on one side of the ditch. The ditch, in such a case, is deemed to belong exclusively to him on whose side the earth is found to be thrown up. Every hedge which separates two estates is reputed common to both, unless there is only one of the estates in an inclosed condition, or unless there are vouchers or sufficient possession to prove the contrary. Cod. Nap. liv. 2, Nos. 666—672.

(*k*) *Berriman* v. *Peacock*, 9 Bing. 384.

(*l*) *Swinburn* v. *Ainslie*, 30 Ch. D. 485. See also *Harrison* v. *Harrison*, 28 Ch. D. 220; 54 L. J., Ch. 617.

(*m*) *Anon.*, 2 Rolle Rep. 255. *Waterman* v. *Soper*, 1 Ld. Raym. 737. *Holder* v. *Coates*, M. & M. 112. As to trees overhanging railways, see the 31 & 32 Vict. c. 119, s. 24. By the French law, "Trees which are found in a common hedge are common like the hedge; each of the two proprietors has the right to require that they should be felled;" and "he whose property is overshadowed by the branches of his neighbour's trees may compel the latter to cut off such branches. If it is the roots which encroach on his estate, he has a right to cut them therein himself." Cod. Civ. art. 672, 673.

CHAPTER VIII.

SECTION III.

INJURIES TO RIGHTS OF PROPERTY IN CHATTELS.

Rights of property in chattels.—The title to goods and chattels does not rest upon title-deeds, nor, in general, upon documentary evidence, but is founded, *primâ facie*, upon visible possession and apparent ownership (*u*).

Acquisition of rights—Title by finding.—The finder of a lost article is entitled to the possession of it as against all persons except the real owner. Where a chimney-sweeper's boy found a jewel, and carried it to a goldsmith's shop to know what it was worth, and delivered it into the hands of the goldsmith's apprentice, who, under the pretence of weighing it, took out the stone, and offered the boy three-halfpence for it, which the boy refused, and insisted upon having the jewel back, whereupon the apprentice delivered him the socket without the stone, and an action was brought against the master for a conversion of the jewel, it was ruled "that the finder of a chattel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain an action for the conversion of it" (*o*). Where the plaintiff, on leaving the defendant's shop, picked up a small parcel which was lying on the shop-floor, and showed it to the shopman, and the parcel, on being opened, was found to contain bank-notes, and the plaintiff requested the defendant to keep the notes, and deliver them to the owner, and

447 the defendant advertised for the owner, and after the lapse of three years, no owner appearing to claim them, the plaintiff applied to the defendant for the notes, offering to pay the expenses of the advertisements, and to indemnify the defendant against any claim in respect of the notes, and the defendant refused to deliver them up, it was held that the plaintiff was entitled to recover

(*u*) *Hiern* v. *Mills*, 13 Ves. 122; 2 T. R. 589, 750. By the French Code (art. 2279), the mere possession of movables is equivalent to title in all cases excepting where property has been lost or stolen; and, as regards lost or stolen property, it is provided (art. 2280) that the party who has lost anything, or from whom it has been stolen, may reclaim it within three years from the party in whose hands he finds it, saving to the latter his remedy over against the person from whom he obtained it; but, if the actual possessor of the thing stolen or lost has purchased it in a fair or market, or at a public sale, or from a merchant who sells similar articles, the original proprietor can only procure it to be restored to him on repaying to the possessor the price which it cost him. Possession of personal property is *primâ facie* evidence of ownership: Wood's Practice Evidence, p. 666.

(*o*) *Armory* v. *Delamirie*, 1 Str. 505. But the property must have been found in such a situation as to indicate that it was lost, and not voluntarily placed by the owner where it was found: *Mavoy* v. *Medina*, 11 Allen (Mass.) 148; *Branden* v. *Huntsville Bank*, 1 Stew. (Ala.) 320; *Clark* v. *Malony*, 3 Har. (Del.) 68; *Matthews* v. *Harsell*, 1 E. D. S. (N. Y.) 393; *McLaughlin* v. *Waite*, 6 Cow. (N. Y.) 570.

them, or the value of them, and that the circumstance of the notes being found by the plaintiff inside the defendant's shop, in the defendant's own house, did not give the defendant any right to detain them as against the plaintiff, who found them there (*p*). But, as the title by finding depends on possession, if the possession of the finder is rightly divested, his title is gone, and he cannot maintain an action for a subsequent dealing with the property by a third person (*q*).

Acquisition of rights—Title by accession.—If a man takes away the chattel of another, either by design or accident, and alters it, or improves it, he has no right to detain it from the owner until his alterations and improvements have been paid for. If a man wrongfully takes away my carriage, and, without any authority from me, sends it to a coachmaker to be repaired or painted, I am entitled to the possession of my carriage without paying for the repairs or painting (*r*). Where, the defendant and the plaintiff being at play, the plaintiff thrust his money into the defendant's heap, and so intermingled the coins that it became impossible to separate them, it was adjudged that the whole heap belonged to the defendant; and Coke, C. J., said, "The law is that, 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" (*s*); and this case was put by Anderson: "If a goldsmith be melting of gold in a pot, and as he is melting it I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, but have lost it; and, if a man take my garment, and embroider it with silk or gold, or the like, I may take back my garment; but, if I take the silk from you, and with this face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to your action for taking of the silk from you" (*t*).

The mixing together by consent or accident of things which belong to different owners has no effect upon their rights if the things can be separated. But, if it is impracticable to separate them, the former proprietors of things so mixed will be joint

448 owners of the whole in proportion to their respective interests, whenever the mixture has been made by the consent of both parties or by accident (*u*).

(*p*) *Bridges* v. *Hawkesworth*, 21 L. J., Q. B. 75.

(*q*) *Buckley* v. *Gross*, 3 B. & S. 566; 32 L. J., Q. B. 129.

(*r*) *Hiscox* v. *Greenwood*, 4 Esq. 174. *Cheshire R. R. Co.* v. *Foster*, N. H. 496; *Purves* v. *Waltz*, 5 Robt. (N. Y.) 654; *Silsbury* v. *McCoun*, 6 Hill. (N. Y.) 425; *Bryant* v. *Ware*, 30 Me. 295; *Hezeltine* v. *Stockwlel*, *id.* 237. But where the confusion of the goods is accidental, the respective owners are treated as tenants in common thereof according to their respective interests: *Verring* v. *Baker*, 53 Me. 544; *Nowlen* v. *Call*, 6 Hill. (N. Y.) 461; *Hill* v. *Robinson*, 3 Jones (N. C.) 501.

(*s*) *Warde* v. *Eyre*, 2 Bulstr. 323.

(*t*) *Anon.*, Poph. 38.

(*u*) *Spence* v. *Union Marine Insurance Co.*, L. R., 3 C. P. 427; 37 L. J., C. P. 169.

Transfer by consent of the parties—Gift.—It requires the assent of both minds to make a gift, as it does to make a contract. The assent of the donee is, indeed, usually presumed; but this is a presumption of fact only, and may be rebutted (*x*). If a verbal gift has been made of a piece of plate, or other valuable chattel, to a person to whom it has previously been delivered to be kept, the verbal gift, unaccompanied by any transfer of possession, cannot, it has been held, transfer any property in the chattel to the donee. There must be either an actual, manual delivery, if the chattel is capable of manual occupation and delivery, or a constructive delivery, if the article is bulky and incapable of manual transfer; or there must be a deed of gift under seal, in order to clothe the donee with the ownership and right of possession of the chattel (*y*). Where a testator, two years before his death, gave some railway debentures to the defendant, intending to transfer to him the money secured by them, and delivered the debentures to the defendant, who took possession of them, and locked them up in his own desk, but no transfer of the debts secured by the debentures was ever made, in accordance with the Act of Parliament regulating the transfer of such securities, and after the testator's death his executors sued the defendant for detaining the debentures, it was held that they were not entitled to recover them (*z*). Where a policy of insurance had been given by the intestate to his mother, and was retained by her, it was held that, although there had been no assignment of the policy, and although the right to the money secured by it might not be affected, there was a valid gift of the document itself as against the administrator (*a*).

A gift by a patient to a physician may be voidable, yet, if after the relation between the parties has ceased to exist, the donor intentionally elects to abide by the gift, it cannot be impeached after his death (*b*). A gift by an infant to a relative, there being no undue influence, within a month before her death, has been held valid (*c*).

Donatio mortis causâ.—The delivery by a donor, in his last

(*x*) *Hill* v. *Wilson*, L. R., 8 Ch. 888; 42 L. J., Ch. 817.

(*y*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551. *Shower* v. *Pilch*, 4 Exch. 478.

(*z*) *Barton* v. *Gainer*, 3 H. & N. 389; 27 L. J., Ex. 390. *Kelsack* v. *Nicholson*, Cro. Eliz. 496.

(*a*) *Rummens* v. *Hare*, 1 Ex. D. 169. In order to give validity to a gift, there must be an effectual delivery. Thus, if a note, bill, bond or other obligation for the payment of money which is payable to the donor or his order is given by one to another, merely giving such obligation to the donee would not render the gift operative, because, in order to enable the donee to recover upon the same, it must be indorsed by the donor, and until that is done an effectual delivery has not been made.

(*b*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587; 50 L. J., Q. B. 460.

(*c*) *Taylor* v. *Johnston*, 19 Ch. D. 603; 51 L. J., Ch. 879.

illness, of a deposit note will constitute a good *donatio mortis* **449** *causâ* (*d*); and so will that of a bill of exchange (*e*); but the delivery of a cheque on the donor's bankers payable to bearer will not (*f*), even when it is accompanied by a delivery of his banker's pass book (*g*), unless it is presented for payment or paid before the death of the donor (*f*). But, if the cheque is payable to order, and has been paid away for valuable consideration or in discharge of a debt of the donee, or if it be the cheque of another party, the gift will be valid (*h*). Railway stock cannot be the subject of a *donatio mortis causâ* (*i*).

Purchase.—At common law the purchaser of a chattel, as a general rule, takes the chattel with such a title only as the vendor had, unless he purchases in market overt. But, if the title of the vendor is voidable only, he can confer a good title on an innocent purchaser for valuable consideration who becomes such before the vendor's title has been avoided (*k*). If, however, *A* obtains goods on credit by representing himself to be *B*, and the vendor parts with the goods in the belief that he is dealing with *B*, *A* obtains no property whatever in the goods, and cannot transfer any title to a purchaser from him (*l*).

Sale in market overt.—At common law the right of property in things sold is changed permanently by a sale in market overt (*m*), so that, whoever buys goods and chattels in the open, public, legally constituted market, acquires an indefeasible title to the chattels so purchased, unless he buys with knowledge of an infirmity of title on the part of his vendor. Things purchased at shops in the city of London in the ordinary way of trade have always been considered to have been bought in market overt, so as to exempt the purchaser from the obligation of inquiring into the title of the shopkeeper to the goods he sold (*n*). But shops in country towns, although openly and notoriously used as public places of purchase and sale accessible to all comers, are not markets overt for the sale of the goods and commodities ordinarily sold or exposed for sale therein (*o*).

(*d*) *Amis* v. *Witt*, 33 Beav. 619. *Moore* v. *Moore*, L. R., 18 Eq. 474; 43 L. J., Ch. 617.

(*e*) *Rankin* v. *Weguelin*, 27 Beav. 309. *Veal* v. *Veal*, 27 Beav. 303.

(*f*) *Hewitt* v. *Kaye*, L. R., 6 Eq. 198; 37 L. J., Ch. 633.

(*g*) *In re Beak's estate*, L. R., 13 Eq. 489; 41 L. J., Ch. 470.

(*h*) *Rolls* v. *Pearce*, 5 Ch. D. 730. *Clement* v. *Cheeseman*, 27 Ch. D. 631; 54 L. J., Ch. 158.

(*i*) *Moore* v. *Moore*, L. R., 18 Eq. 474; 43 L. J., Ch. 617.

(*k*) *Attenborough* v. *St. Katharine's Dock Co.*, 3 C. P. D. 450; 47 L. J., C. P. 763.

(*l*) *Cundy* v. *Lindsay*, 3 App. Cas. 459; 47 L. J., Q. B. 481.

(*m*) See *Crane* v. *London Dock Co.*, 5 B. & S. 313; 33 L. J., Q. B. 224. As to the sale of a ship formerly engaged in acts of piracy, or of goods taken by pirates, see *Reg.* v. *M'Cleverty*, L. R., 3 P. C. 673.

(*n*) Godb. 131, pl. 148; 5 Co. 83 b. *Lyons* v. *De Pass*, 11 Ad. & E. 326.

(*o*) *Prior of Dunstable's case*, 11 Hen. 6, 19, pl. 13; 25 pl. 2; 2 Brownl. 288. *Harris* v. *Shaw*, Cas. temp. Hardw. 349.

450 A wharf in the city of London is not a market overt like a shop (*p*); and a shop in London is not a market overt for the sale of any other commodities than those which are customarily bought and sold therein (*q*); and the distinction must be observed between a sale over the counter to a customer of things exposed in a shop for sale, and a sale to the shopkeeper himself of things bought by him to be added to his stock-in-trade. The one may be a sale in market overt, but not so the other. If a servant, for example, steals his master's books, and goes and sells them to a bookseller in the city of London, the sale to the bookseller is not a sale in market overt, and the bookseller will acquire no right to the books as against the true owner from whom they have been stolen (*r*); but if, after the books have been added to the bookseller's stock-in-trade, and exposed for sale in his shop in the city, they are purchased *bonâ fide* by a customer in the ordinary way of trade, the purchase will be a purchase in market overt, which will change the ownership and give the purchaser a title to the books, defeasible only on the conviction of the thief. So, if the hirer of household furniture takes it to a furniture-broker, and sells it, and receives the money, the sale does not alter the ownership, or give the broker any right to detain the furniture from the owner who has let it out on hire (*s*); but, if the furniture is brought into a furniture-broker's shop in the city and exposed for sale, and is then bought by a customer in the ordinary way of trade, the right of property is altered, and the owner cannot follow the subject-matter of the sale into the hands of such second purchaser. His remedy is either against the party to whom he let out the goods, and who is responsible for the breach of trust (*t*), or against the furniture-broker who bought from him (*u*). The goods, moreover, must be corporeally present in the shop of the vendor at the time of the sale, so that a sale by sample, or a sale of goods to be afterwards manufactured and sent from the manufactory to the residence of the purchaser

Anon., 12 Mod. 521. *Lee* v. *Bayes*, 18 C. B. 601. Our Saxon ancestors were greatly opposed to all private and secret transfers of property. By the laws of Athelstan all persons were absolutely prohibited from buying and selling goods out of the open, public market; and by the ordinances of other Saxon kings no bargain and sale or exchange of goods and chattels was allowed to be valid, unless it was made publicly at a fair or market, or in the presence of two or more credible witnesses. Ancient Laws and Institutes of England, 14, 15, 87, 90, 116, 117, 120, ed. 1840. The Mirror, c. 1, s. 3; 2 Instit. 220. *Mosley* v. *Walker*, 7 B. & C. 54; 9 D. & R. 863. *Mayor, &c. of Macclesfield* v. *Chapman*, 12 M. & W. 18.

(*p*) *Wilkinson* v. *King*, 2 Campb. 335.

(*q*) *Taylor* v. *Chambers*, Cro. Jac. 68. *The Bishop of Worcester's case*, F. Moore, 360. *Clifton* v. *Chancellor*, *ib.* 624; 5 Co. 83 b.

(*r*) *White* v. *Spettigue*, 13 M. & W. 603. *Crane* v. *London Dock Co.*, 5 B. & S. 313; 33 L. J., Q. B. 224.

(*s*) *Cooper* v. *Willomat*, 1 C. B. 672. *Loeschman* v. *Machin*, 2 Stark. 311.

(*t*) 18 Ed. 4, 23, pl. 5. 5 Hen. 7, 15, pl. 5.

(*u*) *Peer* v. *Humphrey*, 2 Ad. & E. 495.

451 without ever having been in the shop, is not a sale in market overt (*x*).

Sale of stolen goods, &c., in market overt—Right of restitution.—At common law the ownership or right of property in goods sold in market overt was changed permanently by the sale, and the purchaser acquired an indefeasible title against all the world; but, formerly, by the 21 Hen. 8, c. 11, and the 7 & 8 Geo. 4, c. 29, and now by the 24 & 25 Vict. c. 96, s. 100, where chattels have been stolen, on conviction of the thief the original owner from whom they were stolen is entitled to maintain an action against the purchaser for the goods, or the value of them, without obtaining an order of restitution (*y*). The section only applies to those cases where merely the possession of the goods, but not the property, has been parted with; so that where the goods have been obtained by fraud or false pretences, that is, where the property has passed from the prosecutor, he cannot re-claim the goods after conviction of the fraudulent person (*z*). The statutes 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, provide for the sale of horses in markets and fairs, and impose sundry good ordinances touching the manner of selling and tolling horses for the purpose of repressing or avoiding horse-stealing. They prevent the property in any stolen horse from being altered by sale in market overt until six months have elapsed from the time of the sale, and enable the owner at any time afterwards to recover the horse on payment of the price to the purchaser. The names and addresses of all the parties to contracts for the sale of horses are to be entered in the toll-gatherer's book, together with the price of the horse, its colour, marks, &c.; and, if the requisites of the Acts, as regards these and other particulars, are not complied with, the sale is void (*a*).

During the interval between the commission of the felony and the conviction the purchaser has a *primâ facie* title, liable to be defeated by the conviction (*b*); and persons who purchase during that period, and have the good fortune to sell again before the conviction, cannot be subjected to an action for taking or converting the stolen property. Thus, where the plaintiff, who had been robbed of some sheep, and was prosecuting the thief, gave notice of the robbery to the defendant, who had purchased the sheep in market overt, not knowing them to have been stolen, and

(*x*) *Crane* v. *London Dock Co.*, 5 B. & S. 313; 33 L. J., Q. B. 224. *Hill* v. *Smith*, 4 Taunt. 520.

(*y*) *Scattergood* v. *Sylvester*, 15 Q. B. 510; 19 L. J., Q. B. 447. And see the 30 & 31 Vict. c. 35, s. 9.

(*z*) *Moyce* v. *Newington*, 4 Q. B. D. 32; 48 L. J., Q. B. 125. *Lindsay* v. *Cundy*, 1 Q. B. D. 348; reversed on another point, 2 Q. B. D. 96, and 3 App. Cas. 459; 45 L. J., Q. B. 381.

(*a*) *Gibbs' case*, Owen, 27.

(*b*) *Peer* v. *Humphrey*, 2 Ad. & E. 495.

452 required the defendant to deliver up the sheep to him, which the defendant refused to do, and sold the sheep again before the conviction of the felon, it was held that the defendant was not responsible for a conversion. "The plaintiff," observes Buller, J., "could not demand the sheep of the defendant, merely because they had been stolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. The plaintiff must prove that the sheep were his property, and that, while they were so, they came into the defendant's possession, who converted them to his use. But here the plaintiff's property did not re-vest in him till after the conviction of the felon; and from the time of the conviction the defendant has never had possession of the sheep" (*c*).

On the other hand, the purchaser cannot claim from the original owner the cost of the keep of the cattle while they were in his possession, and before the conviction of the thief; for they were his own property, until, on the conviction, the property revested in the original owner (*d*).

Private sale.—A person who buys goods by private contract, and not by public sale in market overt acquires no better title than that possessed by his immediate vendor. He may purchase a horse, or he may buy merchandise or furniture in the ordinary way of trade from a party in possession thereof; but, if the vendor was not the owner, and had no authority from the owner to sell, the purchaser will have no title whatever to the property he has bought as against the true owner (*e*), unless the vendor was a factor or agent for the sale of goods as presently mentioned (*f*). If he purchases, at a sheriff's sale or a pawnbroker's auction, property which the sheriff or the pawnbroker had no right to sell, he acquires no title as against the true owner of such property (*g*). Whenever, therefore, a purchaser buys of the servant or agent of the owner out of market overt, he takes the risk of the servant's having sold without authority; and, if the servant had no authority to sell, the purchaser must give up the subject-matter of the sale on demand to the master (*h*).

A purchase out of market overt of property which has been stolen does not convey any right of property in the thing sold to the purchaser, although he may have purchased *bonâ fide* for a

(*c*) *Horwood* v. *Smith*, 2 T. R. 756. *Gimson* v. *Woodfall*, 2 C. & P. 41.

(*d*) *Walker* v. *Matthews*, 8 Q. B. D. 109; 51 L. J., Q. B. 243.

(*e*) *Loeschman* v. *Machin*, 2 Stark. 311. *Cooper* v. *Willomat*, 1 C. B. 672. *Dyer* v. *Pearson*, 3 B. & C. 38; 4 D. & R. 648.

(*f*) *Post*, p. 473 *et seq.*

(*g*) *Farrant* v. ———, 3 Stark. 130. *Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239. *Morley* v. *Attenborough*, 3 Exch. 500.

(*h*) *Metcalfe* v. *Lumsden*, 1 C. & K. 309.

453 valuable consideration, and without notice of the felony. A person, therefore, who has been robbed may follow the stolen property, and is entitled to recover it from *bonâ fide* purchasers who have not bought it in the open, public market, although the thief has not been convicted of the felony. In like manner, if the property has been pledged with a pawnbroker or any other person, he may sue the pawnbroker or other pledgee, for detaining or converting the property, although he has not prosecuted the thief, nor taken any steps to put the criminal law in motion (*i*).

It is said to be a general rule of the common law that a vendee out of market overt cannot acquire a better title than his vendor. There are, however, some important exceptions to this rule. Where, for example, a man obtains possession of goods through the medium of a pretended contract of sale, buying the goods and paying for them by a cheque on a bank where he has no funds, or by a fictitious bill of exchange, he himself has no title to the goods after they have been demanded back by the vendor; but, if he re-sells them and delivers them into the hands of a *bonâ fide* purchaser before the vendor interferes to recover possession of them, the title of such *bonâ fide* purchaser cannot be defeated (*k*). If, however, the party selling the goods obtained merely the possession of them through the medium of false pretences, and not a defeasible property in them by virtue of a contract of sale, the purchaser will have no title to the goods as against the true owner (*l*). Where the plaintiffs had sold a quantity of tartaric acid, to be delivered to the order of their purchaser, and one Anderson came to the plaintiffs and represented himself to be a sub-purchaser of the acid, and upon the strength of such representation obtained a delivery-order from the plaintiffs, and got possession of the acid, and pledged it with the defendants, it was held that the defendants could make no title to the acid through Anderson, who had obtained the transfer of the acid to himself without authority and by false pretences, and that mere possession of chattels, with no further *indicia* of title than a delivery-order, is not sufficient to entitle a *bonâ fide* pawnee of the person fraudulently obtaining possession from the true owner to resist the claim of the latter in an action for a conversion of the property (*m*).

If several joint owners of goods and chattels permit one of them alone to have the possession of the joint property, and the

(*i*) *White* v. *Spettigue*, 13 M. & W. 608. *Lee* v. *Bayes*, 18 C. B. 599. *S. C.*, nom. *Lee* v. *Robinson*, 25 L. J., C. P. 249. *Stone* v. *Marsh*, 6 B. & C. 551.

(*k*) *White* v. *Garden*, 10 C. B. 919; 20 L. J., C. P. 167. *Peace* v. *Gloahec*, *The Marie Joseph*, L. R., 1 P. C. 219; 35 L. J., P. C. 66.

(*l*) *Kingsford* v. *Merry*, 1 H. & N. 515; 26 L. J., Ex. 83. See *Lindsay* v. *Cundy*, *ante*, p. 451, and *Hardman* v. *Booth*, *post*, p. 477.

(*m*) *Kingsford* v. *Merry*, *supra*.

454 one so trusted with the possession sells to a *bonâ fide* purchaser, the latter will acquire a good title as against them all (*n*). If, too, the owner of goods has intrusted another with the possession of them, or with documentary evidence of title to them, for purposes of sale, and the party so intrusted has sold contrary to the express directions of the owner, the purchaser will nevertheless acquire a complete and perfect title by the sale (*o*). If the owner of goods stands by and voluntarily allows another to deal with the goods as if he were the owner, and thereby induces some third party to purchase them, he cannot afterwards, though he acted under a mistake, claim them from such third party (*p*). But he may, in general, claim the price of them, if such price has not previously been paid over to the immediate vendor and apparent owner (*q*). If goods are deposited in the hands of a warehouseman or wharfinger, and the owner sells them and hands to the purchaser a delivery order or dock-warrant for their delivery, which is accepted by such warehouseman or wharfinger, and the purchaser then re-sells the goods, the original vendor cannot prevent the delivery of the goods to the sub-purchaser, although the first purchaser has become bankrupt, without paying the price (*r*). Having been a party to the creation of the title of the sub-vendor, he is bound by the re-sale.

Whenever by a contract of sale, made either by the plaintiff in person, or through the medium of his agent, both the right of property in and the right of possession of the thing sold have passed to the plaintiff, he is entitled to maintain an action for the unlawful taking, detaining, or converting of the thing which has thus become his own property. Where the plaintiff commissioned her brother to buy a cow for her when he should meet one which he thought would suit her, and the brother bought a cow, and, as it was being driven home, and before the plaintiff knew of or had assented to the purchase, the cow was seized by a creditor of the brother, it was held that the plaintiff was entitled to maintain an action of trespass for the seizure of the cow (*s*).

By the common law the right of property in, and the title to, goods and chattels may be transferred to a purchaser by a contract of sale, without any delivery of the goods or payment of the price,

(*n*) *Morgan* v. *Marquis*, 9 Exch. 145; 23 L. J., Ex. 21.

(*o*) *Post*, p. 476 *et seq.*

(*p*) *Pickering* v. *Busk*, 15 East, 43. *Gregg* v. *Wells*, 10 Ad. & E. 90. *Waller* v. *Drakeford*, 1 El. & Bl. 749; 22 L. J., Q. B. 275.

(*q*) *Dickenson* v. *Naul*, 4 B. & Ad. 638. *Allen* v. *Hopkins*, 13 M. & W. 94. As to intrusting documents of title to factors and agents, see *post*, p. 476 *et seq.*

(*r*) *Hawes* v. *Watson*, 2 B. & C. 540; 4 D. & R. 22. *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185. *Knights* v. *Wiffen*, L. R., 5 Q. B. 660; 40 L. J., Q. B. 51.

(*s*) *Thomas* v. *Philips*, 7 C. & P. 573. *Payne* v. *Brander*, 2 Stark. 568.

455 so that, after the bargain has been concluded, the goods may become the property of the buyer, although they still continue in the possession of the vendor; and if the vendor sells them again by sale not in market overt, and actually delivers them to a second *bonâ fide* purchaser who pays him the price, yet the latter will have no title to the goods as against the first purchaser, although the first purchaser by leaving the goods in the hands of the vendor enabled him to commit the fraud (*t*).

A contract for the sale of goods, wares, and merchandise, duly authenticated in the mode required by the Statute of Frauds, or of the value of less than 10*l.*, and so not requiring authentication by a signed writing, may operate as a direct transfer of the ownership and right of property in the thing sold to the purchaser, or may amount only to an agreement for a future transfer, giving the purchaser a right of action against the vendor for a breach of contract, but not effecting any alteration of ownership. When the bargain operates as a transfer of ownership, the sale is perfect and complete; when it amounts only to an agreement to procure or manufacture an article of a given character or description, and then transfer it to the purchaser, and does not effect any immediate alteration of ownership, the sale is imperfect and incomplete. To constitute a perfect and complete sale, the precise thing sold must be ascertained and identified, except where the sale is of shares and undivided quantities expressly sold as such, and the price must, in general, be ascertained and fixed. Personal engagements may subsist between the parties; but there can be no transfer of ownership, until such ascertainment and identification have been accomplished, unless there appears a clear intention of the parties to the contrary (*u*).

Private sale—Insolvency of the purchaser.—When the purchaser becomes insolvent before the contract for sale has been completely performed, the seller, notwithstanding he may have agreed to give credit for the goods, is, under certain circumstances, not bound to deliver any more goods under the contract until the price of the

(*t*) *Cooper* v. *Willomat*, 1 C. B. 672. By the civil law actual tradition or delivery was essential to the transference of the ownership of movables; and no right of property passed to the purchaser until possession was given. As between the vendor and purchaser, the contract of sale so far altered the situation of the parties that, from the time of the making of it, the price became a debt due to the vendor, and the thing sold (when the sale was of an ascertained subject at an ascertained price) remained at the risk of the purchaser; but the contract conveyed to the latter a mere JUS AD REM, or *chose in action*, and not the JUS IN RE or right of property. Troplong, *De la vente*, Vol. 1, p. 50, 4th ed. The vendor, so long as delivery had not been made, preserved as between himself and third parties the full dominion and ownership over the thing sold. "*Qui nondum rem emptori tradidit, adhuc ipse dominus est.*" Instit. lib. 3, tit. xxiv. § 3. Consequently, whenever the same thing was sold by the same owner to two different individuals successively, he who was first put into actual possession became the true owner.

(*u*) Addison, *On Contracts*, 8th ed., bk. 2, chap. 7, sect. 2, p. 926.

456 goods not delivered is tendered to him; and, if a debt is due to him for goods already delivered, he may refuse to deliver any more, until he is paid the debt due for those already delivered, as well as the price of those still to be delivered. If the goods are in the hands of the vendor, he may refuse delivery, unless actual possession has been given to the purchaser, or the latter has re-sold them to a sub-purchaser, and the vendor has consented to hold them for such sub-purchaser. If the goods are in the hands of a warehousekeeper or bailee for the vendor, and the vendor has given the purchaser a delivery order or warrant, such order or warrant may be countermanded, even although it has been accepted by the warehouse-keeper or bailee, unless possession has been given under it, or there has been a complete delivery by transfer of the goods in the bailee's books into the name of the purchaser, or into that of some sub-purchaser from him. If the goods are in the hands of a carrier or forwarding agent, the vendor may stop them *in transitu*, as it is called, that is, before they have come into the possession of the purchaser or some agent for him, or have reached their destination and are held by the carrier as the purchaser's agent for custody, unless there has been a sale to a sub-purchaser who claims as the *bonâ fide* indorsee and holder of a bill of lading (*x*).

Private sale—Avoidance of sale on the ground of fraud.—A sale is voidable on the ground of fraud at the option of the party defrauded, if the parties can be restored to the position in which they stood before the sale. But, if a vendor has parted with goods in fulfilment of a contract of sale obtained by fraud, he cannot, after the goods have been re-sold and have passed into the hands of a *bonâ fide* sub-purchaser, disaffirm the contract, and annul the title of the latter to the property. If, however, the relation of vendor and purchaser does not subsist between the original owner and the person who commits the fraud—if, for instance, the goods have been obtained by false pretences in such a way as not to transfer the property in them—a *bonâ fide* purchaser does not acquire a title to the goods, unless he has bought them in market overt (*y*).

Bill of sale—Construction.—The law with respect to bills of sale is now regulated by the Acts of 1878 and 1882, the latter Act only applying to bills executed after November, 1882 (*z*), and

(*x*) Addison, *On Contracts*, 8th ed., bk. 2, chap. 7, sect. 2, pp. 956 *et seq.*

(*y*) *Ibid.* p. 992.

(*z*) Sect. 3. The section says the Act shall not apply, unless the context otherwise requires, to any bill of sale duly registered before the commencement of the Act, nor does sect. 8 apply to an unregistered bill (see *Hickson* v. *Darlow*, 23 Ch. D. 690; 52 L. J., Ch. 543), so long as the registration thereof is not avoided by non-renewal or otherwise. It seems doubtful

457 where the bill is given as a security for money. Every bill of sale under the Amendment Act made in consideration of any sum under 30*l.* is void (*a*).

Nothing in the Act is to apply to debentures of incorporated companies (*b*).

A bill of sale by way of security for the payment of money by the grantor is void unless made in accordance with the form in the schedule (*c*). The meaning of the section is that nothing substantial must be subtracted from the form and nothing actually inconsistent must be added to it (*d*). Thus, it must not entitle the grantee to seize and sell for the whole amount on failure to pay one instalment, and it must distinguish between bonus and interest, and show the rate of interest payable. It must not promise to "perform the covenants, &c." (*e*) contained in other bills or indentures (*f*). It must not purport to be an assignment of the chattels by the grantor "as beneficial owner" (*g*). But if the variance from the form given in the schedule is not calculated to deceive those for whose benefit the statutory form is provided, and produces the precise legal effect of the form, though the words may be different, such variance is not fatal (*h*).

If the bill of sale is void by reason of its not being in accordance with the form, it is void *in toto*, not merely as regards the personal chattels comprised in it, but also as regards the covenants contained in it (*i*).

"If one gives or grants to another all his 'goods,' or all his 'chattels,' by this do pass all his movable and immovable, personal and real, goods, horses, and other beasts, plate, jewels, and household stuff, bows, weapons, and such-like, and his money, and his corn growing in the ground: but not the term or interest in his dwelling-house; nor his leasehold estates, unless there is some term or provision in the deed manifesting an intention on

what is the meaning of these words. *Cookson* v. *Swire*, 9 App. Cas. 653; 54 L. J., Q. B. 49. *Ex parte Izard*, 23 Ch. D. 409.

(*a*) Sect. 12.

(*b*) Sect. 17.

(*c*) Sect. 9. See *Hetherington* v. *Groome*, 13 Q. B. D. 789; 53 L. J., Q. B. 576. *Sibley* v. *Higgs*, 15 Q. B. D. 619. *Melville* v. *Stringer*, 13 Q. B. D. 392; 53 L. J., Q. B. 482. *In re Williams*, 25 Ch. D. 656; 53 L. J., Ch. 500. *Goldstrom* v. *Tallermann*, 17 Q. B. D. 80. *Hughes* v. *Little*, 17 Q. B. D. 204. *Blaiberg* v. *Parsons*, 17 Q. B. D. 336.

(*d*) *Davis* v. *Burton*, 11 Q. B. D. 537; 52 L. J., Q. B. 626. *Hammond* v. *Hocking*, 12 Q. B. D. 291; 53 L. J., Q. B. 205. *Consolidation Credit Corp.* v. *Gosney*, 16 Q. B. D. 24; 55 L. J., Q. B. 61.

(*e*) *Myers* v. *Elliott*, 16 Q. B. D. 526; 55 L. J., Q. B. 233. *Thorp* v. *Cregeen*, 55 L. J., Q. B. 80, questioned.

(*f*) *Lee* v. *Barnes*, 17 Q. B. D. 77.

(*g*) *Ex parte Stanford*, 17 Q. B. D. 259; 55 L. J., Q. B. 341.

(*h*) *Ex parte Stanford*, *supra*. Per Lord Esher, M.R., and Cotton, Lindley, Bowen, and Lopes, L.JJ.

(*i*) *Davies* v. *Rees*, 17 Q. B. D. 408; 55 L. J., Q. B. 363.

458 the part of the grantor that his leasehold property should pass under the general description (*k*); nor things which he has in keeping for another; nor *choses in action;* nor things of pleasure, such as hawks, hounds, &c." If one grants to another all his utensils, "hereby will pass all his household stuff, but not his plate, or jewels, or articles of trade;" and, "if two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all the goods they have in common, and likewise all the goods they have in severalty" (*l*). But, if a schedule or inventory of the things purported to be granted by a bill of sale was annexed thereto, nothing would pass under the bill of sale except the things specified in the inventory (*m*), or comprehended under some general description contained therein (*n*). Evidence of surrounding circumstances was admissible to show what was intended to be bought and sold, and what was and what was not parcel of the subject-matter of the contract, and intended to pass thereby (*o*). By the Amendment Act, 1882, ss. 4 and 5, however, the schedule to the bill of sale is conclusive except as against the grantor. In order to transfer the right of property in goods and chattels by a deed of grant, or bill of sale, or other instrument of transfer, the chattel intended to be conveyed must be in existence, and be ascertained and identified at the time of the execution of the grant or transfer. If I grant a man twenty deer to be taken out of the herd in my park, no right of property in any particular deer passes to the grantee. "But, if I have a black deer amongst the other deer in my park, I can grant him, and the grant is good; or, if I have two that can be distinguished from the rest, and I grant one or both of them, the grant is good for this, that it is certain what thing is granted" (*p*). A grant of fifty quarters of corn, twenty hogsheads of ale, or a dozen baskets of fruit, amounts only to a covenant to deliver goods answering the description given in the grant, and does not operate as an immediate transfer of any particular parcel of corn, or quantity of ale or fruit, unless the corn was measured, the ale put into hogsheads, and the fruit into baskets, and set apart so as to be ascertained and identified at the time of the execution of the grant.

(*k*) *Harrison* v. *Blackburn*, 17 C. B., N. S. 678; 34 L. J., C. P. 109, qualifying *Ringer* v. *Cann*, 3 M. & W. 343.

(*l*) Shep. Touch. 98.

(*m*) *Wood* v. *Rowcliffe*, 6 Exch. 407.

(*n*) *Cort* v. *Sagar*, 3 H. & N. 373; 27 L. J., Ex. 378.

(*o*) *M'Donald* v. *Longbottom*, 1 El. & El. 977; 29 L. J., Q. B. 256.

(*p*) Brian, C. J., 18 Edw. 4, 14. *Lunn* v. *Thornton*, 1 C. B. 379. *Gale* v. *Burnell*, 7 Q. B. 863. *Barr* v. *Gibson*, 3 M. & W. 390. Perk. GRANTS, §§ 65, 90. *Robinson* v. *Macdonnell*, 5 M. & S. 228.

459 Under the Bills of Sale Act, 1882 (*q*), a bill of sale is not void for omitting to specify the house or place at which the goods assigned are situated (*r*).

A bill of sale given by way of mortgage generally contains a power to the mortgagee to seize the chattels mortgaged on default in payment of the amounts due after demand. In such a case the demand should either be made on the mortgagor personally (*s*), or, if made at his dwelling-house in his absence, he must have an opportunity of complying with it in a reasonable time (*t*).

Bills of sale of after-acquired property.—A deed which professes to convey property not in existence at the time is, as a conveyance, void, simply because there is nothing to convey. So a contract which purports to transfer property not in existence cannot operate as an immediate alienation, simply because there is nothing to transfer; but, if a vendor or mortgagor has agreed to sell or mortgage property, real or personal, of which he was not possessed at the time of the making of the contract, and he receives the consideration for the contract, and afterwards becomes possessed of the property, and the property is of such a nature that specific performance would be decreed, the beneficial interest in the property is transferred to the purchaser or mortgagee, as soon as the property is acquired; and the title of the grantee or assignee under the bill of sale will prevail, not only against a judgment creditor, but against a purchaser for value of the specific thing, unless he has fortified himself with actual possession without knowledge of the contract (*u*), or where the legal estate has passed to him without notice of the equitable interest (*v*). Since the Amendment Act, 1882, bills of sale registered after the commencement of that Act are void, except as against the grantor in respect of personal chattels in the schedule of which the grantor was not the true owner at the time of execution. (Sect. 5.) But a bill of sale of existing and after-acquired property is not void with respect to the existing property (*x*). The right to growing crops and the growing produce of the soil, not sown or planted at the time of the making of the grant, may pass thereby. "The land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after; and the property shall pass as soon

(*q*) 45 & 46 Vict. c. 43, ss. 4, 11.

(*r*) *Ex parte Hill*, 17 Q. B. D. 74.

(*s*) *Belding* v. *Read*, 3 H. & C. 955; 34 L. J., Ex. 212. *Jones* v. *Wilson*, 4 B. & S. 442; 32 L. J., Q. B. 382.

(*t*) *Massey* v. *Sladen*, L. R., 4 Ex. 13; 38 L. J., Ex. 34.

(*u*) *Holroyd* v. *Marshall*, 10 H. L. C. 214; 33 L. J., Ch. 193; overruling *Holroyd* v. *Marshall*, 30 L. J., Ch. 387. *Reeve* v. *Whitmore*, 32 L. J., Ch. 497. *Clements* v. *Matthews*, 11 Q. B. D. 808; 52 L. J., Q. B. 772. *In re Count D'Epineul*, 20 Ch. D. 758; 47 L. T. 157. *Official Receiver* v. *Tailby*, 17 Q. B. D. 88 (reversed 35 W. R. 91).

(*v*) *Joseph* v. *Lyons*, 15 Q. B. D. 280; 54 L. J., Q. B. 1; *Hallas* v. *Robinson*, *ib.* 288; 54 L. J., Q. B. 364.

(*x*) *Roberts* v. *Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313.

460 as the fruits are extant. A parson may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially" (*y*). Growing crops separately assigned are excepted from the rule as to after-acquired property by sect. 6 of the Amendment Act, 1882 (*z*).

When the power or authority has been executed to the extent of taking possession of the after-acquired property by the grantee thereof, it is the same as if the grantor had himself put the grantee in actual possession of it (*a*). Whether the debtor gives possession by delivery with his own hands, or directs the creditor to take it, the effect after actual possession by the creditor is the same (*b*); and the authority may be extended to crops and property on after-taken land, as well as on land in the possession of the grantor at the time of the making of the grant (*c*).

Bill of sale—Registration of bills of sale of chattels.—By the Amendment Act, 1882, every bill of sale must be duly attested and registered within seven days, otherwise it is void (*d*). To prevent frauds on creditors by parties in possession of moveables and personal chattels which appear to be their own property, but which have been secretly mortgaged to grantees or holders of bills of sale who have the power of taking possession of such chattels to the exclusion of other creditors, it has been enacted (*e*) that every bill of sale (whether the same is absolute or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (*f*), shall be duly attested, and

(*y*) *Grantham* v. *Hawley*, Hob. 132.

(*z*) As to crops being "separately assigned," see *Roberts* v. *Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313.

(*a*) *Belding* v. *Read*, 3 H. & C. 955; 34 L. J., Ex. 212.

(*b*) *Congreve* v. *Evetts*, 10 Exch. 308. *Hope* v. *Hayley*, 5 El. & Bl. 847. *Holroyd* v. *Marshall*, 10 H. L. C. 214; 33 L. J., Ch. 193.

(*c*) *Carr* v. *Allatt*, 27 L. J., Ex. 385.

(*d*) Sect. 8.

(*e*) By the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which came into force on the 1st of January, 1879, and applies to bills of sale executed on or after that date. This Act has been amended by the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), which came into force on the 1st of November, 1882, and applies to bills of sale executed on or after that date. The Act of 1878 repeals the former Acts (17 & 18 Vict. c. 36, and 29 & 30 Vict. c. 96), except as to bills of sale executed before the 1st of January, 1879.

(*f*) It would seem that sect. 3 of the Bills of Sale Act, 1878, applies to all documents comprised in sect. 4. The words therefore "whereby the holder has power to seize," apply to all such documents, and it was therefore held that if the effect of the document was immediately to *transfer* the possession in the goods, such document was not a bill of sale. *In re Hall, Ex parte Close*, 14 Q. B. D. 386; 54 L. J., Q. B. 43. *Attenborough's case*, 28 Ch. D. 682. But the *ratio decidendi* of these cases has been disputed, and at all events a licence to take immediate possession is a bill of sale within the Acts, and must be in the form contained in the schedule of the Act of 1882, or it will be void, and as from its nature it cannot be in that form, such a document must be void. *Ex parte Parsons, In re Townsend*, 16

461 shall be registered under that Act within seven (*g*) days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given (*h*); otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation (*i*), or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be) (*k*). The bill of sale must truly set forth the consideration for which it was given (*l*), and if given for less than 30*l.* it is void (*m*). A bill of sale expressed to be in consideration of 30*l.*, of which 15*l.* was to be, and in fact was, repaid immediately, may, in the absence of evidence that the transaction is a sham, be valid (*n*).

Bill of sale—What is a bill of sale within the meaning of the Act.—The expression, "bill of sale," includes bills of sale, assign-

Q. B. D. 532; 55 L. J., Q. B. 137. See also *North Central Waggon Co.* v. *Manchester, Sheffield and Lincoln Rail. Co.*, 32 Ch. D. 477. And *Ex parte Hubbard*, 17 Q. B. D. 690.

(*g*) Under the former Acts twenty-one days were allowed for registration.

(*h*) This clause as to setting forth the consideration is not to be found in the former Acts. As to what is a sufficient compliance with this provision, see note (*l*).

(*i*) The time specified in the former Acts was the time of the bankruptcy; and it was held that the "time of the bankruptcy" meant the time of the committing of any act of bankruptcy to which the title of the trustee could relate back, and that it was immaterial whether or not the grantee had notice of the act of bankruptcy, the taking possession by the grantee of an unregistered bill of sale not being a protected transaction within sects. 94 and 95 of the Bankruptcy Act, 1869. *Ex parte Attwater*, 5 Ch. D. 27; 46 L. J., Bk. 41.

(*k*) 41 & 42 Vict. c. 31, ss. 3 and 8.

(*l*) Sect. 8 of Act of 1882. *Ex parte Allam*, 14 Q. B. D. 43. *Roberts* v. *Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313. As to setting forth the consideration under sect. 8 of the Act of 1878, see *Credit Co.* v. *Pott*, 6 Q. B. D. 295; 44 L. T. 506. *Hamilton* v. *Chaine*, 7 Q. B. D. 319; 50 L. J., Q. B. 456. *In re Cann*, 13 Q. B. D. 36, *in re Firth*, 19 Ch. D. 419; 51 L. J., Ch. 473 (distinguished). *Ex parte Johnson*, 26 Ch. D. 338; 53 L. J., Ch. 762. *Ex parte Bolland*, 21 Ch. D. 543; 52 L. J., Ch. 113. *Ex parte Rolph*, 19 Ch. D. 98; 51 L. J., Ch. 88. *Ex parte Carter*, 12 Ch. D. 908. *Hughes* v. *Little*, 17 Q. B. D. 204.

(*m*) Sect. 12.

(*n*) *Davis* v. *Usher*, 12 Q. B. D. 490; 53 L. J., Q. B. 422.

462 ments, transfers, declarations of trust without transfer, inventories of goods with receipts thereto attached, or receipts for purchase-moneys of goods (*o*), and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (*p*); but it does not include assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (*q*).

An assignment for the benefit of creditors, in order to be exempt from the necessity for registration, must be for the benefit of all the creditors and not of a part only (*r*). A post-nuptial settlement must be registered (*s*).

Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for

(*o*) Notwithstanding these two last expressions, which are not to be found in the former Acts, a document, to be a bill of sale to which the Act applies, must be one on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction; and a receipt not given or asked for until after the transaction of purchase or sale is completed does not require registration. *Marsden* v. *Meadows*, 7 Q. B. D. 80; 50 L. J., Q. B. 536.

(*p*) This clause as to agreements conferring an equitable right is new, and is intended to put to rest the doubts raised in *Ex parte Mackay* (L. R., 8 Ch. 643; 42 L. J., Bk. 68), and *Brantom* v. *Griffiths* (2 C. P. D. 212; 46 L. J., C. P. 408), whether an agreement which was intended to be followed by another instrument amounted to a bill of sale under the former Acts. The effect of the first decision was that, where an agreement to assign was relied on as an equitable assignment, it was within the Acts; while in the second case it was held that an agreement to sell, which amounted to a transfer *in præsenti*, was a bill of sale. It has also been held that a deed by which a debtor covenanted that, if the debt was not paid on a day named, certain chattels should be charged with it, and that he would, when required, assign them to the creditor as security, required registration as a bill of sale under the former Acts. *Edwards* v. *Edwards*, 2 Ch. D. 291; 45 L. J., Ch. 391. See *Reeves* v. *Barlow*, 12 Q. B. D. 436; 53 L. J., Q. B. 192, discussing *Brown* v. *Bateman*, L. R., 2 C. P. 272; 36 L. J., C. P. 134, and *Blake* v. *Izard*, 16 W. R. 108, as to building agreements conferring an equitable right.

(*q*) Sect. 4.

(*r*) *General Furnishing Co.* v. *Venn*, 2 H. & C. 153; 32 L. J., Ex. 220.

(*s*) *Fowler* v. *Foster*, 28 L. J., Q. B. 210.

463 any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable, as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, is to be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress. But this provision does not extend to any mortgage of any estate or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor or his tenant at a fair and reasonable rent (*t*).

Bill of sale—What are "personal chattels" within the Act.—The expression "personal chattels" means goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but does not include chattel interests in real estate, nor fixtures (except trade machinery), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interest in the stocks, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands, which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale (*u*).

Bill of sale—The inventory.—Every bill of sale executed after the 31st of October, 1882, must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in it. Such bill of sale will have effect only in respect of the personal chattels specifically described (*x*) in the schedule, and will be void, except as against the grantor, in respect of any personal chattels not so specifically described (*y*). This provision, however, is not to apply to any growing crops separately assigned or charged, when such crops were actually growing at the time when the bill of sale was executed, or to any fixtures separately assigned or charged, or any plant or trade machinery, when such fixtures, plant, or trade machinery, are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like

(*t*) Sect. 6.

(*u*) Sect. 4; and see sect. 7 as to fixtures or growing crops separately assigned, *post*, pp. 530, 532.

(*x*) As to what is the meaning of "specifically described," see *Roberts* v. *Roberts*, 13 Q. B. D. 794; 53 L. J., Q. B. 313

(*y*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 4.

464 fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale (*z*).

Bill of sale—The attestation.—So much of sect. 10 of the principal Act as provides that the execution of every bill of sale must be attested by a solicitor of the supreme court, and the attestation must state that, before the execution of the bill of sale, the effect thereof has been explained to the grantor by the attesting solicitor (*a*), is repealed, and it is enacted that the execution of every bill of sale shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. As the Act, however, does not apply to bills executed before November, 1832, nor to such as are not given by way of security for money, the section of the Act of 1878 is still to be considered.

Non-compliance with this provision will not invalidate the bill of sale as between grantor and grantee (*b*).

The grantee, although he may be a solicitor, cannot be the attesting witness (*c*), but the grantee's solicitor may be (*d*).

If the attestation states that a proper explanation has been given, it is immaterial that in point of fact the solicitor has failed to discharge the duty imposed upon him (*e*).

It is sufficient if there be a description of the deponent's residence and occupation in the introductory part of the affidavit (*f*).

Bill of sale—Mode of registration.—The bill of sale, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill, and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with, the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is

(*z*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 6.

(*a*) Sect. 10 of the Act of 1882.

(*b*) *Davis* v. *Goodman*, 5 C. P. D. 128; 49 L. J., C. P. 344. *Cookson* v. *Swire*, 9 App. Cas. 653; 54 L. J., Q. B. 49.

(*c*) *Seal* v. *Claridge*, 7 Q. B. D. 516; 50 L. J., Q. B. 316.

(*d*) *Penwarden* v. *Roberts*, 9 Q. B. D. 137; 51 L. J., Q. B. 312.

(*e*) *Ex parte National Mercantile Bank, In re Haynes*, 15 Ch. D. 42; 49 L. J., Bk. 62.

(*f*) *Blaiberg* v. *Parke*, 10 Q. B. D. 90; 52 L. J., Q. B. 110.

465 now by law required to be filed (*g*). By the Stamp Act, 1870 (*h*), no copy of a bill of sale is to be filed, unless the original, duly stamped, is produced to the proper officer.

Bill of sale—The affidavit.—Under the Act of 1878 the affidavit must state that the bill of sale was duly attested by the attesting solicitor. If it merely verifies his signature to the attestation clause, and describes his residence and occupation, it is insufficient (*i*). It need not state that the effect of the bill was explained to the grantor (*k*). The affidavit must contain a description of the residence and occupation of the grantor, and of the attesting witness; and it is not sufficient that there is such a description in the bill of sale (*l*). But, if the bill of sale itself clearly specifies all these particulars, and the affidavit refers to them as set forth in the bill of sale in such a way as to verify them on oath, the affidavit will be sufficient (*m*); and the description of the residence of the grantor in the copy of the bill of sale may be referred to, to explain and supplement the description given in the affidavit where that is insufficient (*n*). An affidavit of the residence and occupation of the grantor to the best of the deponent's belief is sufficient, if uncontradicted (*o*).

Bill of sale—Affidavit—Description of the residence and occupation of the grantor and witnesses.—The description must be such as fits the grantor at the time of swearing the affidavit, not that of giving the bill of sale (*p*). The witness is properly described as residing at the place where he is employed or carries on his business. Thus a solicitor's clerk is properly described as residing at his master's office, where he attends all day (*q*); but he may also be described

(*g*) Sect. 10 of Act of 1878; as to local registration, see sect. 11 of Act of 1882. The copy of the bill of sale and the affidavit and the fact and date of registration may be proved by the production of a copy of the registered bill of sale and affidavit purporting to be an office copy thereof. Sect. 16. As to the former Acts, see *Grindell* v. *Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333. Under the former Acts it was held that a certificate under the seal of the Queen's Bench Division that an affidavit and copy bill of sale had been filed did not relieve the party relying on such bill of sale from the necessity of producing the copy filed, so as to show that it was in the same terms as that proved to have been executed. *Emmott* v. *Marchant*, 3 Q. B. D. 555; *S. C.*, nom. *Halkett* v. *Emmott*, 47 L. J., Q. B. 436.

(*h*) 33 & 34 Vict. c. 97, s. 57.

(*i*) *Sharpe* v. *Birch*, 8 Q. B. D. 111; 51 L. J., Q. B. 74. *Ford* v. *Kettle*, 9 Q. B. D. 139; 51 L. J., Q. B. 558. Sect. 11 of the Amendment Act, 1882, provides for the local registration of the contents of a bill of sale where the affidavit shows the bill is not within the London Bankruptcy District.

(*k*) *Ex parte Bolland*, 21 Ch. D. 543; 52 L. J., Ch. 113. *Ex parte National Mercantile Bank*, 15 Ch. D. 42; 49 L. J., Bk. 62.

(*l*) *Hatton* v. *English*, 7 El. & Bl. 94; 26 L. J., Q. B. 161. *Pickard* v. *Bretz*, 5 H. & N. 9; 29 L. J., Ex. 18.

(*m*) *Routh* v. *Roublot*, 1 El. & El. 850; 28 L. J., Q. B. 240. *Foulger* v. *Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154.

(*n*) *Jones* v. *Harris*, L. R., 7 Q. B. 157; 41 L. J., Q. B. 6.

(*o*) *Roe* v. *Bradshaw*, L. R., 1 Ex. 106; 35 L. J., Ex. 71.

(*p*) *Button* v. *O'Neill*, 4 C. P. D. 354, overruling *London and Westminster Loan Co.* v. *Chace*, 12 C. B., N. S. 730; 31 L. J., C. P. 314. But where the address in the affidavit was the same as in the bill, but the deponent had gone to America, it was held correct. *In re Hewer*, 21 Ch. D. 871; 46 L. T. 856.

(*q*) *Attenborough* v. *Thompson*, 2 H. & N. 559; 27 L. J., Ex. 23.

466 as residing at the place where he sleeps at night (*r*). If the description is substantially correct, and parties could not have been misled by it, it will suffice (*s*). Where the number of the residence is essential, it must be given correctly (*t*).

Where a person has an occupation, it must be correctly stated as a means of identification; but the *onus* of proving that the party has an occupation lies on the person seeking to impeach the bill of sale. If the grantor of the bill of sale had no occupation at the time of the execution of the instrument, he may be described as having no occupation (*u*), or as a "gentleman" (*x*). But, if the party has any occupation at all, and is receiving remuneration for services of any sort or kind, his occupation must be correctly stated; and it will not do to describe him generally as a "gentleman" (*y*), or "esquire" (*z*). A description of a clerk in a government office, or an attorney's clerk, as "gentleman" is not sufficient (*a*). A description of a clerk in the accountant's department of a railway company as an "accountant" is insufficient (*b*).

Where the bill of sale is given by a trading company, a statement of the name of the company and the address of its principal office in the affidavit is a sufficient compliance with the Act, and it is not necessary to state the residences or occupations of directors who sign as such, and not as attesting witnesses (*c*).

Where there are two witnesses to the execution of a bill of sale, and the affidavit filed with the bill contains a description of the residence and occupation of one of them only, it is insufficient (*d*).

Bill of sale—Time of registration.—When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration will be valid if made on the next following day on which the office is open (*e*).

A bill of sale is not invalid by reason of its not having been filed, if the goods comprised in it are seized before the expiration of the time for filing it (*f*).

(*r*) *Blackwell* v. *England*, 8 El. & Bl. 541; 27 L. J., Q. B. 124.

(*s*) *Hewer* v. *Cox*, 30 L. J., Q. B. 73. *Briggs* v. *Boss*, L. R., 3 Q. B. 268; 37 L. J., Q. B. 101. *Ex parte M'Hattie*, 10 Ch. D. 398.

(*t*) *Murray* v. *Mackenzie*, L. R., 10 C. P. 625; 44 L. J., C. P. 313.

(*u*) *Trousdale* v. *Shepperd*, 14 Ir. C. L. R. 370.

(*x*) *Sutton* v. *Bath*, 3 H. & N. 382. *S. C.*, *Bath* v. *Sutton*, 27 L. J., Ex. 388. *Morewood* v. *South York, &c.*, 3 H. & N. 800; 28 L. J., Ex. 114. *Gray* v. *Jones*, 14 C. B., N. S. 743. *Smith* v. *Cheese*, 1 C. P. D. 60; 45 L. J., C. P. 156.

(*y*) *Beales* v. *Tennant*, 29 L. J., Q. B. 188. *Dryden* v. *Hope*, 9 W. R. 18. *Adams* v. *Graham*, 33 L. J., Q. B. 71. *Brodrick* v. *Seale*, L. R., 6 C. P. 98; 40 L. J., C. P. 130.

(*z*) *Ex parte Hooman*, L. R., 10 Eq. 63; 39 L. J., Bk. 4.

(*a*) *Allen* v. *Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249. *Tuton* v. *Sanoner*, 3 H. & N. 280; 27 L. J., Ex. 293.

(*b*) *Larchin* v *North Western Deposit Bank*, L. R., 10 Ex. 64; 44 L. J., Ex. 71.

(*c*) *Shears* v. *Jacob*, L. R., 1 C. P. 512; 35 L. J., C. P. 241. *Deffel* v. *White*, L. R., 2 C. P. 144; 36 L. J., C. P. 25.

(*d*) *Pickard* v. *Marriage*, 1 Ex. D. 364; 45 L. J., Ex. 594.

(*e*) Sect. 22 of Act of 1878.

(*f*) *Marples* v. *Hartley*, 30 L. J., Q. B. 92. *Banbury* v. *White*, 2 H. & C. 300; 32 L. J., Ex. 259.

467 *Bill of sale—Registration of defeasance or condition.*—If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration is to be deemed to be part of the bill, and must be written on the same paper or parchment therewith before the registration, and be truly set forth in the copy filed therewith, and as part thereof, or the registration will be void (*g*). Where a bill of sale of furniture was given to secure the payment of 250*l.* and interest on demand, and in default of payment the mortgagee was empowered to take possession, but there was a prior, parol agreement, not appearing in the bill of sale, that the debt should be paid off by small weekly instalments, it was held that this was a defeasance or condition, and that the bill was void as against the trustee in bankruptcy of the mortgagor (*h*). But, if the grantee under the bill of sale holds the property in trust for some third party who has advanced money upon the property included in it, such trust need not be declared on the face of the bill of sale (*i*). A transfer or assignment of a registered bill of sale need not be registered (*k*).

Bill of sale—Renewal of registration.—The registration of a bill of sale, whether executed before or after the 1st of January, 1879, must be renewed once at least every five years; and, if a period of five years elapses after the registration, or renewed registration, of a bill of sale, without a renewal or further renewal (as the case may be), the registration will become void (*l*). The renewal of a registration must be effected by filing with the registrar an affidavit (*m*), stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein (*n*), and that the bill of sale is still a subsisting security (*o*). Any renewal after the 1st of January, 1879, of a bill of sale executed before that day and registered under the former Acts must be made in the same manner as the renewal of a registration made under the existing Act (*p*). A renewal of registration does not become necessary by reason only of a transfer or assignment of a bill of sale (*q*). But, where the grantee, before the period for renewal, assigns his interest in the bill of sale to a third person, the assignee, if the registration is not renewed at the proper time, has no title as against an execution creditor (*r*).

(*g*) Sect. 10 of Act of 1878.
(*h*) *Ex parte Southam, In re Latham*, L. R., 17 Eq. 578; 43 L. J., Bk. 39.
(*i*) *Robinson* v. *Collingwood*, 17 C. B., N. S. 777; 34 L. J., C. P. 18.
(*k*) Sect. 10.
(*l*) Sect. 11.
(*m*) A form of affidavit is given in the Act.
(*n*) The residence must be stated as in the original bill, even if incorrect. *Ex parte Webster*, 22 Ch. D. 136; 52 L. J., Ch. 375.
(*o*) Sect. 11.
(*p*) Sect. 23.
(*q*) Sect. 11.
(*r*) *Karet* v. *Koshen Meat Supply Association*, L. R., 2 Q. B. 361. See *Cookson* v. *Swire*, 9 App. Cas. 653; 54 L. J., Q. B. 49.

468 *Bill of sale—Rectification of the register.*—Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by the Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct (*s*).

Bill of sale—Evasion of registration.—A practice had grown up under the former Acts of giving an unstamped bill of sale for a debt, and then, before the time for registration had arrived, renewing the bill, and so on, until at last a final bill was given which was duly stamped and registered. Upon each renewal the old bill was cancelled, and the original debt thus became the consideration for the new bill, and ultimately the last bill which was registered was good against the execution creditor (*t*). The Act of 1878, however, provides that, where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it will to the extent to which it is a security for the same debt, or part thereof, and so far as respects the personal chattels, or part thereof, comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act (*u*).

Bill of sale—Priority of bills of sale.—If two or more bills of sale are given, comprising in whole or in part any of the same chattels, they will have priority in the order of the date of their registration respectively as regards such chattels (*x*).

(*s*) Sect. 14.

(*t*) *Smale* v. *Burr*, L. R., 8 C. P. 64; 42 L. J., C. P. 20. *Ramsden* v. *Lupton*, L. R., 9 Q. B. 17; 43 L. J., Q. B. 17.

(*u*) Sect. 9.

(*x*) Sect. 10. Under the former Acts the law was otherwise. The grantee under an unregistered bill had priority over the grantee under a registered bill (*Nicholson* v. *Cooper*, 3 H. & N. 384; 27 L. J., Ex. 393. *Stansfeld* v. *Cubitt*, 2 De G. & J. 227; 27 L. J., Ch. 266. *Badger* v. *Shaw*, 2 El. & El. 472; 29 L. J., Q. B. 77), unless the unregistered bill was avoided by an execution, in which case it was displaced altogether, and the grantee under the registered bill got priority. *Richards* v. *James*, L. R., 2 Q. B. 285; 36 L. J., Q. B. 116; but now, as to this, see *Ex parte Blaiberg*, 23 Ch. D. 254; 52 L. J., Ch. 461, upon sect. 8 of the Act of 1878, which section is repealed.

469 *Bill of sale—Effect of non-registration.*—A bill of sale which was unregistered was not void under the Act of 1878 as between grantor and grantee (*y*); but a registered bill of sale took priority over one that was earlier but unregistered, as to any chattels that might be comprised therein (*z*); but now every bill of sale must be registered, otherwise such bill of sale will be void in respect of the personal chattels comprised therein (*a*). Where a bill of sale, under the Act of 1878, given by two partners was not registered, and one of them afterwards became bankrupt, the bill was void as against the trustee only to the extent of the bankrupt's moiety (*b*). The fact that an execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered (*c*).

Bill of sale—What is possession of the grantor.—The question of possession or apparent possession of the grantor is not now material as to bills of sale executed after November, 1882 (*d*), and given by way of security; but as to other bills of sale the law remains as heretofore. Goods in the possession of a bailee to hold on account of the bailor are still in the possession of the bailor within the meaning of the Bills of Sale Act, 1878; and they are not taken out of the possession of the bailor by the holder of the bill of sale requiring the bailee to deliver them up to him, if the bailee refuses to deliver possession of them (*e*). Actual possession by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of the Act. But, in the case of a wrong-doer, the possession will not be extended by construction of law beyond the actual physical possession (*f*).

Bill of sale—What is "apparent possession."—Personal chattels are to be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain, or are, in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by, or given to, any other person (*g*). The question of whether there is an apparent possession or not is a question of fact (*h*). There must be something done which takes the goods plainly out of the apparent possession

(*y*) *Davis* v. *Goodman*, 5 C. P. D. 128; 49 L. J., C. P. 344. *Cookson* v. *Swire*, 9 App. Cas. 653.

(*z*) *Conelly* v. *Steer*, 7 Q. B. D. 520; 50 L. J., Q. B. 326.

(*a*) 45 & 46 Vict. c. 43, s. 8.

(*b*) *Ex parte Brown*, 9 Ch. D. 389.

(*c*) *Edwards* v. *Edwards*, 2 Ch. D. 291; 45 L. J., Ch. 391.

(*d*) See Reed's Bills of Sale Acts, p. 53, per Wills, J., *Walrond* v. *Goldman*, 16 Q. B. D. 121. As to goods in the order or disposition of a bankrupt grantor, see *post*, p. 484.

(*e*) *Ancona* v. *Rogers*, 1 Ex. D. 285; 46 L. J., Ex. 121.

(*f*) *Ex parte Fletcher*, 5 Ch. D. 809; 46 L. J., Bk. 93.

(*g*) Sect. 4.

(*h*) *Gough* v. *Everard*, 2 H. & C. 1; 32 L. J., Ex. 212.

470 of the debtor in the eyes of everybody who sees them (*i*). Thus, where the assignee under a bill of sale of household furniture and effects immediately sent a person into the house to take and keep, and who took and kept, possession, but the assignor, down to the date of his bankruptcy, continued to live in the house and use the furniture as before, it was held that the goods were in the apparent possession of the assignor (*k*). Where the grantor of a bill of sale of household furniture managed a business as servant to the grantee at a weekly salary, and was allowed to reside in the house where the business was carried on, and to use the furniture as part of his salary, the grantee residing elsewhere, it was held that the goods were in the possession of the grantor (*l*). But, where the grantor was tenant of rooms in which the goods comprised in the bill of sale were placed, but resided elsewhere, and, having made default in paying the sum secured, he gave the keys of the rooms to the grantee, who opened them and put his name on some of the goods, it was held that the grantor did not occupy the rooms, and that the goods were not in his apparent possession (*m*). So, where the grantee of a bill of sale takes possession of the goods comprised in it, and advertises them for sale as the goods of the grantor sold under a bill of sale, the goods, though still in the house of the grantor, are no longer in his apparent possession (*n*). Goods formally seized by the sheriff under an execution do not, as it seems, remain in the apparent possession of the debtor (*o*).

Bill of sale—Seizure of goods under bill of sale.—With respect to the power to seize under a bill of sale, it is enacted:—

Sect. 7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security (*oo*);

(2.) If the grantor shall become a bankrupt (*p*), or suffer the

(*i*) *Ex parte Jay*, L. R., 9 Ch. 697; 43 L. J., Bk. 122.

(*k*) *Ex parte Hooman*, L. R., 10 Eq. 63; 39 L. J., Bk. 4. *Ex parte Lewis*, L. R., 6 Ch. 626. *Seal* v. *Claridge*, 7 Q. B. D. 516; 50 L. J., Q. B. 316.

(*l*) *Pickard* v. *Marriage*, 1 Ex. D. 364; 45 L. J., Ex. 594.

(*m*) *Robinson* v. *Briggs*, L. R., 6 Ex. 1; 40 L. J., Ex. 17.

(*n*) *Emanuel* v. *Bridger*, L. R., 9 Q. B. 286; 43 L. J., Q. B. 96.

(*o*) *Ex parte Saffery*, 16 Ch. D. 668; 44 L. T. 321. But see *Ex parte Mutton*, L. R., 14 Eq. 178; 41 L. J., Bk. 57.

(*oo*) This does not mean merely "useful" for maintaining the security, *Binanchi* v. *Offord*, 17 Q. B. D. 484, and it is of no avail that the parties declare a covenant to be necessary. *Furber* v. *Cobb*, 17 Q. B. D. 499.

(*p*) A bill of sale authorized seizure in case the grantor "shall do or suffer any matter or thing whereby he shall become bankrupt;" this was held to be in substance the same as the words in the section. *Ex parte Allam*, 14 Q. B. D. 43.

471 said goods, or any of them, to be distrained for rent, rates, or taxes;

(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4.) If the grantor shall not, without reasonable excuse (*q*), upon demand in writing by the grantee, produce to him his last receipts to him for rents, rates, and taxes;

(5.) If execution shall have been levied against the goods of the grantor under any judgment at law:

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just (*r*).

By sect. 13, all personal chattels seized, or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized, or so taken possession of.

By sect. 14, a bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which, but for such bill of sale, would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

Bills of lading.—Bills of lading, made out to the order of the shipper or consignee, are negotiable and transferable by indorsement and delivery, so as, in the absence of notice of fraud, or insolvency, or want of title on the part of the indorser (*s*), to vest the right of property and ownership of the merchandize comprised therein in a *bonâ fide* indorsee or holder for value, and defeat the right of the unpaid vendor to stop them *in transitu* (*t*). The contract evidenced by the bill of lading is now also transferred by the indorsement and delivery of the instrument to the indorsee, so as to enable the latter to maintain an action, or be

(*q*) See *Ex parte Cotton*, *infra*, as to what is "reasonable excuse."

(*r*) This section applies to goods seized after the commencement of the Act under a bill of sale registered before the Act. *Ex parte Cotton*, 11 Q. B. D. 301; 49 L. T. 52.

(*s*) *Pease* v. *Gloahec*, *The Marie Joseph*, L. R., 1 P. C. 219. *Rodger* v. *Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393; 40 L. J., P. C. 1. *Gilbert* v. *Guignon*, L. R., 8 Ch. 16.

(*t*) *Pease* v. *Gloahec*, *The Marie Joseph*, L. R., 1 P. C. 219; 35 L. J., P. C. 66. *Coventry* v. *Gladstone*, L. R., 4 Eq. 493; 37 L. J., Ch. 30.

472 sued, upon it(*u*). A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them, and is not spent or exhausted by the landing and warehousing of them at a sufferance wharf, at all events as long as they are under stop for freight; and the person who first gets the bill of lading (though only one of a set of three), gets the property which it represents, and need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, so that any subsequent dealings with the others of the set are subordinate to the rights passed by that one. Therefore, where *A*, the indorsee of a bill of lading drawn in a set of three, making cotton deliverable on payment of freight, having got the cotton landed at a sufferance wharf, with a stop thereon for freight, procured an advance from *M* on the deposit of two copies of the bill of lading, and subsequently, the stop for freight having been removed, obtained a second advance from *B* on the deposit of the third copy, and *B* afterwards, hearing of the prior advance, sent his copy of the bill of lading to the wharf, and procured the cotton to be transferred into his own name, and afterwards sold it and received the proceeds, it was held that the bill of lading when deposited with *M* retained its full force and effect; that there was therefore a valid pledge of the cotton to *M;* and that he could maintain an action against *B*, either for the proceeds of the sale or for a wrongful conversion of the cotton (*x*). Where a bill of lading and a bill of exchange to cover the goods included in the bill of lading are sent in a letter to the vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained: and, where the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it (*y*).

Documents of title.—By the 40 & 41 Vict. c. 39, s. 5, where any document of title (*z*) to goods has been lawfully endorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery, where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for a valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as

(*u*) Addison on Contracts, 8th edit. pp. 935, 966.

(*x*) *Meyerstein* v. *Barber*, L. R., 2 C. P. 38, 661; 4 H. L. 317; 39 L. J., C. P. 197.

(*y*) *Shepherd* v. *Harrison*, L. R., 4 Q. B. 196, 493; 5 H. L. 116; 40 L. J., Q. B. 148.

(*z*) As to what are documents of title, see *post*, p. 476.

473 the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

The mere possession of a dock warrant, delivery-order, or warehouse-keeper's or wharfinger's receipt for goods, or any other documentary evidence of title to chattels, is no stronger evidence of title and ownership than the actual possession of the goods themselves; and, if, by means of a delivery-order fraudulently obtained and presented to a warehouse-keeper, merchandize has been transferred in the warehouse-keeper's books of transfer into the name of the wrong-doer, the latter cannot thereby convey a valid title by sale or by pledge (*a*).

Transfers of chattels in the hands of bailees.—If the owner of a chattel places it in the hands of *A*, with directions to hand it over to *B* for *B*'s use, that alone does not have the effect of transferring the property to *B*. The direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former (*b*). "The transaction amounts to no more than a mandate from a principal to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit; and it will be revoked by any disposition of the property inconsistent with the execution of it" (*c*). But, as soon as the person holding the chattel enters into a binding engagement with the third person to hold it for him, he cannot afterwards contest the title of the latter (*d*). If the defendant has led the plaintiff to believe that he would act as a warehouseman or bailee of the goods for the plaintiff, and after that parts with them to another, he will be guilty of a conversion (*e*).

Transfer by factors.—As a general rule the mere possession of the property of another, without authority to deal with the thing in question, otherwise than for the purpose of safe custody, will not, if the person so in possession takes upon himself to sell or pledge it to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter may have been (*f*). In order, however, to protect innocent persons from fraud in the case of sales or pledges by factors or agents en-

(*a*) *Boyson* v. *Coles*, 6 M. & S. 14. *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L. J., Ex. 83. *Godts* v. *Rose*, 17 C. B. 229; 25 L. J., C. P. 61.

(*b*) *Brind* v. *Hampshire*, 1 M. & W. 373. *Williams* v. *Everett*, 14 East, 596.

(*c*) *Scott* v. *Porcher*, 3 Mer. 663.

(*d*) *Stonard* v. *Dunkin*, 2 Campb. 344.

(*e*) *Hawkes* v. *Dunn*, 1 Cr. & J. 527.

(*f*) *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 32; 47 L. J., C. P. 241.

474 trusted with goods as such, certain acts called the Factors' Acts have been passed; and the protection given by those statutes has been extended to cases where a purchaser, before the property has passed to him, or a vendor after the property has passed from him, has been allowed to obtain or retain possession of the goods, and has thereby been enabled to dispose of them as his own.

Factors—Sales by factors and agents.—By the 6 Geo. 4, c. 94, s. 4, it is enacted that it shall be lawful for any person to contract with an agent intrusted with goods, or to whom the same may be consigned for sale, for the purchase of such goods, and to receive the same of, and pay for the same to, such agent; and such contract or payment will be binding upon and good against the owner, notwithstanding the person dealing with the agent knew at the time that he was only an agent. But the contract and payment must be made in the usual course of business; and the purchaser must not be aware of any want of authority on the part of the agent to sell or to receive the purchase-money.

Factors—Pledges by factors and agents.—By the common law a factor had no right to pledge the goods of his principal, although he had a lien upon them for his advances to the latter, or for the general balance due to him on the accounts between them. Neither could he pledge the symbol of property in, or the documentary evidence of the title to, such goods, such as bills of lading, or orders or warrants for the delivery of goods (*g*). To meet this inconvenience the 4 Geo. 4, c. 83, first gave to the pledgee the rights of the pledgor over the thing pledged; then came the 6 Geo. 4, c. 94, which gives certain powers of pledging to persons intrusted for the purpose of consignment or sale with goods or merchandize shipped in their own names. Lastly, by the 5 & 6 Vict. c. 39, reciting the 4th section of this last-named statute, which enables agents intrusted with goods, and persons to whom goods have been consigned, to confer a good title on *bonâ fide* purchasers, who have bought and paid for the goods in the usual course of business without being aware of any want of authority on the part of the agent, it is declared that it is expedient that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandize as by the recited Act is given to sales: and that owners, intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should, in all cases where such owners, by the recited Act or otherwise, would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof: and it is therefore enacted (s. 1),

(*g*) *Daubigny* v. *Duval*, 5 T. R. 604. *Newson* v. *Thornton*, 6 East, 40.

475 that any agent who shall be intrusted with the possession of goods, or of the documents of title to goods, shall be *deemed and taken to be owner* of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security *bonâ fide* made by any person with such agent so intrusted, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent. Also (s. 2) that, where any such contract for pledge, lien or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien in respect of a previous advance by virtue of some contract made with such agent, such contract, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the meaning of the Act, and be as valid and effectual as if the consideration for the same had been a *bonâ fide* present advance of money: provided the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value, at the time, of the goods and merchandize, or the documents of title, or negotiable security which shall be delivered up and exchanged.

But it is provided (s. 3), that the Act shall give validity to such contracts only, and protect only such loans, as shall be made *bonâ fide*, and without notice that the agent making such contracts or agreements has no authority to make the same, or is acting *malâ fide* in respect thereof against the owner, and shall not protect any lien or pledge in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, nor authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bonâ fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement shall be binding on the owner and all other persons interested in such goods.

Although, therefore, the owner of goods who intrusts them to

476 a factor to sell expressly prohibits the factor from pledging them, the prohibition will be of no avail against a pledgee who has received the goods in pledge from the factor, knowing that he was an agent for sale, but not knowing that he had been prohibited from pledging. Under this Act an agent, who is known to be so, may be treated as owner, in accepting any pledge of goods from him, although the goods have been intrusted to him to sell, provided no notice that the agent is acting *malâ fide* and disobeying his instructions has been given (*h*). But, if the circumstances are such that a reasonable man of business applying his understanding to them would certainly know that the agent had no authority to make the pledge, the transaction will not be protected (*i*).

Factors—What are documents of title.—Every bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, is to be deemed a document of title (*k*). Certificates of railway stock are not documents of title within the Act (*l*).

Factors—What is an intrusting.—Any agent intrusted with the possession of any document of title to goods, and possessed thereof, whether derived immediately from the owner, or obtained by reason of the agent's having been intrusted with the possession of the goods, or of any other document of title thereto, is to be deemed and taken to have been intrusted with the possession of the goods represented by such document of title (*m*). An agent in possession of goods or documents of title is to be taken to have been intrusted therewith by the owner thereof, until the contrary is shown; and an agent is to be deemed to be possessed of such goods or documents, whether they are in his actual custody, or held by any other person subject to his control, or for him, or on his behalf (*n*).

To bind his principals by a sale or pledge, the agent must have been intrusted with the goods for the purpose of sale, or he must be a person who is ordinarily instructed to sell such goods, and must have made the sale or pledge in the course of his ordinary business, in pursuance of the authority so conferred upon him (*o*).

(*h*) *Navulshaw* v. *Brownrigg*, 2 De G., M. & G. 441; 21 L. J., Ch. 908.
(*i*) *Gobind Chunder Sein* v. *Ryan*, 15 Moo. P. C. 230.
(*k*) 5 & 6 Vict. c. 39, s. 4.
(*l*) *Freeman* v. *Appleyard*, 32 L. J., Ex. 175.
(*m*) 5 & 6 Vict. c. 39, s. 4.
(*n*) *Ib.*
(*o*) *Cole* v. *North Western Bank*, L. R., 9 C. P. 470; 10 C. P. 354; 44 L. J., C. P. 233.

477 A factor does not lose his character of factor or his right of lien by reason of his acting under special instructions from his principal to sell at a particular price and in the principal's name (*p*).

Where pictures were deposited with *A* (whose ordinary business was that of an agent for two insurance offices), with instructions to sell them, it was held that *A* was an agent intrusted with the possession of goods (*q*); and, where bonds payable to bearer and passing by delivery only were deposited with bankers for safe custody, and the bankers fraudulently deposited them with their broker as a security for money advanced, and became bankrupt, it was held that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers in ignorance of the fraud (*r*).

But a warehouse keeper who has goods deposited with him as such is not "an agent intrusted with the possession of them" within the Act, although he is also a broker, and is usually employed to sell such goods, but always upon specific instructions for that purpose received from the principal (*s*). Nor is a person instructed to keep in his own house the furniture of another, an agent within the meaning of the Act (*t*).

But a factor or agent who has got possession of a bill of lading, dock-warrant, or document of title without the sanction and authority of the principal is not necessarily *intrusted* therewith, although the principal has put it in the power of the agent to obtain possession of the document. If one man gives to another the key of his bureau to take out a receipt, and the latter possesses himself of a bill of lading, he cannot be said to be intrusted with the latter document (*u*); and a merchant's clerk having dock-warrants in his possession in the course of his employment is not intrusted with them within the meaning of the Act (*x*).

So, also, where either the goods or documents of title are obtained from the owner, not on a contract of sale defeasible on account of fraud but good till avoided, but by some trick, a purchaser or pledgee acquires no title, for the trickster is not an agent intrusted with the possession (*y*). But, if the true owner does in fact entrust the agent as an agent, though he is induced to do so by fraud, a pledge by the agent will be good (*z*).

(*p*) *Stevens* v. *Biller*, 25 Ch. D. 31; 53 L. J., Ch. 249.

(*q*) *Heyman* v. *Flewker*, 13 C. B., N. S. 519; 32 L. J., C. P. 132. *Baines* v. *Swainson*, 4 B. & S. 270; 32 L. J., Q. B. 281.

(*r*) *Jones* v. *Peppercorne*, Johns. 430; 28 L. J., Ch. 158.

(*s*) *Cole* v. *North Western Bank*, L. R., 9 C. P. 470; 10 C. P. 354; 44 L. J., C. P. 233.

(*t*) *Wood* v. *Rowcliffe*, 6 Hare, 183.

(*u*) *Phillips* v. *Huth*, 6 M. & W. 599.

(*x*) *Lamb* v. *Attenborough*, 1 B. & S. 831; 31 L. J., Q. B. 41.

(*y*) *Kingsford* v. *Merry*, 1 H. & N. 503; 26 L. J., Ex. 83. *Hardman* v. *Booth*, 1 H. & C. 803; 32 L. J., Ex. 105; *Lindsay* v. *Cundy*, *ante*, p. 451.

(*z*) *Sheppard* v. *Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154. *Barvies* v. *Swainson*, 4 B. & S. 270; 32 L. J., Q. B. 281.

478 *Factors—What pledges and liens are within the Act.*—All contracts pledging, or giving a lien upon, documents of title are to be deemed and taken to be pledges of, and liens upon, the goods to which the documents relate; and, where any loan or advance is *bonâ fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver them, and they are actually received by the person making such advance, without notice that the agent was not authorized to make the pledge or security, the loan or advance is to be deemed a loan or advance on the security of such goods or documents of title, though they are not actually received by the person making the loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such agent, or with any clerk or other person on his behalf, is to be deemed a contract or agreement with such agent; and any payment made, whether by money or bills of exchange or other negotiable security, is to be deemed and taken to be an advance within the meaning of the Act (*a*).

A factor, by pledging goods to an amount which does not exhaust their value, has not thereby parted with his control over the goods so as to preclude himself from making a further hypothecation for the balance of their value; and such further hypothecation will be valid against the principal. Thus, where cotton was consigned by *A* to *B* for sale, and *B* deposited the bill of lading with *C*, a broker, and authorized him to receive and sell the cotton, and subsequently gave *D* a lien upon the balance of the net proceeds of the cotton by order in writing communicated to and assented to by *C*, it was held that the subsequent charge was valid against the principal (*b*). The Act protects every *bonâ fide* advance, but only *bonâ fide* advances, not antecedent liabilities (whether they may or may not have ripened into debts), where no actual advance is made at the time of the pledge. Therefore, where a factor pledged goods of his principal with *A*, first, to secure the payment of an acceptance of the factor's in *A*'s hands, not then due, which had been given to protect *A* from liability on a contract as the factor's broker; and, secondly, to repay to *A* his loss on a re-sale of goods *A* had purchased from the factor in his own name, it was held that the transaction was not within the Act (*c*). Where the plaintiff, a manufacturer, had consigned goods to one Clark, who had acted as agent for him, and also as agent for the defendant, and Clark, being liable, with the de-

(*a*) 5 & 6 Vict. c. 39, s. 4.

(*b*) *Portalis* v. *Tetley*, L. R., 5 Eq. 140; 37 L. J., Ch. 139.

(*c*) *Macnee* v. *Gorst*, L. R., 4 Eq. 315. See *Kaltenbach* v. *Lewis*, 10 Ap. Cas. 617; 55 L. J., Ch. 58.

479 fendant, on a bill of exchange which had become due, obtained from the defendant 300*l.* for the purpose of taking up the bill, and at the same time deposited the plaintiff's goods with the defendant, it was held that the payment of the 300*l.* by the defendant, to be applied by Clark in discharging the joint liability upon the bill, was not an advance or loan of money upon a deposit of goods, nor a contract of pledge, within the intent and meaning of the Factors' Acts, and that the defendant, consequently, had no lien upon the goods as against the plaintiff (*d*). An advance made to a third person at the request of the factor is within the Act (*e*).

Factors—Revocation of the agent's authority.—By the 40 & 41 Vict. c. 39, s. 2, it is enacted that, where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person, who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents (*f*).

Transfer—Sales and pledges by vendors after a previous sale.—By sect. 3 of the same Act it is enacted that, where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent intrusted by the vendor with the goods or documents so continuing or being in his possession, shall be as valid and effectual as if such vendor, or other person, were an agent or person intrusted by the vendee with the goods or documents, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold (*g*).

Transfer—Sales and pledges by purchasers.—By sect. 4, where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession, or by any other person or agent entrusted by the vendee with the documents, shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents, provided the person to whom the

(*d*) *Learoyd* v. *Robinson*, 12 M. & W. 745.

(*e*) *Sheppard* v. *Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154.

(*f*) This Act applies only to acts done and rights acquired after the 10th of August, 1877 (sect. 6). The law was formerly otherwise. *Fuentes* v. *Montis*, L. R., 4 C. P. 93; 38 L. J., C. P. 137.

(*g*) The Act applies only to acts done and rights acquired after the 10th of August, 1877 (sect. 6). The law was formerly otherwise. *Johnson* v. *Credit Lyonnais Co.*, 3 C. P. D. 32; 47 L. J., C. P. 241.

480 sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods (*h*).

Transfer—Title by estoppel.—If the defendant has by deed admitted the title of the plaintiff to the chattels in respect of which the action is brought, he will be estopped from disputing it at the trial (*i*). If he has accredited the title of some third person to the goods, and so induced the plaintiff to buy from the latter, he will be estopped from setting up any title in himself (*k*). If the owner of goods parts with the possession of them, and knowingly suffers his bailee to deal with the goods as owner, and culpably and negligently stands by and allows a third person to acquire an interest in the goods on the faith and understanding of a fact which he can contradict, and does not contradict, he will be afterwards estopped from disputing the fact in an action against the person whom he has himself assisted in deceiving. Thus, if *A*, the owner of goods, stands by and permits *B* to sell them to *C*, without giving any notice to *C* of his being the real owner of the goods, he will be estopped from disputing *C*'s title under the sale (*l*).

So, where the defendants negligently issued for one consignment of wheat two delivery orders which differed so much that they might reasonably be supposed to relate to different consignments, it was held that the defendants were estopped by their negligence from showing that the orders related only to one consignment, and that they were liable for loss sustained by the plaintiffs who had advanced money on both delivery orders thinking that they related to distinct consignments (*m*).

Where the plaintiff, in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant, and, in order that the latter might appear to be the true owner, made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale, it was nevertheless held that the plaintiff, as between himself and the defendant, was not estopped from showing the real character of the transaction, so as to entitle him to recover back the goods from the defendant. Here no deed of transfer had been executed, and the jury found that there was no sale and no intention of transferring the right of property in the things to the defendant. "It is perfectly true," observes Martin, B., "that, if an act is done, the party cannot avail himself of his own fraud to undo it; but here the act is not done, as the jury expressly find there was no sale at all to the defendant,"

(*h*) This Act applies only to acts done and rights acquired after the 10th of August, 1877 (sect. 6). The law was formerly otherwise. *Jenkyns* v. *Usborne*, 7 M. & G. 678; 8 Sc. N. R. 505. *McEwan* v. *Smith*, 2 H. & C. 309.

(*i*) *Wiles* v. *Woodward*, 5 Exch. 557.

(*k*) *Waller* v. *Drakeford*, 1 El. & Bl. 753; 22 L. J., Q. B. 275.

(*l*) *Gregg* v. *Wells*, 10 Ad. & E. 98.

(*m*) *Coventry* v. *Great Eastern Rail. Co.*, 11 Q. B. D. 776; 52 L. J., Q. B. 694.

481 and no transfer whatever of the property in these goods to him (*n*).

Transfer by death—Title of an administrator.—The title of an administrator relates back to the death of the intestate; and, therefore, an action is maintainable by an administrator for a wrongful seizure (*o*) or sale by the defendant of the intestate's goods made between the death of the intestate and the grant of the letters of administration (*p*). If a man has intermeddled with the goods of a deceased person for the purpose of preserving and administering his estate, and has thus made himself executor *de son tort*, he may be sued for a trespass and conversion by the rightful administrator, when he has obtained letters of administration; but, if no injury has been sustained by the estate, nominal damages only will be recoverable (*q*).

Recovery of judgment in an action.—The recovery of judgment by a plaintiff, in an action for the wrongful taking and conversion of his goods and chattels, has the effect of transferring the property of the goods converted from the plaintiff to the defendant, if the judgment has been satisfied (*r*). The plaintiff, by recovering damages for the wrong, loses his right of property in the chattel that has been converted; and this transfer of the right of property dates back, by relation, to the time of the conversion. The damages recovered by the plaintiff against the defendant are regarded as the price of the goods, so that the defendant hath now the same property therein as the original plaintiff had, and this against all the world" (*s*). Having once recovered judgment and satisfaction in respect of the goods, the plaintiff cannot recover again the same thing against somebody else. His further remedy is altogether gone, and his claim satisfied (*t*).

Seizure and sale by the sheriff.—The right of the sheriff to seize property under a writ of execution formerly dated from the time of the delivery of the writ at the sheriff's office (*u*); but it has been enacted (*v*) that no writ of execution or attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration, before the actual seizure or attachment thereof by virtue of such writ, provided such person had not, at the time when he

(*n*) *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262. *Taylor* v. *Bowers*, 1 Q. B. D. 291: 46 L. J., Q. B. 39.
(*o*) *Thurpe* v. *Stallwood*, 5 M. & G. 777.
(*p*) *Foster* v. *Bates*, 12 M. & W. 226.
(*q*) *Elworthy* v. *Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.
(*r*) *Cooper* v. *Shepherd*, 3 C. B. 272. Holroyd, J., *Morris* v. *Robinson*, 3 B. & C. 206. *In re Scarth*, L. R., 19 Ch. 234; 44 L. J., Bk. 29.
(*s*) Per Cur., *Adams* v. *Broughton*, Andr. 19; 6 M. & G. 640, n. Byles, J., *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102.
(*t*) *Brinsmead* v. *Harrison*, L. R., 6 C. P. 584; 40 L. J., C. P. 281; aff. on appeal, on another point, *ante*, p. 94. See *Ex parte Drake*, L. R., 5 Ch. D. 866; 46 L. J., Bk. 105.
(*u*) 29 Car. 2, c. 3, s. 16.
(*v*) 19 & 20 Vict. c. 97, s. 1.

482 acquired such title, notice that such writ, or any other writ by virtue of which the goods might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the sheriff, under-sheriff, or coroner (*x*).

The ordinary course, in cases of seizure of goods by a sheriff under a *fi. fa.*, is for the sheriff to sell by auction or by bill of sale; but the law does not require the sale to be made in any particular manner. If the sheriff has the goods valued, and then delivers them by way of sale to the execution creditor for the amount of the valuation, this is a good sale of the property to him (*y*). In ordinary cases of sales by sheriffs there is no implied warranty of title on the part of the sheriff to the property he sells (*z*). In an interpleader suit between a claimant under a bill of sale from the sheriff and an execution creditor, proof of the bill of sale, with some evidence of a previous seizure of the chattels by the sheriff, is sufficient *primâ facie* evidence of the title of the claimant (*a*).

Executions levied on the property of bankrupts—Garnishee orders.—If execution issued against the debtor has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court, the debtor commits an act of bankruptcy (*b*).

The Act of 1869 confined this act of bankruptcy to traders, and to process upon execution to the amount of 50*l.* The title of the trustee was held, under the Act of 1869, to relate back to the completion of the act of bankruptcy (*c*). Under the present Act the completion of the act of bankruptcy would appear to be seizure *and sale*. (See sect. 45, sub-s. 2, *infra*.)

By sect. 43, the bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid

(*x*) *Gladstone* v. *Padwick*, L. R., 6 Ex. 203; 40 L. J., Ex. 154. *Hobson* v. *Thelluson*, L. R., 2 Q. B. 642; 36 L. J., Q. B. 302.

(*y*) *Hornamann* v. *Bowker*, 11 Exch. 760.

(*z*) *Morley* v. *Attenborough*, 3 Exch. 500.

(*a*) *Hornidge* v. *Cooper*, 27 L. J., Ex. 314.

(*b*) Bankruptcy Act, 1883, s. 4.

(*c*) *Ex parte Villars*, L. R., 9 Ch. D. 432.

483 by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Sect. 45. (1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt (*d*); and an execution against land is completed by seizure; or, in the case of an equitable interest, by the appointment of a receiver.

By sect. 9, after the making of a receiving order (except as directed by the Act) no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court, and on such terms as the court may impose; but the section is not to affect the power of any secured creditor to deal with his security in the same manner as he could have done if the section had not existed.

Where the debtor before committing any act of bankruptcy paid a sum of money to the sheriff on account of the debt, and the judgment creditor assented to the payment, it was held that the latter was entitled to the money as against the trustee in bankruptcy (*e*).

Bankruptcy — Order and disposition. — The general effect of bankruptcy in transferring the debtor's property to a trustee for the benefit of his creditors has already been considered (*f*). The peculiar effect of bankruptcy upon the goods and chattels of another, which, with the consent of the true owner, have been left in the order and disposition of the bankrupt, will be treated of here.

By sect. 44, sub-sect. (3) of the Act of 1883 (*g*) it is enacted that the property of the bankrupt, divisible amongst his creditors,

(*d*) As to what is a receipt of the debt, see *Butler* v. *Wearing*, 17 Q. B. D. 182.

(*e*) *Stock* v. *Holland*, L. R., 9 Ex. 147; 43 L. J., Ex. 112. *Ex parte Brooke*, L. R., 9 Ch. 301.

(*f*) *Ante*, p. 239 *et seq.*

(*g*) Which is substantially a re-enactment of the 12 & 13 Vict. c. 106, s. 125.

484 shall comprise all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that the bankrupt is the reputed owner thereof; but no *chose in action*, other than debts due, or growing due, to the bankrupt in the course of his trade or business, are to be deemed goods within this section. It is only the trustee of the bankrupt who can take advantage of this section; and, if he disclaims all interest in the goods, a third person cannot set up the trustee's title under this section against the true owner (*i*).

Bankruptcy—What things are comprehended under the word "goods."—The word "goods" includes all chattels personal (*j*). It was held that the words "goods and chattels" in the corresponding section of the Act of 1869 extended only to chattels personal, and did not embrace chattels real, leases, interests in land, or fixtures and things attached to the freehold; and *choses in action*, other than trade debts, are expressly excepted by the section (*k*). The object of the legislature was to prevent debtors from gaining a delusive credit by a false appearance of substance, which may be caused by the possession of personal chattels, as the possession and ownership generally go together; which is not the case with regard to land and fixtures annexed to the realty (*l*). But movable machinery in buildings, all kinds of personal property in possession, shares in newspapers (*m*), stock in the public funds, patents for inventions, and all personal property assignable by deed at common law, are within the section. Shares in a railway company are *choses in action* (*n*).

Possession of the bankrupt.—The goods must be in the possession of the bankrupt with the consent of the true owner. A possession against the will or without the knowledge of the true owner will not vest the property in the trustee (*o*). "There has been no case, nor ever will be, wherein a court of law or equity will do so severe a thing as to subject the property of one man to the debts of another without proof of the consent of the real

(*i*) *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. 711; 47 L. J., Q. B. 119.

(*j*) Sect. 168 of Act of 1883.

(*k*) This was otherwise under the former statutes; see *Hornblower* v. *Proud*, 2 B. & Ald. 327. As to trade debts, see *Cooke* v. *Hemming*, L. R., 3 C. P. 334; 37 L. J., C. P. 179. *Leslie* v. *Guthrie*, 1 Bing. N. C. 697.

(*l*) *Horn* v. *Baker*, 9 East, 215. *Ex parte Barclay*, 5 De G., M. & G. 403; 25 L. J., Bk. 4. *Ex parte Lloyd*, 3 D. & C. 787. *Ex parte Wilson*, 4 *ib.* 143. *Coombs* v. *Beaumont*, 5 B. & Ad. 73. *Hubbard* v. *Bagshaw*, 4 Sim. 338. *Boswell* v. *M'Michael*, 1 C., M. & R. 177.

(*m*) See *Longman* v. *Tripp*, 2 B. & P. N. R. 67.

(*n*) *Colonial Bank* v. *Whinney*, 11 Ap. Cas. 426.

(*o*) *Ex parte Richardson*, Buck, 488. *Lingham* v. *Biggs*, 1 B. & P. 88. *Oliver* v. *Bartlett*, 1 B. & B. 273.

485 owner to leave them in the power of the bankrupt (possession only not being sufficient), or a *laches* in letting them remain there so as to get him a false credit" (*p*). Therefore the property of infants in the hands of traders, who deal with it as the reputed owners, will not pass to the trustee for the benefit of creditors, by reason of the incapacity of infants to give their consent and permission within the intent and meaning of the statute (*q*). But, if the real owner is of full age and capable of acting for himself, it should be made notorious "to the world in which the bankrupt moves" that the latter holds the property adversely, and without the consent or permission of such owner (*r*), or the latter should have done all that can reasonably be expected of him to obtain possession of the property prior to the bankruptcy (*s*). If the goods have been placed in the possession of the bankrupt by a person who was himself only the bailee, the consent of the latter to the bankrupt's possession is not the consent of the true owner (*t*). A seizure by a sheriff, under an execution against a bankrupt, of the goods and chattels of a third person in the possession, order, and disposition of the bankrupt, does not in any way withdraw the goods from the possession, order, and disposition of the bankrupt, so as to interfere with the title of the trustee (*u*). If the true owner *bonâ fide* demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not in the possession of the bankrupt with his consent after the demand has been made (*x*); and, if the goods are in the hands of a warehouseman to the order of the bankrupt, and a demand has been made upon the bankrupt, that is sufficient, although no demand has been made upon the warehouseman (*y*).

Goods obtained by fraud before the act of bankruptcy, and remaining in the bankrupt's possession at the time he becomes bankrupt, are not in the possession, order, and disposition of the latter with the consent of the owner. If, therefore, the bankrupt has obtained possession of goods through the medium of a fraudulent and pretended purchase, never intending to pay for them, and then becomes bankrupt, with the goods in his possession,

(*p*) Ld. Hardwicke, *West* v. *Skip*, 1 Ves. sen. 243. Parke, B., *Beleher* v. *Bellamy*, 2 Exch. 310; 17 L. J., Ex. 222.

(*q*) Ld. Eldon, *Viner* v. *Cadell*, 3 Esp. 89.

(*r*) Best, J., *Ex parte Enderby*, 2 B. & C. 398.

(*s*) *Smith* v. *Topping*, 5 B. & Ad. 674.

(*t*) *Fraser* v. *Swansea Navigation, &c.*, 1 Ad. & E. 354.

(*u*) *Barrow* v. *Bell*, 5 El. & Bl. 540; 25 L. J., Q. B. 3. *Ex parte Edey*, L. R., 19 Eq. 264; 44 L. J., Bk. 55. *Ex parte Foss*, 2 De G. & J. 230.

(*x*) *Smith* v. *Topping*, 5 B. & Ad. 674.

(*y*) *Ex parte Ward*, L. R., 8 Ch. 144; 42 L. J., Bk. 17.

486 they may be reclaimed by the vendor, as there is no consent of the true owner, in such a case, the transaction being a cheat, and fraudulent altogether on the part of the buyer (*z*).

Chattels—Commencement of the bankruptcy.—By sect. 43 of the Act of 1883, the bankruptcy commences from the committing of the act of bankruptcy on which the receiving order is made, and not from the completion of the act of bankruptcy, as in the Act of 1869, sect. 11. That section extended to chattels which were in the order and disposition of the bankrupt at the time of his committing any act of bankruptcy capable of supporting the adjudication, although such act was prior to the act on which the adjudication is founded (*a*). If, before the adjudication, and without notice of an act of bankruptcy, the true owner had actually taken the goods out of the possession, order, and disposition of the bankrupt, his title would prevail over that of the trustee (*b*), although he might have received notice of the debtor's intention to commit an act of bankruptcy; for he was not bound to inquire whether the act had been committed, but was entitled to avail himself of his remedies just as if he had received no such notice (*c*). So, if, before adjudication, and after the act of bankruptcy, the owner had, *bonâ fide* and without notice of the act of bankruptcy, done anything which, before an act of bankruptcy, would have been sufficient to determine his permission and consent to the goods remaining in the possession, order, and disposition of the bankrupt, so that a subsequent act of bankruptcy would not have subjected the goods to be dealt with under the clause respecting reputed ownership, his title would prevail, although he had not, before notice, succeeded in obtaining the actual possession of the goods. If, before the date of the adjudication, and before notice of an act of bankruptcy, he had *bonâ fide* demanded the goods, and, communicating with the bankrupt, had done that which showed that the goods did no longer, with his consent and permission, remain in the possession, order, and disposition of the bankrupt, his title would not be defeated by a prior, secret act of bankruptcy. But a mere intention to demand the goods, and to get possession of them, was not a "dealing" within the meaning of the former statutes (*d*); and, if his consent had not been withdrawn, and it appeared that, at the time he got back his goods, he was cognizant of an act of bankruptcy having been committed by the bankrupt,

(*z*) *Load* v. *Green*, 15 M. & W. 216.
(*a*) *Stansfeld* v. *Cubitt*, 2 De G. & J. 222; 27 L. J., Ch. 266.
(*b*) *Graham* v. *Furber*, 14 C. B. 134.
(*c*) *Ex parte Arnold*, L. R., 3 Ch. D. 70; 45 L. J., Bk. 130.
(*d*) *Brewin* v. *Short*, 5 El. & Bl. 237. *Young* v. *Hope*, 2 Exch. 109. *Pariente* v. *Pennell*, 2 Moo. & Rob. 578. The corresponding section of the Act of 1883 is sect. 49.

487 the title of the trustee would prevail, and would relate back to the period of the commission of such act of bankruptcy (*e*).

Bankruptcy — Reputed ownership. — The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all the creditors or of particular creditors, and still less of the outside world who are no creditors at all, as to the position of particular goods. It is enough for the doctrine, if those goods are in such a situation as to convey to the minds of those who know that situation the reputation of ownership, that reputation arising from the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject (*f*). The possession of the goods and chattels by the bankrupt must be a possession as reputed owner. A mere temporary custody, or the mere possession without reputation of ownership, will not vest the property in the trustee (*g*). If it is notorious that furniture in the possession of a bankrupt never was his property, but was hired by him with the house in which he resides, there will be no reputation of ownership from his possession of the furniture (*h*). Moreover, the goods must be in the sole possession and sole reputed ownership of the bankrupt. Therefore, where two partners, one of whom was an infant, committed an act of bankruptcy, and the adult partner was adjudicated bankrupt, it was held that the machinery and trade fixtures in the house where the business was carried on, which belonged to the landlord, and were with his consent in the possession of the firm, did not pass to the trustee in the bankruptcy (*i*).

The Act of 1869, s. 15, sub-s. (5), contained the words "being a trader," but the Act of 1883, s. 44, substituted for these words the words "in his trade or business," so that while the doctrine of reputed ownership now extends to other persons than to traders, it only extends to property in the debtor's trade or business. The live and dead stock, and implements of husbandry of a person who occupies a residential property, and engages in farming and market gardening for his pleasure, but at a profit, are not goods in his order and disposition in his "trade or business;" but they are so if his primary intention is profit (*k*).

Shares in a waggon company, deposited with a banker as security for an overdraw, are not goods in the order and disposition of a stockbroker, silversmith and watchmaker "in his trade or

(*e*) *Fawcett* v. *Fearne*, 6 Q. B. 28. *Heslop* v. *Baker*, 8 Exch. 423; 20 L. J., Ex. 350.

(*f*) *Ex parte Watkins*, L. R., 8 Ch. 520; 42 L. J., Bk. 50. *Ex parte Vaux*, L. R., 9 Ch. 602; 43 L. J., Bk. 113.

(*g*) *Trismall* v. *Lovegrove*, 6 L. T., N. S. 329; 10 W. R. 527.

(*h*) *In re Shaw*, 8 L. T., N. S. 336.

(*i*) *Ex parte Dorman*, L. R., 8 Ch. 51; 42 L. J., Bk. 20.

(*k*) *In re Wallis*, 14 Q. B. D. 950.

488 business" (*l*); nor, as it would seem, are shares in a railway company bought with partnership money for the purposes of the partnership (*m*).

Where a trader is in possession at his place of business of articles, the inference from the nature of which is, that they are not connected with the business, it will require very strong evidence to prove reputed ownership (*n*).

Bankruptcy—Reputed Ownership—Goods once owned by the bankrupt.—Where the bankrupt has once been the actual and visible owner of goods and chattels, and has made over all his right and interest in them to a third person, either absolutely or by way of mortgage, and remains in possession of the things so transferred, the continuance of possession raises a strong presumption of the continuance of ownership (*o*); so that, if the goods are not taken out of the possession of the mortgagor before the mortgagee has notice of an act of bankruptcy (*p*), they will pass to the trustee. This is the case where a trader mortgages his furniture, goods and chattels, and stock-in-trade, and the mortgaged property is let to him by the mortgagee to be used for hire, or is allowed to remain in his hands notwithstanding the mortgage, and continues in his possession at the time of the adjudication (*q*); where the tenant of a mill gives his landlord by deed a lien upon the fixtures and fixed machinery of the mill (*r*); where the goods and chattels of a trader are taken in execution by a creditor, and the latter receives an assignment of them from the sheriff, and allows the goods to remain in the trader's dwelling-house, and to be used by him for hire, down to the time of the adjudication (*s*); where a person, who is forbidden to trade in his own name, ships, and warehouses, and deals with goods in the name of the bankrupt, the latter not being a commission agent for sale, and the course of dealing not being according to the ordinary usage of trade (*t*); where a shareholder in a joint-stock company or a railway company deposits the certificates of his shares with the creditor as a security for the repayment of money advanced, undertaking to execute a transfer of the shares when called upon, and the shares continue standing in his name, in the books of the company, notwithstanding the

(*l*) *In re Jenkinson*, 15 Q. B. D. 441; 54 L. J., Q. B. 601.

(*m*) *Colonial Bank* v. *Whinney*, 11 Ap. Cas. 426. At all events they are "choses in action," and are therefore within the proviso of the section. See S. C., *ante*, p. 484.

(*n*) *Ex parte Lovering*, 24 Ch. D. 31; 53 L. J., Ch. 951.

(*o*) *Ex parte Castle*, 3 M., D. & De G. 124.

(*p*) *Young* v. *Hope*, 2 Exch. 105.

(*q*) *Ryall* v. *Rowles*, 1 Ves. sen. 360. *Kirkley* v. *Hodgson*, 1 B. & C. 598. *Freshney* v. *Carrick*, 1 H. & N. 661. *In re Hams*, 10 Ir. Ch. R. 100. *Spackman* v. *Miller*, 12 C. B., N. S. 659; 31 L. J., C. P. 309. *Ex parte Lovering*, L. R., 9 Ch. 621; 43 L. J., Bk. 116.

(*r*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322. As to movable machinery, see *post*, p. 490.

(*s*) *Lingham* v. *Biggs*, 1 B. & P. 82. *Bryson* v. *Wylie*, *ib.* 83 n. (a). *Lingard* v. *Messiter*, 1 B. & C. 312.

(*t*) *Gordon* v. *East India Company*, 7 T. R. 228.

489 assignment or deposit of the certificates, and no notice of the assignment has been given to the company (*u*). But, if the company does not permit transfers to be made by shareholders without the production of the certificates of the proprietorship of the shares, and these certificates are not in the possession or under the control of the bankrupt, there will be no reputation of ownership, from the circumstance of the shares continuing to stand in his name (*x*); and, if the change of ownership has been made notorious to "the world in which the bankrupt moves," the presumption of ownership from the continuance of possession will be rebutted (*y*). Nor does the clause apply to the case where a person becomes a dormant or secret partner of a firm in partnership, and permits the partnership stock, furniture, and effects to be in the possession and under the control of the ostensible partners, who become bankrupt; for there must be a real as distinguished from an apparent owner; and in the case supposed the possession is quite consistent with the real title (*z*). But, where one man, who is the real owner, forms a partnership consisting of two or three persons, and allows them to have the apparent possession and ownership of the property, the doctrine of reputed ownership will apply. There, the real owner being one person, some other persons, who are not the real owners, have acquired by his consent the reputed ownership and the apparent possession; and it can make no difference that he himself is one of the firm who have the apparent possession (*a*). So, if one of two partners in trade mortgages the plant, stock-in-trade, debts, and profits, &c., to secure the repayment of a sum of money lent by the other, and the mortgagor is permitted to continue in possession of the things mortgaged and to retain the management and visible ownership of them, and becomes bankrupt, the trustee will be entitled to claim the mortgagor's share of the partnership effects discharged of the mortgage-debt (*b*). Where a registered mortgagee of a ship, having deposited with a creditor the instrument of mortgage,

(*u*) *Ex parte Nutting*, 2 M., D. & De G. 302. *Ex parte Vallance*, 2 Deac. 354. *Ex parte Lancashire Canal Co.*, 1 D. & C. 423. *Ex parte Boulton*, 20 Beav. 178. *Ex parte Union Bank of Manchester*, L. R., 12 Eq. 354; 40 L. J., Bk. 57. The same rule has been held to apply, under the repealed statutes, to the deposit by way of mortgage of a policy of insurance where no notice, or no sufficient notice, has been given to the company. *Edwards* v. *Martin*, L. R., 1 Eq. 121; 35 L. J., Ch. 186. And see *Ex parte Caldwell*, L. R., 13 Eq. 188; 41 L. J., Bk. 55. As to what is sufficient notice, see *Ex parte Agra Bank, re Worcester*, L. R., 3 Ch. 555; 36 L. J., Bk. 23.

(*x*) *Morris* v. *Cannan*, 31 L. J., Ch. 425. *Ex parte Harrison*, 3 Deac. 196. *Ex parte Masterman*, 2 Mont. & Ayr. 212. *Ex parte Langmead*, 20 Beav. 25. *Ex parte Littledale*, 6 De G., M. & G. 714; 24 L. J., Bk. 9. *Ex parte Boulton*, 1 De G. & J. 179. *Ex parte Richardson*, 3 Deac. 503. *Colonial Bank* v. *Whinney*, 11 Ap. Cas. 426.

(*y*) *Muller* v. *Moss*, 1 M. & S. 335.

(*z*) *Reynolds* v. *Bowley*, L. R., 2 Q. B. 41; 36 L. J., Q. B. 247.

(*a*) *Ex parte Hayman*, 8 Ch. D. 11; 47 L. J., Bk. 54.

(*b*) *Ryall* v. *Rowles*, 1 Ves. sen. 358. *West* v. *Skip*, *ib.* 243. *Ex parte Stephenson*, 1 De G. 586; 17 L. J., Bk. 5. *Ex parte Bell*, 1 De G. 577; 17 L. J., Bk. 9.

490 subsequently became bankrupt, it was held that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor an equitable mortgagee (*c*).

Movable machinery placed in a mill or factory does not cease to be a personal chattel, if it is capable of being removed at any time without injury either to itself or to the building; and, if such machinery is left in the hands of a mortgagor who becomes bankrupt, it will be considered to be in his reputed ownership (*d*). But, if the machinery is annexed to the freehold, and transferable therewith, it is not within the operation of the reputed ownership clause, which is confined to chattels personal, and does not extend to fixtures and things annexed to the freehold; so that, if the owner in fee of a manufactory or buildings containing fixtures mortgages the buildings and fixtures, and is permitted to remain in possession of the mortgaged premises, and to carry on his trade there, and then becomes bankrupt, the fixtures annexed to the realty will not pass to the trustee (*e*), although they have been mortgaged separately from the building in which they are contained (*f*).

Bankruptcy—Reputed ownership—Goods sold by the bankrupt and left in his possession.—If the bankrupt gets his living by buying and selling goods and chattels, and it is a known custom of trade for the vendor to keep possession after a sale of the things sold, until it is convenient for the purchaser to remove them, possession under such circumstances will not raise a presumption of ownership (*g*). Also, if, after the sale, the bankrupt removes the articles away from the rest of his stock-in-trade, and puts them away in his cellars, or warehouses, or in some private place of deposit, and there sets them apart for the purchaser, and enters the sale in his books, they are no longer, after such appropriation has been made, in the possession, order, or disposition of the bankrupt within the meaning of the statute; "for they are not then in the possession of the bankrupt under such circumstances as to deceive the creditors by the appearance of their forming part of that stock to which they might give credit" (*h*). But, if the things are left upon the bankrupt's premises undistinguishable from his stock-

(*c*) *Lacon* v. *Liffen*, 4 Giff. 75; 32 L. J., Ch. 25, 315.

(*d*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322. *Waterfall* v. *Penistone*, 6 El. & Bl. 889; 26 L. J., Q. B. 100.

(*e*) *Horn* v. *Baker*, 9 East, 215. *Ex parte Lloyd*, 3 D. & C. 787. *Ex parte Wilson*, 4 *ib.* 143. *Coombs* v. *Beaumont*, 5 B. & Ad. 73. *Hubbard* v. *Bagshaw*, 4 Sim. 338. *Boydell* v. *M'Michael*, 1 C., M. & R. 177. *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97. *Ex parte Barclay*, 5 De G., M. & G. 403.

(*f*) *Whitmore* v. *Empson*, 23 Beav. 313.

(*g*) *Priestley* v. *Pratt*, L. R., 2 Ex. 101; 36 L. J., Ex. 89. *Ex parte Watkins*, L. R., 8 Ch. 520; 42 L. J., Bk. 50. *Ex parte Vaux*, L. R., 9 Ch. 602; 43 L. J., Bk. 113.

(*h*) *Ex parte Marrable*, 1 Gl. & Jam. 402. *Ex parte Dover*, 2 M., D. & De G. 259.

491 in-trade, in order that they may be re-sold for the benefit of the buyer, they will be in the possession of the bankrupt as reputed owner, unless it is shown that the latter acts as a commission agent for the sale of goods, or it is a custom of the trade for property to remain on the premises of the trader to be re-sold (*i*). "It is the usage," observes Parke, B., "of clock-makers to have clocks of other persons in their shops, both for repair and for sale; and a man has no right to infer, from finding a clock there, that it is the property of the clockmaker. No inference ought to be drawn either that it is or is not his; and, it being uncertain, there is no reputed ownership" (*k*).

If a ship-builder or manufacturer of steam-engines and machinery contracts for the building and sale of a specific vessel, or steam-engine, or mass of machinery, to be paid for by instalments as the work proceeds, and several instalments of the purchase-money are paid by the purchaser, so that the right of property in the chattel, so far as it has been completed, vests in the purchaser, and the builder or manufacturer becomes bankrupt, the unfinished chattel in his hands is not in his possession, order, or disposition, as the reputed owner; for it is the known custom of such trades for the manufacturer to be paid from time to time as the work progresses; and it is, in general, notorious that the builders and manufacturers of such articles are not themselves the owners of them; and the trade could never be carried on, if such payments by purchasers were not protected (*l*). With regard to property not capable of manual occupation and delivery, such as a ship building on the stocks, a haystack in a meadow, timber in a timber-yard, or oil, wine, or corn in stores and warehouses, the rule is that, if the bankrupt has sold such property *bonâ fide*, and received the purchase-money, and made such a delivery as the subject-matter of the sale is capable of, and placed the property at the disposal of the purchaser prior to the act of bankruptcy, it is not in the bankrupt's possession, order, or disposition, and does not pass to the trustee (*m*), although it has not been removed from the bankrupt's premises, provided it has remained there after the sale no longer than was reasonably necessary to enable the purchaser to fetch it away (*n*). But the transfer of the right of property must be complete. If the thing sold is in the hands of a third person, or if it is on board a

(*i*) *Thackthwaite* v. *Cock*, 3 Taunt. 487. *Shaw* v. *Harvey*, 1 Ad. & E. 920.

(*k*) *Hamilton* v. *Bell*, 10 Exch. 545; 24 L. J., Ex. 46.

(*l*) *Clarke* v. *Spence*, 4 Ad. & E. 448. *Woods* v. *Russell*, 5 B. & Ald. 942. *Holderness* v. *Rankin*, 2 De G., F. & J. 258; 29 L. J., Ch. 793. *Ex parte Watts*, 32 L. J., Bk. 36.

(*m*) *Manton* v. *Moore*, 7 T. R. 71. *Brown* v. *Heathcote*, 1 Atk. 159.

(*n*) *Flyn* v. *Mathews*, 1 Atk. 185. Parke, B., *Belcher* v. *Bellamy*, 2 Exch. 303; 17 L. J., Ex. 222.

492 vessel at sea, the bill of lading, delivery-order, or whatever documents of title may be necessary to establish the transfer of the ownership, must have been delivered to the purchaser prior to the adjudication (*o*); and, in the case of transfers and assignments of ships, the provisions of the Registry Acts must be complied with, and actual possession taken of the vessel on the first practicable opportunity.

Bankruptcy—Reputed ownership—Registered bill of sale.—If an owner of chattels transferred them by bill of sale to another, and remained in possession of the property, the registration of the bill of sale did not formerly prevent them from being in his reputed ownership and passing to the assignees (*p*). The 20th section of the Bills of Sale Act, 1878 (*q*), enacted that chattels comprised in a bill of sale which had been and continued to be duly registered under that Act were not to be deemed to be in the possession, order, or disposition of the grantor of the bill of sale. This section has been repealed as regards bills of sale by way of security, and the former law is restored (*r*) as to such bills, but bills operating as an absolute transfer are still within the Act of 1878 (*s*), and so are bills registered before the commencement of the Act, and not avoided by non-renewal or otherwise (*t*).

What is called the "hire system," that is, the hiring of furniture under an agreement to pay a certain sum for the hire of furniture by instalments, the furniture to become the property of the hirer upon all the instalments being paid, but until then to be liable to seizure on non-payment of the instalments, is, as regards hotel-keepers, a custom of which the courts will take judicial notice, and does not operate as a bill of sale under the Act of 1878 (*u*). But the general public may assume, notwithstanding the prevalence of the "hire system," that a householder is the real owner of the furniture in his house, especially if he was known to be the owner of it previously (*v*).

Bankruptcy—Reputed ownership—Goods and chattels which have never been the property of the bankrupt.—Where it is shown that the property in possession of the bankrupt at the time of the adjudication never belonged to him at all, and was confided to him only for a temporary and special purpose, slighter circumstances will rebut a presumption of ownership arising from possession than in

(*o*) *Belcher* v. *Capper*, 4 M. & G. 551. *Lemprière* v. *Pasley*, 2 T. R. 495.
(*p*) *Stansfeld* v. *Cubitt*, 2 De G. & J. 227; 27 L. J., Ch. 266. *Badger* v. *Shaw*, 2 El. & El. 472; 29 L. J., Q. B. 77. *Ex parte Harding*, L. R., 15 Eq. 223; 42 L. J., Bk. 30.
(*q*) 41 & 42 Vict. c. 31, s. 20.
(*r*) 45 & 46 Vict. c. 43, s. 15.
(*s*) *Swift* v. *Pannell*, 24 Ch. D. 210; 53 L. J., Ch. 341.
(*t*) *Ex parte Izard*, 23 Ch. D. 409; 52 L. J., Ch. 678.
(*u*) *Crawcour* v. *Salter*, 18 Ch. D. 30; 50 L. J., Ch. 495. *Ex parte Turquand*, 14 Q. B. D. 636; 54 L. J., Q. B. 242.
(*v*) *Ex parte Brooks*, 23 Ch. D. 261.

493 those cases where the property originally belonged to him, and has been subsequently sold and mortgaged without any change of possession (*x*). If goods and chattels have been sent pursuant to order, for the inspection and approval of an intended purchaser, and the latter becomes bankrupt with the goods in his hands before any contract of sale has been made, the goods so sent are not in his possession as reputed owner (*y*). Whenever the possession, taken in connection with the custom and usage of trade and the surrounding circumstances, "is consistent with the fact of the possessor being absolute owner, and also of his not being absolute owner, the mere possession ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner" (*z*). Therefore, where there exists a custom which is known, that property standing in the name of a man in the books of a public company may only be his nominally, while the real right to it may be in another person, the reputation of ownership does not attach to the mere nominal possession. This is the case with money in the funds, and shares in railway companies standing in the name of a person as trustee (*a*). Where it is the known custom and usage at a watering-place for houses to be taken ready furnished as well as unfurnished, and for carriages and horses to be let by the job, day, week, or month, the mere possession of furniture by the tenant of a house, or of a carriage and horses by an inhabitant, will of itself raise no presumption of ownership in the possessor (*b*).

Whenever the custom to hire as well as to buy the plant, machinery, and implements used in the trade which the bankrupt carried on, is shown to be so general and notorious in the trade that those who had dealings with the bankrupt, "the world in which he moved" might reasonably be provoked to inquire, before giving the bankrupt credit, whether he was the owner of them or not, there is no presumption of ownership from the possession of them. This is the case in the coal-mining trade, where it is the notorious custom of the owners of collieries to demise, not only the colliery, but also the steam-engines, plant, and machinery necessary to get out the coal (*c*); in the coal-lighterage trade, where it is the custom for the owners of barges and lighters used to discharge coal to let such lighters out to hire, and to suffer the names of the hirers to be painted upon them (*d*); also in the brewing

(*x*) *Ex parte Wiggins*, 2 D. & C. 270. As to the "hire system," see *supra*.

(*y*) *Gibson* v. *Bray*, 8 Taunt. 76; 1 Moore, 519. *In re Ashton*, 1 Fonb. N. R. 258.

(*z*) Abbott, C. J., *Storer* v. *Hunter*, 3 B. & C. 376; 24 L. J., Ex. 46.

(*a*) *Ex parte Watkins*, 4 D. & C. 87. *Ex parte Stewart*, 34 L. J., Ch. 6.

(*b*) *Burton* v. *Hughes*, 9 Moore, 334.

(*c*) *Storer* v. *Hunter*, 3 B. & C. 368; 24 L. J., Ex. 46.

(*d*) *Watson* v. *Peache*, 1 Bing. N. C. 327; 1 Sc. 149. *Horn* v. *Baker*, 9 East, 239.

484 trade, where it is the notorious custom of brewers to hire their vats, barrels, coppers, and brewing utensils; and in the malting trade, where the malting agents are notoriously not the owners of the barley or malt on their premises (*e*), and in the wine trade, where the purchaser leaves his wine in a bonded warehouse (*f*); and in the hosiery and lace trade, where it is the notorious custom for stocking-frames and masses of machinery to be let out to hire to the working hosiers, weavers, and mechanics. But the custom must be shown to be general and notorious in the trade, otherwise the presumption of ownership arising from the possession and use of such things will not be rebutted (*g*).

Bankruptcy—Reputed ownership—Possession by manufacturers, workmen, and depositaries.—Possession by manufacturers and workmen of goods and chattels, and of raw materials furnished to them by their employers to be manufactured, worked up, or repaired, in the way of their trade, raises no presumption of ownership. This has been held to be the case with the timber of the carpenter, delivered to him to be converted into waggons; the cloth of the tailor, sent to him for the purpose of being made into garments; the gold of the goldsmith, sent to him to be worked up in the course of his trade; carriages sent to the coach-maker to be repaired; and machinery and chattels manufactured and made to order, and left on the manufacturer's premises after they have been paid for by the employer or purchaser, that they may be altered or repaired, or in order that the purchaser may send for them and convey them away (*h*). Possession by depositaries in the ordinary course of trade, where it is the custom for persons to let out vaults, stores, warehouses, and rooms for the purpose of receiving, storing, and taking care of pictures, furniture, or merchandise, for hire and reward, is not a possession by such depositaries as reputed owners of the goods entrusted to them for safe keeping. Goods and chattels held by the bankrupt at the time of his bankruptcy as a security for the repayment of money advanced by him to the owners thereof, are not in the reputed ownership of the bankrupt; but the trustee is entitled to all the rights of the bankrupt over them. Goods deposited in the hands of a bankrupt for a specific purpose, or to be applied in a particular way in the ordinary course of trade, and held by him no longer than is reasonably necessary to carry into effect the trust reposed in him, are not in his reputed ownership; nor is a sum of money in a bag,

(*e*) *Harris* v. *Trueman*, 9 Q. B. D. 264.

(*f*) *In re Vann*, L. R., 9 Ch. 602; 43 L. J., Bk. 113.

(*g*) *Priestley* v. *Pratt*, L. R., 2 Ex. 101. *Knowles* v. *Horsfall*, 5 B. & A. 134.

(*h*) *Carruthers* v. *Payne*, 2 M. & P. 429. *Bartram* v. *Payne*, 3 C. & P. 177. *Wilkins* v. *Bromhead*, 6 M. & G. 963; 7 Sc. N. R. 921. *Holderness* v. *Rankin*, 2 De G., F. & J. 258; 29 L. J., Ch. 793.

495 purse, or box, deposited in the hands of a bailee for a special purpose, and set apart by the latter, and kept distinct from his own moneys and effects; but, if the money is taken out of the bag or box and used by the bailee, and mixed with his own moneys, it will form part of his general estate, and the amount will be a debt due from him to the bailor, which must be proved under the bankruptcy (*i*).

Where a custom of holding certain goods on hire is relied on to take the goods out of the order and disposition of a bankrupt, it must be proved to have existed so long and to have been so extensively acted upon that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it (*j*). Such a custom has been held to have been established in the case of pianos (*k*).

Bankruptcy—Reputed ownership—Possession of goods and chattels by factors and commission agents for sale in the ordinary course of their trade and business is not a possession by them as reputed owners, although they sell their own goods as well as the goods of other persons, and all are confounded and mixed together, so that it is impossible to tell which goods belong to them and which belong to their customers. Persons selling goods on commission must have the goods of other people in their possession whilst carrying on their calling; and their possession is known not to be necessarily their own possession as owners. If it is the custom of shopkeepers in certain trades to receive the goods of third persons, and expose them for sale in their shops for a certain hire or commission paid by the owners of such goods, the things so received for sale are not, in the case of their bankruptcy, in their possession as reputed owners (*l*). Booksellers and publishers, for example, who publish and sell books on commission for the authors and owners thereof, have not the reputed ownership of the books they sell, although the books are mixed with their own books, and are not to be distinguished from their general stock-in-trade (*m*); nor coach-makers, who receive and exhibit in their shops and warehouses coaches for sale (*n*); nor watch and clock-makers, who receive watches to be repaired and sold for their customers (*o*). But, if it

(*i*) *Parke* v. *Eliason*, 1 East, 551. *Thompson* v. *Giles*, 2 B. & C. 431. *Sadler* v. *Belcher*, 2 M. & Rob. 489. *Zinck* v. *Walker*, 2 W. Bl. 1154. *Jombart* v. *Woollett*, 2 Myl. & Cr. 389. *Tooke* v. *Hollingworth*, 5 T. R. 227. *Taylor* v. *Plumer*, 3 M. & S. 575.

(*j*) *Ex parte Powell*, 1 Ch. D. 501; 45 L. J., Bk. 100. As to the "hire system," see *ante*, p. 492.

(*k*) *Ex parte Hattersley*, L. R., 8 Ch. D. 601; 47 L. J., Bk. 113.

(*l*) The fact of the bankrupt's having been intrusted with the goods as a commission agent for sale may be proved by oral evidence, although the agreement for the deposit and sale of the goods has been put into writing. *Whitfield* v. *Brand*, *infra*.

(*m*) *Whitfield* v. *Brand*, 16 M. & W. 282.

(*n*) *Carruthers* v. *Payne*, 2 M. & P. 441.

(*o*) *Hamilton* v. *Bell*, 10 Exch. 545; 24 L. J., Ex. 46.

496 is not the custom for persons carrying on the trade exercised by the bankrupt to sell goods on commission, or if the whole stock-in-trade of a retail dealer is furnished to him by a wholesale house, and he trades therewith apparently on his own account, such stock-in-trade and goods will be in his possession, order, or disposition as reputed owner (*p*).

If the goods have been sold by the factor, and not paid for at the time of his bankruptcy, the owner or principal should give notice to the purchaser of the position in which he stands, and require the price to be paid to himself; and if, after such notice has been received, the purchaser pays over the money to the bankrupt factor, or his trustee in bankruptcy, the payment will be no answer to an action by the principal for the money. If, after the bankruptcy, the trustee receives the money, it may be recovered from him by the principal (*q*). If the factor has sold the goods, and received money by way of payment which is ear-marked, and can be identified, or which he has put into a bag, box, or parcel, set apart for his principal or employer, the money thus set apart is not in his possession, order, or disposition as reputed owner; but, if it has been mixed with the general moneys of the bankrupt, it will form part of the bankrupt's estate, to be administered by the trustee, and the principal must then come in as a creditor upon the estate for the amount, as a debt due to him from the bankrupt at the time of his bankruptcy (*r*).

The Act of 1869, s. 15, sub-s. (5), provided that the property of the bankrupt divisible amongst his creditors should include all goods of which he was the reputed owner, "or of which he has taken upon himself the sale or disposition as owner." These words are omitted in sect. 44, sub-s. (iii) of the Act of 1883, and the words used are: "under such circumstances that he is the reputed owner thereof."

Bankruptcy—Reputed ownership—Possession by bankrupt trustees.—Goods and chattels of which the bankrupt is possessed as trustee, do not pass to the trustee in bankruptcy as his own goods (*s*); nor is his possession of them a possession with the consent and permission of the true owner within the meaning of the statute. This is the case with respect to the possession by trustees of government stock and shares in the public funds, and joint-stock companies, &c., whether the trust does or does not

497 appear upon the bank books, or the books or register of the

(*p*) *Livesay* v. *Hood*, 2 Camp. 83. *Shaw* v. *Harvey*, 1 Ad. & E. 920.

(*q*) *Ex parte Pauli*, 3 Deac. 169. *Ex parte Murray*, Cooke's B. L. 379.

(*r*) *Ex parte Dumas*, 2 Ves. sen. 585; 1 Atk. 232. *Scott* v. *Surman*, Willes, 400. *Tooke* v. *Hollingworth*, 5 T. R. 227. *Godfrey* v. *Furzo*, 3 P. Wms. 185. *Whitcomb* v. *Jacob*, 1 Salk. 160. *Smith* v. *Hudson*, 34 L. J., Q. B. 145.

(*s*) Sect. 44 of Act of 1883.

company (*u*). However, where the trust has not been created by a third person, but by the *cestui que trust*, or person beneficially interested, himself, who has clothed the bankrupt trustee with the apparent ownership of shares in a public company, by buying them in the name of the latter, and procuring him to be registered as a shareholder, and permitting him to have possession of the scrip certificates, and to attend the meetings of the company, and vote as owner, there may be an apparent ownership with the consent of the true owner, within the meaning of the statute; for a delusive credit may be occasioned by a secret trust of that description (*x*). Property of testators and intestates, held by executors and administrators, in the ordinary course of their administration, is held by them as trustees, and does not, therefore, pass to the trustee for the benefit of creditors in case of their bankruptcy (*y*). But, if they are allowed to continue in possession of the trust property for several years, and to trade with it, to all appearance, on their own account, by the persons who are entitled to dispute their possession and call them to account, the property will be deemed to have been in the possession of such executors, &c., as reputed owners, with the consent of the true owners, within the statute (*z*).

Bankruptcy—Reputed ownership—Possession by a bankrupt husband of property settled on the wife.—Possession by the bankrupt of furniture belonging to the trustees of his wife's ante-nuptial marriage settlement, is not a possession by him with the consent of the true owner, within the meaning of the statute (*a*); nor possession by the bankrupt's wife of cows and stock-in-trade, held by trustees under a *bonâ fide* settlement for her separate use, unless the bankrupt has himself traded with the trust property, and got it into his own hands (*b*).

Goods and furniture belonging to a woman who has passed herself off in the world as the wife of a bankrupt, have been held to be in his possession as reputed owner (*c*). A woman, however, married after the 1st January, 1883, will be entitled to hold all property, as well present as after acquired, as her separate
498 property (*d*), and every woman carrying on a trade separately from her husband is, with respect to her separate property, subject to

(*u*) *Ex parte Rogers*, 25 L. J., Bk. 41. *Ex parte Witham*, 1 M., D. & De G. 624. *Pinkett* v. *Wright*, 2 Hare, 120. *Ex parte Stewart*, 34 L. J., Ch. 6.

(*x*) *Ex parte Burbridge*, 1 Deac. 142. *Ex parte Ord*, *ib.* 170.

(*y*) Ld. Mansfield, *Howard* v. *Jemmett*, 3 Burr. 1369. *Ludlow* v. *Browning*, 11 Mod. 139.

(*z*) *Fox* v. *Fisher*, 3 B. & Ald. 136. *Ex parte Thomas*, 3 M., D. & De G. 40. *Kitchen* v. *Ibbetson*, L. R., 17 Eq. 452; 43 L. J., Ch. 58.

(*a*) *Simmons* v. *Edwards*, 16 M. & W. 838. *Ashton* v. *Blackshaw*, L. R., 9 Eq. 510; 39 L. J., Ch. 205.

(*b*) *Jarman* v. *Woolloton*, 3 T. R. 618. *Haselinton* v. *Gill*, *ib.* 620 n. (a). *Ex parte Martin*, 19 Ves. 493.

(*c*) *Mace* v. *Cammel*, Lofft, 782; Cowp. 232.

(*d*) Married Women's Property Act, 1882, s. 2.

the bankruptcy laws in the same way as if she were a *feme sole* (*e*). A loan by her to her husband for the purpose of his trade or business (*f*) is an asset of his estate, subject to her claim for a dividend after other creditors are satisfied (*g*).

Injuries to property—Chattels—Trespass.—If one man meddles with the goods and chattels of another, either by laying hold of, removing, or carrying away inanimate things, or by striking, chasing, or driving cattle, sheep, and domestic animals in which the owner has a valuable property, he is guilty of a trespass, and is responsible in damages, unless the act can be justified on the ground that it was done in necessary self-defence of the person, or of property, or of one's absolute or relative rights, or in obedience to some legal or personal authority, or can be excused on the ground that it was the result of inevitable accident, or was caused by the negligent or wrongful act of the plaintiff himself; as where a man wrongfully suffers his cattle to trespass upon my land, or leaves thereon corn or hay which he ought to have removed, and his cattle get injured, or his corn or hay is eaten by my beasts. In these cases he has no remedy for the injury, as it was caused by his own default (*h*).

If a chattel has been lost by one man and found by another, the finder has an implied licence or authority from the owner to take the chattel and keep it for his use; and, therefore, it is no trespass, if he *bonâ fide* removes it to a place of security (*i*). But, though the taking of a chattel may be lawful in the first instance, yet, if the person who has taken it abuses it, uses it, or wastes it, he may render himself a trespasser *ab initio*, and disable himself from justifying or excusing the original taking, as well as any of his subsequent dealings with the property (*k*).

If a man's goods and chattels obstruct me in the exercise of my right of way, I have a right to remove them. If he places a horse and cart in the way of the access to my house, or before my door, so that I cannot drive up to it, I have a right to lay hold of the horse and lead him away, and, if necessary, to whip him to make him move on (*l*). So, if a person's goods are placed on my ground, I may lawfully remove them (*m*); and, if his cattle or sheep come upon my land, I may chase them and drive them out.

499 Where the defendant with a little dog chased the plaintiff's

(*e*) Sect. 1, sub-sect. (5). A general power of appointment is not "separate property." *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*f*) See *In re Genese*, 16 Q. B. D. 700; 55 L. J., Q. B. 118.

(*g*) Sect. 3.

(*h*) *Webb* v. *Paternoster*, Godb. 282, pl. 401. *Farmer* v. *Hunt*, Brownl. 220.

(*i*) *Isack* v. *Clarke*, 1 Roll. Rep. 130.

(*k*) *Oxley* v. *Watts*, 1 T. R. 12. *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146.

(*l*) *Slater* v. *Swann*, 2 Str. 872.

(*m*) *Cole* v. *Maundy*, Roll. Abr. TRESPASS, 1, pl. 17, p. 566. *Rea* v. *Steward*, 2 M. & W. 426.

sheep out of his grounds, where they were trespassing, and the sheep went into another man's land next adjoining, and the dog pursued them there, and the defendant did his best to recall his dog, but the dog could not be recalled at once, and the plaintiff sued the defendant for chasing and worrying his sheep, it was held that the action was not maintainable, as the defendant had not incited the dog to chase the sheep after they had left his premises, but had done his best to call the dog off (*n*). But the chasing of trespassing beasts with a mastiff dog is unlawful; and, if any damage is done to them by such a dog, the owner will be responsible for a trespass (*o*).

Conversion.—If a man, who has no right to meddle with goods at all, takes them and removes them from one place to another, an action may be maintained against him for a trespass; but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the plaintiff, or of exercising some dominion or control over them for the benefit of himself or of some other person (*p*). Thus, where the plaintiff and defendant, who were porters on the custom-house quay, had each a small box in a hut on the quay, for storing small parcels of goods until they could be put on board ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that the defendant had a right to remove the goods, and so far was in no fault; but that, although, as he had not returned them to the place where he found them, there might be ground for an action for a trespass in meddling with them, there was no conversion of them, as the defendant had not in anywise disturbed the plaintiff's dominion or ownership over the property (*q*).

It has never yet been held that the single act of removing a chattel, independent of any claim over it, either in favour of the person himself or any one else, amounts to a conversion of the chattel. If a gate has been wrongfully erected by the plaintiff, so as to obstruct the defendant's right of way, and the defendant pulls down and carries away the gate and places it on his own land, in a convenient situation for the plaintiff to fetch it away, if

(*n*) *Mitten* v. *Faudrye*, Poph. 161, cited 4 Burr. 2094.

(*o*) *King* v. *Rose*, 1 Freem. 347.

(*p*) See *Falke* v. *Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146.

(*q*) *Bushel* v. *Miller*, 1 Str. 129. In order to make a person liable for a conversion of goods, he must have applied them to his own use, or must have refused to deliver them to the party entitled thereto, on demand. If the taking was tortious, no demand is necessary: *Farrington* v. *Payne*, 15 John (N. Y.) 451; *Woodbury* v. *Long*, 8 Pick (Mass.) 543; *Davis* v. *Webb*, 1 McCord (S. C.) 213. Nor where there has been an actual conversion: *Daniel* v. *Mashier*, 8 John (N. Y.) 445; *Tompkins* v. *Hull*, 3 Wend. (N. Y.) 406; *Earle* v. *Van Buren*, 7 N. J. L. 344; *Nunsum* v. *Nunsum*, 1 Leigh (Va.) 86; *Jewett* v. *Partridge*, 12 Me. 243; *Hinee* v. *McKinney*, 3 Me. 382.

he thinks fit so to do, this does not amount to a conversion of the gate (*r*). "Suppose," observes Rolfe, B., "I, seeing a horse in a ploughed field, thought it had strayed, and, under that impression,

500 led it back to pasture, it is clear that an action would lie against me for a trespass; but would any man say that this amounted to a conversion of the horse to my own use?" (*s*). "Scratching the panel of a carriage would be an act of trespass, but no conversion of the carriage" (*t*). But any asportation of a chattel for the use of the defendant or some third person, or the doing of any unauthorised act, which deprives another of his chattel permanently or for an indefinite time, is a conversion of it, because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places (*u*).

If a man has possession of my chattel and refuses to deliver it up, knowing or having the means of knowing that I am the owner of it, this is an assertion of a right inconsistent with my general dominion over the chattel, and the use which at all times and in all places I am entitled to make of it, and, consequently, amounts to an act of conversion (*x*). So, if a man who is intrusted with the goods of another puts them into the hands of a third person, contrary to orders, it is a conversion. So, if the pawnee of goods, with a power of sale, sells them before the day stipulated for the exercise of the power of sale has arrived (*y*). If a person, without my permission, takes my horse to ride, and leaves it at an inn, this is a conversion; for, though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me; and it is different from the case of a misdelivery of goods merely owing to a mistake (*z*). If a vendor who has sold goods on credit re-sells the goods before the day of payment has arrived, he is guilty of a conversion (*a*); and so he is, though the purchaser makes default in payment, unless he has given the purchaser due notice of his intention to sell (*b*). However, if a person has obtained possession of goods under colour of a pretended contract of sale on credit, and with the preconceived intention of never paying for them, it is competent to the vendor to consider the contract as a nullity, and treat the fraudulent purchaser as a

(*r*) *Houghton* v. *Butler*, 4 T. R. 364.

(*s*) *Fouldes* v. *Willoughby*, 8 M. & W. 551.

(*t*) Alderson, B., *Fouldes* v. *Willoughby*, 8 M. & W. 549.

(*u*) *Hiort* v. *Bott*, L. R., 9 Ex. 86; 43 L. J., Ex. 81.

(*x*) *Baldwin* v. *Cole*, 6 Mod. 212. *Burroughes* v. *Bayne*, 5 H. & N. 296; 29 L. J., Ex. 188.

(*y*) *Johnson* v. *Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130. *Pigot* v. *Cubley*, 15 C. B., N. S. 701; 33 L. J., C. P. 124.

(*z*) *Syeds* v. *Hay*, 4 T. R. 264; 3 Burr. 1264. *Tear* v. *Freebody*, 4 C. B., N. S. 263.

(*a*) *Chinnery* v. *Viall*, 5 H. & N. 293; 29 L. J., Ex. 180. *Martindale* v. *Smith*, 1 Q. B. 389.

(*b*) *Page* v. *Cowasjee Eduljee*, L. R., 1 P. C. 127. *A fortiori*, therefore, if the vendor re-takes possession of the goods and re-sells them. *S. C.*

person who has tortiously got possession of the goods (*e*). If a
501 man enters the house of another, and takes an inventory of his goods, and gives him notice that they are distrained for rent and will be sold, this is evidence of a conversion (*d*). So, if a man takes the property of another without his consent, by abuse of the process of the law, this is an act of conversion (*e*); and, if a person aids and assists in the sale of goods under a fraudulent and void warrant of attorney, he may render himself responsible for a conversion of the property (*f*).

If a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess. Whether he has sold more than was necessary is a question of fact in each particular case (*g*). If a judgment-debtor, against whom execution is issued, has a qualified interest only as a bailee in goods seized by the sheriff, and the sheriff, having no notice of the qualified interest, sells them absolutely, he is not, it seems, guilty of a conversion by the mere act of selling. It must be shown that he parted with the possession of the goods, and caused them to be used and damaged by the purchaser (*h*). If a landlord distrains and carries away goods, and, after selling enough to satisfy the rent in arrear, returns the surplus to the demised premises from whence they were taken, there is no conversion by the landlord of any part of the property, he having dealt with it no otherwise than he was by law entitled to do (*i*).

A mere negligent dealing with goods by a bailee to whom they have been delivered, is not a conversion of them, although he may be liable to an action for negligence; for that only is a conversion, where some dominion is asserted over the chattel, the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is, to a certain extent, guilty of a conversion; but, where there is no unlawful taking of possession or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion. If the goods of one man are consigned to another, whether rightfully or wrongfully, the consignee is justified in depositing them in a place of safe custody; and their destruction there without his default cannot make him guilty of a conversion (*k*).

Conversion—Wrongful destruction.—Every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it,

(*e*) *Ferguson* v. *Carrington*, 9 B. & C. 59.
(*d*) *Neilan* v. *Hanny*, 2 Car. & K. 710. *Needham* v. *Rawbone*, 6 Q. B. 771, n.
(*e*) *Grainger* v. *Hill*, 4 Bing. N. C. 221; 5 Sc. 577.
(*f*) *Billiter* v. *Young*, 6 El. & Bl. 1.
(*g*) *Aldred* v. *Constable*, 6 Q. B. 381.
(*h*) *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231.
(*i*) *Evans* v. *Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.
(*k*) *Heald* v. *Carey*, 11 C. B. 993.

whereby the owner is deprived of the use of it in its original
502 state, is a conversion of it. Thus, the taking of wine from a cask and filling the cask up with water, is a conversion of all the wine (*l*). If a bailee of a cask of wine consumes part of the wine, this, as against him, is a conversion of the whole of the wine; but he cannot himself set it up and rely upon it as a conversion of the whole, so as to enable him in any way to take advantage of his own wrong (*m*). But to constitute a conversion by reason of the destruction of chattels by the defendant, it must be shown that he destroyed them with the intention of taking to himself the property in them, or deriving some benefit from them, or with the intention of depriving the plaintiff of the possession or use of them; for, if *A* finding property belonging to *B* encumbering his close, unintentionally destroys it in endeavouring to remove it, this is no conversion of the property (*n*).

Conversion—Disposal by purchasers without title.—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 (*o*). According to Lord Holt, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them; "and certainly," observes Lord Ellenborough, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect" (*p*). If such person acts as agent for another who subsequently, although without a knowledge that the sale was illegal, adopts it, the latter will also be liable (*q*).

Conversion—Innocent bailees.—One who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodian is the true owner, or has the authority of the true owner, is excused for what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or trusted with their custody (*r*).

Conversion—Demand and refusal.—When the chattels of the

(*l*) *Richardson* v. *Atkinson*, 1 Str. 577.
(*m*) Patteson, J., *Philpott* v. *Kelley*, 3 Ad. & E. 106.
(*n*) *Simmons* v. *Lillystone*, 8 Exch. 442; 22 L. J., Ex. 217.
(*o*) *Hollins* v. *Fowler*, L. R., 7 H. L. 757, 795; 44 L. J., Q. B. 169.
(*p*) *M'Combie* v. *Davies*, 6 East, 540. See *Fine Art Society* v. *Union Bank*, 17 Q. B. D. 705.
(*q*) *Hilbery* v. *Hatton*, 2 H. & C. 832; 33 L. J., Ex. 190.
(*r*) Per Blackburn, J., *Hollins* v. *Fowler*, L. R., 7 H. L. 757; 44 L. J., Q. B. 169.

503 plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them, until they have been demanded of him by the owner, or the person entitled to the possession of them, and he has refused to deliver them up. Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or person entitled to the possession of them, should go himself, or send some one with a proper authority, to demand and receive them; and if the holder of the goods then refuses to deliver them up, or to permit them to be removed, there will be evidence of a conversion (*s*); for "whoever," observes Holt, C. J., "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of a conversion (*t*). The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period (*u*).

Conversion—What is a sufficient demand and refusal.—If, when goods are demanded, the person in possession of them refuses to deliver them except upon a condition which he has no right to impose (*x*), such as giving a receipt in writing for the goods (*y*), that is tantamount to an absolute refusal, and he is guilty of a conversion. If the person in possession of the goods says, when the goods are demanded of him, that he shall do nothing but what the law requires, and does not produce or tender the goods, this is evidence of a conversion of them (*z*). But, though he at first refuses, if he afterwards, and before a writ is issued against him, goes to the plaintiff and offers to deliver them up to him, the effect of the previous refusal is done away with, and there is then no evidence of a conversion (*a*). If the demand is for the delivery of an article to the plaintiff in some particular state and condition, a refusal to comply with the demand is not necessarily a conversion, as the defendant may not be bound, or may be totally unable, to deliver the article in the state required (*b*). So, if the demand is too large; if the plaintiff, being entitled to demand five beasts, requires seven, and the defendant refuses to give up seven, such a refusal is no evidence of a conversion of the five which were never demanded (*c*). If the goods are not in the possession and under the control of the defendant, he is not guilty

(*s*) *Thorogood* v. *Robinson*, 6 Q. B. 772.
(*t*) *Baldwin* v. *Cole*, 6 Mod. 212.
(*u*) *Wilton* v. *Girdlestone*, 5 B. & Ald. 847.
(*x*) *Davies* v. *Vernon*, 6 Q. B. 450. *Cobbett* v. *Clutton*, 2 C. & P. 471.
(*y*) *Barnett* v. *Crystal Palace Co.*, 2 F. & F. 443.
(*z*) *Davies* v. *Nicholas*, 7 C. & P. 339.
(*a*) *Hayward* v. *Seaward*, 1 M. & So. 459.
(*b*) *Rushworth* v. *Taylor*, 3 Q. B. 700.
(*c*) *Abington* v. *Lipscomb*, 1 Q. B. 780.

504 of a conversion in refusing to deliver them. If, therefore, at the time of the demand, they have been distrained or attached under legal process, and are in the actual custody of the law, it is no longer in the defendant's power to deliver them up, and he cannot be made responsible for a conversion (*d*). So, where a mortgagee of a vessel demanded possession of it, and it was accordingly delivered to him, but at the time of delivery money was owing to the crew for wages, and the crew took proceedings against the vessel in the Admiralty Court, and the mortgagee had in consequence to pay money to regain possession of the ship, it was held, nevertheless, that he could not recover in an action of trover (*e*).

Conversion—Qualified refusal.—"Authorities are not wanting to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control" (*f*). There must be some evidence to show the defendant to be a tort-feasor. Where, therefore, all that appeared was that some wine-warrants, the property of the plaintiff, came to the hands of the defendant in her representative character as administratrix of her deceased husband, that she handed them over to her solicitor, and, when the plaintiff demanded them, said they were in her solicitor's hands, it was held that this was no evidence of a conversion (*g*). If the refusal is by a person who does not know the plaintiff's title, and, having a *bonâ fide* doubt as to the title to the goods, detains them for a reasonable time for clearing up that doubt, it is not a conversion. Where the defendant, on entering into possession of some premises which he had taken on lease, found thereon some timber which had been deposited there by the permission of the previous occupier, and the plaintiff, to whom the timber belonged, demanded it of the defendant, who said, "If you will bring any one to prove it is your property I will give it you, and not else;" it was held that this qualified refusal, taken in connexion with the surrounding circumstances, and the absence of all evidence of any intermeddling with the timber by the defendant, did not amount to evidence of a conversion (*h*). If a man finds goods, and the owner comes and demands them, and the finder says that he will not deliver them to him until he is satisfied that he is the owner of them, and keeps the goods no longer than is reasonably necessary to enable him to make due inquiry, this is no conversion of the property (*i*).

(*d*) *Verrall* v. *Robinson*, 2 C., M. & R. 495.

(*e*) *Johnson* v. *Royal Mail Steam Packet Co.*, L. R., 3 C. P. 38; 37 L. J., C. P. 33.

(*f*) Wilde, C. J., *Towne* v. *Lewis*, 7 C. B. 611.

(*g*) *Canot* v. *Hughes*, 2 Bing. N. C. 448; 2 Sc. 663.

(*h*) *Green* v. *Dunn*, 3 Camp. 216, n.

(*i*) *Isack* v. *Clarke*, 1 Roll. Rep. 130; 1 Buls. 306.

505 *Conversion—Goods not in the possession of the defendant at the time of the demand.*—A man cannot be made a bailee of goods against his will; and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them (*k*); and, if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them (*l*).

Conversion—Claim of lien.—If a man has a lien upon goods, he may refuse to deliver them up until his lien is satisfied; but, if, having a lien upon goods, he claims to retain them on grounds quite distinct from a claim of lien, his refusal to deliver them up will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property (*m*). But a man does not waive his right of lien merely by omitting to mention it when the goods are demanded; and, if he claims a right to detain them in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal to deliver is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (*n*).

Conversion—Goods deposited in the hands of public officers, servants, and bailees.—Any officer of the customs having the charge or custody of any goods which have come to his hands under the laws relating to the customs, may refuse delivery thereof until proof shall be given to his satisfaction that the freight due upon the goods has been paid (*o*). Where goods, which have been left at sea, are deposited in the hands of an admiral or public officer, to be kept in his custody until salvage has been paid, and he refuses to give them up until it is ascertained whether salvage is due or not, such qualified refusal does not amount to a conversion (*p*). A servant, who has been intrusted with the custody of goods by his master, does not do his duty if he gives them up on the demand of a stranger, without a previous application to his master for instructions. A refusal, therefore, by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable, and justifiable refusal, and no evidence of a conversion (*q*). The servant has a right to say, "I received the goods from my master, and he ought to have

(*k*) *Lethbridge* v. *Phillips*, 2 Stark. 544.

(*l*) *Hawkes* v. *Dunn*, 1 Cr. & J. 527.

(*m*) *Cannee* v. *Spanton*, 7 M. & G. 903; 8 Sc. N. R. 714. *Dirks* v. *Richards*, 4 M. & G. 574; 5 Sc. N. R. 534. *Weeks* v. *Goode*, 6 C. B., N. S. 367.

(*n*) *Scarfe* v. *Morgan*, 4 M. & W. 281. *Kerford* v. *Mondel*, 29 L. J., Ex. 303. See Add. on Contracts, 8th ed. p. 421.

(*o*) 39 & 40 Vict. c. 36, s. 73.

(*p*) *Clark* v. *Chamberlain*, 2 M. & W. 83. *Kerford* v. *Mondel*, *supra*.

(*q*) *Alexander* v. *Southey*, 5 B. & Ald. 249. *Mires* v. *Solebay*, 2 Mod. 245.

506 an opportunity of admitting or rejecting your title, and of giving his instructions to me in the matter;" but, if, after having had an opportunity of receiving, or having received, the instructions of his master, he sets up, or relies upon, the title of the latter, and gives an absolute and unqualified refusal to deliver up the goods, he will then, if the person demanding the goods is entitled to the possession of them, be guilty of a conversion (*r*).

If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*s*). In an action for a conversion of chattels, it was held by Lord Kenyon that, where the demand of the things for which the action is brought is not made by the owner who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or not, and therefore keeps them till that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*t*). If the defendant has a *bonâ fide* doubt as to the title of the claimant, it must be shown that reasonable time was given him for clearing up that doubt (*u*). But, if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute, unqualified refusal to deliver up the chattels, there is evidence of a conversion (*x*). Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter produced, either the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property, without doing either the one or the other (*y*).

If a bailor has no title at the time of the bailment, the bailee can have none; for the bailor can give no better title than he has himself (*z*). The right to chattels personal, therefore, may be tried

(*r*) *Lee* v. *Bayes*, 18 C. B. 607.
(*s*) *Lee* v. *Bayes*, *supra*; *S. C.*, nom. *Lee* v. *Robinson*, 25 L. J., C. P. 249. *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 30 L. J., C. P. 247. *Sheridan* v. *New Quay Co.*, 4 C. B., N. S. 618; 28 L. J., C. P. 58.
(*t*) *Solomons* v. *Dawes*, 1 Esp. 82.
(*u*) *Pillot* v. *Wilkinson*, 3 H. & C. 345; 34 L. J., Ex. 22. *Vaughan* v. *Watt*, 6 M. & W. 492.
(*x*) *Pillot* v. *Wilkinson*, *supra*. *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185.
(*y*) *Buxton* v. *Baughan*, 6 C. & P. 674.
(*z*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137. *Batut* v. *Hartley*,

507 in an action against the bailee; but the situation of the bailee, in cases of disputed ownership to goods in his hands, is not one without remedy. He is not bound to ascertain who has the right; for he may compel the adverse claimants to interplead. If the bailee forbears to adopt this mode of proceeding, and makes himself a party in the matter by retaining the goods for the bailor, he must stand or fall by the title of the latter (*a*).

If the deposit of goods with a bailee has been made in furtherance of a fraud, and the bailee has notice of the fraud, the assistance of the court may be obtained for the purpose of enabling the bailee to keep possession of the goods, and prevent the owner of them from obtaining the benefit of the fraud (*b*).

Conversion by railway companies.—If goods are brought by mistake, and without right, and delivered at a railway station, the station-master has no right to detain them, after demand by the owner and the tender of any reasonable expenses due upon them. Where, therefore, a station-master said, in answer to a demand of some goods, "The goods were brought to our station by an intermediate line, which has no right to send goods here, and I shall send them back," it was held that the railway company were liable for the conversion of the goods (*c*). But, in order to fix the company, it must be shown that the wrongful act was done by their authority; that is, by some person acting for them within the scope of his authority (*d*).

Detention.—The detention necessary to support an action is an adverse or wrongful detention by the party sued, or by his servants or agents; and it is not enough to prove merely that he has given notice to trustees not to give up to the plaintiff some property which is in their possession (*e*). There should be evidence of a request on the part of the plaintiff to have the goods delivered to him, and a refusal to deliver on the part of the defendant. A defendant, having the goods in his possession, is not by reason thereof bound to seek out the plaintiff and send them to him. The plaintiff must come for them (*f*). It may be that the goods are the plaintiff's, and yet the detention of them by the defendant may be perfectly lawful (*g*). As the authorities show that it is no answer to an action of detinue, when a demand is made for the re-delivery of a chattel, to say that the defendant is unable to comply with the demand, by reason of his own negligence or

L. R., 7 Q. B. 594; 41 L. J., Q. B. 273.

(*a*) Ld. Tenterden, *Wilson* v. *Anderton*, 1 B. & Ad. 456. *Atkinson* v. *Marshall*, 12 L. J., Ex. 117.

(*b*) *Hunt* v. *Maniere*, 34 Beav. 157; 34 L. J., Ch. 142.

(*c*) *Rooke* v. *Midland Rail. Co.*, 16 Jur. 1069.

(*d*) *Glover* v. *London and North Western Rail. Co.*, 5 Exch. 66.

(*e*) *Latter* v. *White*, L. R., 5 H. L. 578; 41 L. J., Q. B. 342.

(*f*) *Clements* v. *Flight*, 16 M. & W. 42; Fitz. Nat. Brev. 138 A.

(*g*) *Clossman* v. *White*, 7 C. B. 55.

508 breach of duty, it is clearly no answer to say that he has lost the chattel, and is consequently unable to re-deliver it to the plaintiff (*h*).

It is no answer to an action for detaining goods to show that the defendant abandoned possession of the goods before action, by delivering them over to some third person. The evidence of the detention is, that the defendant having taken possession of the plaintiff's chattel, does not return it when demanded (*i*). But, if the defendant has parted with the possession of the property before the plaintiff's title to it accrued, he has not then detained it as against the plaintiff, and is not liable in detinue. Thus, where the defendant took possession of goods to which he conceived himself to be entitled under a will, which turned out to be invalid from want of due execution, and before letters of administration were taken out, and before there was any legal representative appointed with authority to demand and receive the goods, the defendant delivered them back to the person from whom he received them, and then the plaintiff took out administration and demanded the property of the defendant, it was held that he could not recover, as the defendant had never detained the goods as against him (*j*). But, where title-deeds were deposited with the defendant by the testator, and lost by the bailee during the lifetime of the testator, and the plaintiff became entitled to the possession of the deeds by devise, it was held that in such a case the loss thereof by the defendant was no answer to the plaintiff's claim to the deeds (*k*).

Injuries to animals.—The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify a man in shooting it. To justify such a course, the animal must be actually attacking the shooter at the time he uses his gun (*l*). If the defendant justifies the shooting of a dog, on the ground that the animal was hunting and chasing deer in a park, or conies in a rabbit-warren, sheep in a fold, or fowls in a poultry-yard, he must prove that the dog was in hot pursuit at the time he shot

(*h*) *Reeve* v. *Palmer*, 5 C. B., N. S. 90, 92; 28 L. J., C. P. 168. *Goodman* v. *Boycott*, 2 B. & S. 1; 31 L. J., Q. B. 69.

(*i*) *Jones* v. *Bowle*, 9 M. & W. 19.

(*j*) *Crossfield* v. *Such*, 8 Exch. 828.

(*k*) Wightman, J., *Goodman* v. *Boycott*, *supra*.

(*l*) *Morris* v. *Nugent*, 7 C. & P. 572. *Clark* v. *Webster*, 1 C. & P. 104. It is not necessary that a man should wait until he is actually bitten by a dog, or until his sheep or cattle are actually bitten, but he must wait until he is attacked or is positively sure to be, before he can kill it: *Woolf* v. *Chalker*, 31 Conn. 131; *Brown* v. *Carpenter*, 20 Vt. 638; *King* v. *Kline*, 6 Penn. St. 318; *Bowers* v. *Fitznondolph*, Add. (Penn.) 215; *Brown* v. *Hoburger*, 52 Barb. (N. Y.) 15; *Moxwell* v. *Palmerston*, 21 Wend. (N. Y.) 407; *Lentz* v. *Strob*, 6 S. & R. (Penn.) 34. Mad dogs, or dogs reasonably suspected of having been bitten by a rabid animal, are nuisances, and may be killed by any person if found off the owner's premises: *Woolf* v. *Chalker*, *ante*; *Putman* v. *Payne*, 13 John. (N. Y.) 312; *Maxwell* v. *Palmerston*, 21 Wend. (N. Y.) 407; *McAneny* v. *Jewett*, 10 Allen (Mass.) 151; *Perry* v. *Phipps*, 10 Ired. (N. C.) 259. So dogs that bark and disturb the neighbourhood at night, may be killed: *Brill* v. *Flagler*, 23 Wend. (N. Y.) 354.

it (*m*). But, if a man allows his sheep or his fowls to escape from his own land, and to trespass upon his neighbour's property, and they are there attacked and worried by his neighbour's dog, he cannot justify the shooting of the dog in defence of his strayed sheep or fowls.

Dogs trespassing in pursuit of animals *feræ naturæ* cannot law-
509 fully be destroyed. "A dog," observes Lord Ellenborough, "does not incur the penalty of death for running after a hare in another man's ground; and, if there is any precedent of that sort which outrages all reason and common sense, it is of no authority to govern other cases. A gamekeeper has no right to kill a dog for following game" (*n*), although the owner of the dog has received notice that trespassing dogs will be shot (*o*). But a dog chasing and pursuing game in a preserve might, it is apprehended, be shot, if the game could not otherwise be saved from destruction (*p*). Thus, if a dog chases conies in a warren, or game in a preserve, or deer in a park, or sheep in a fold, he may be killed by the owner of the animals to prevent their destruction (*q*), but not after the chase is discontinued and the peril has ceased (*r*). The setting dog-spears on land is not in itself an illegal act; nor was it rendered such by the 7 & 8 Geo. 4, c. 18 (see 24 & 25 Vict. c. 97, s. 41), if it appeared that the dog-spears were set in a wood for the mere purpose of destroying dogs trespassing in pursuit of game, and not with intent to destroy human life, or inflict grievous bodily harm on any human being. The owner of a dog, therefore, passing with his dog through a wood, has no right of action against the owner of the wood for the death of, or for an injury to, his dog, which, by reason of its own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured (*s*). But, where the defendant caused traps scented with the strongest meats to be placed on his own land, so near to the plaintiff's house as to influence the instinct of the plaintiff's dogs and cats, and draw them irresistibly to their destruction, it was held that the defendant was responsible to the plaintiff for the injuries he sustained, although he had no intention of injuring the plaintiff, and meant only to catch foxes and vermin. It was held also, that the defendant would be responsible for injuries sustained by any dogs tempted from the highway, or a

(*m*) *Barrington* v. *Turner*, 3 Lev. 28. *Protheroe* v. *Mathews*, 5 C. & P. 586. *Wadhurst* v. *Damme*, Cro. Jac. 45. *Wells* v. *Head*, 4 C. & P. 568. *Janson* v. *Brown*, 1 Campb. 41. See *ante*, p. 498.

(*n*) *Vere* v. *Ld. Cawdor*, 11 East, 569.

(*o*) *Corner* v. *Champneys*, cited 2 Marsh. 584.

(*p*) *Read* v. *Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 31.

(*q*) *Wadhurst* v. *Damme*, Cro. Jac. 45. *Barrington* v. *Turner*, 3 Lev. 28.

(*r*) *Janson* v. *Brown*, 1 Campb. 41. *Wells* v. *Head*, 4 C. & P. 568.

(*s*) *Jordin* v. *Crump*, 8 M. & W. 787.

public path, to the traps on the defendant's land, as he had no right to invite them there for the purpose of destroying them (*t*).

Remedy by action — Assessment of damages.—Whenever the chattels of one man have been wrongfully seized by another, who has assumed a virtual dominion over them, substantial damages are recoverable, although no pecuniary damage can be proved to have been sustained. Where, therefore, the defendant wrongfully seized the plaintiff's horse and cart, and placed a man to keep pos-

510 session of them, who allowed the plaintiff the free use of the cart, which was driven to market every day, it was held that the plaintiff was, nevertheless, entitled to recover substantial damages in respect of the infringement of his proprietary rights (*u*).

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion is the measure of the damages, where no special damage has been sustained, and the goods have not been tendered and received back after action (*x*). By the recovery of the judgment the ownership of the converted property is transferred from the plaintiff to the defendant, and the plaintiff holds the damages as the price of the goods he has lost (*y*); he is therefore entitled to their full marketable value where he does not consent to receive them back. If the chattel is of such a nature that the loss of it may readily be supplied by the purchase of a similar chattel in the market, the damage will be the marketable value of the chattel at the time of the conversion. If the value of it is doubtful, every presumption is made against the wrong-doer. Where a boy, having found a jewel set in a socket, took it to a jeweller's to know what it was worth, and the jeweller took the jewel out of the socket to examine it, and then refused to deliver it up, and the boy brought an action for the conversion of the jewel, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the Chief Justice directed the jury, that, unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they did" (*z*).

There is, however, no absolute rule that in all cases the full value of the goods can be recovered; and it has frequently been laid down that the true measure of damage is the real damage sustained by the unlawful act of the defendant. Thus, where mort-

(*t*) *Townsend* v. *Wathen*, 9 East, 277.
(*u*) *Bayliss* v. *Fisher*, 7 Bing. 153.
(*x*) *Wood* v. *Morewood*, 3 Q. B. 440, n. *Finch* v. *Blount*, 7 C. & P. 478. *Alsager* v. *Close*, 10 M. & W. 584. *Ewbank* v. *Nutting*, 7 C. B. 809. *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102.
(*y*) *Ante*, p. 481.
(*z*) *Armory* v. *Delamirie*, 1 Str. 504.

gagees had entered prematurely, and had seized the mortgaged goods before the day appointed for payment, it was held that the measure of the damages was not the value of the goods, but the value of the plaintiff's interest at the time of the trespass (*a*). So, where the plaintiff, having bought some sheep of the defendant on credit, left them in his custody, and the defendant, without any default or refusal to pay on the part of the plaintiff, sold the sheep, it was held that the measure of damages was not the value

511 of the sheep, but the loss sustained by the plaintiff by not having the sheep delivered to him (*b*).

In the above-mentioned cases, the defendants had an interest in the property they had converted; but, where the action is brought against a third party, it will be no ground for a reduction of damages that the plaintiff is a purchaser who has bought the goods on credit, unless, perhaps, where the conversion has the effect of relieving him from the legal liability to pay for the goods (*c*). So, also, it is no ground for a reduction of damages that the defendant might have seized other goods, and has taken the wrong goods by mistake (*d*), or at a time when he was not justified in seizing them (*e*). These distinctions, however, have ceased to be of much practical value since the passing of the Judicature Acts, under which, if the defendant has any right in respect of the goods converted, he may generally make it a subject of counterclaim.

If an action is brought for the shooting of a dog, the character and propensities of the animal for mischief may be considered in mitigation of damages (*f*).

If the jury arrive at the conclusion that the defendant has come dishonestly by a part of property which has been stolen, they are warranted in assuming that he got possession of the whole. Thus, where a diamond necklace worth 500*l.* had been stolen, and a portion of the diamonds shortly after the robbery came into the defendant's possession, and the latter gave contradictory and unsatisfactory accounts as to the mode in which he became possessed of them, and the owner sued and recovered a verdict for the full value of the necklace, it was held that the jury were justified in finding that the whole necklace came into the defendant's hands (*g*).

The jury are not limited in assessing the damages to the price

(*a*) *Brierly* v. *Kendall*, 17 Q. B. 937; 21 L. J., Q. B. 161.

(*b*) *Chinnery* v. *Viall*, 5 H. & N. 288; 29 L. J., Ex. 180. And see *Hiort* v. *London and North Western Rail. Co.*, L. R., 4 Ex. D. 188.

(*c*) *Johnson* v. *Lancashire and Yorkshire Rail. Co.*, 3 C. P. D. 499.

(*d*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J., Ex. 157.

(*e*) *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102.

(*f*) *Wells* v. *Head*, 4 C. & P. 568.

(*g*) *Mortimer* v. *Cradock*, 12 L. J., C. P. 166.

or value of the article on the day of the conversion, but may give the value at any subsequent time at their discretion, as the plaintiff might have had a good opportunity of selling the goods if they had not been detained (*h*). If the defendant, acting *bonâ fide* under the belief that he had acquired the lawful ownership of the chattel, has proceeded to lay out money upon it, and improve it, and increase its value, the plaintiff will not in all cases be entitled to swell the damages by estimating them according to the

512 improved value of the article. "It may be," observed Maule, J., "that the wrong-doer, who acquires no property in the thing he converts, acquires no lien for what he expends upon it, and the owner may bring an action for the detention or conversion of it; but it does not follow that the owner is to recover the full value of the thing in its improved state. The proper measure of damage is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, that is, what it was really worth at the time of the conversion" (*i*). If at the time of the seizure the plaintiff was under an obligation to have the goods sold, then, if they have been fairly sold, the price realised at the sale may be the fair measure of damages, if there has been nothing harsh or oppressive in the defendant's conduct, or that of his agents (*k*); but, if at the time of the seizure the plaintiff was under no obligation to part with his goods, but was in a position to retain the dominion and use of them, he is at the very least entitled to be placed in the condition he was in at the time his goods were taken away from him, and to be compensated with such an amount of money as will enable him to replace the goods (*l*). "It is, however," said Alderson, B., "entirely a question for the jury, what damages they will allow. Juries have not much compassion for trespassers; and they are not bound to weigh in golden scales how much injury a party has sustained by a trespass" (*m*).

If the act of conversion amounts to pound breach, the person guilty of the wrong will be liable in damages to the landlord, and also to the owner of the property for damages for the conversion. "It might be difficult in such a case to ascertain the damages; but they would not exceed in the whole the value of the chattels distrained" (*n*).

Remedies—Damages for the conversion of bills and notes are calculated, in general, according to the amount of principal and interest due upon the bills or notes at the time of the demand and

(*h*) *Greening* v. *Wilkinson*, 1 C. & P. 626.
(*i*) *Reid* v. *Fairbanks*, 13 C. B. 729; 22 L. J., C. P. 206.
(*k*) *Whitmore* v. *Black*, 13 M. & W. 509; 14 L. J., Ex. 19.
(*l*) *Glasspoole* v. *Young*, 9 B. & C. 696; 4 M. & R. 533.
(*m*) *Lockley* v. *Pye*, 8 M. & W. 135.
(*n*) *Turner* v. *Ford*, 15 M. & W. 215.

refusal to deliver them up (*o*). But, if a document purporting to be a bill or note, has been lost or accidentally destroyed, and the defendant is unable to deliver it up, and can prove that it was not a genuine security, and was of no value at all at the time of the conversion, nominal damages only may be recoverable, if the plaintiff is entitled to recover damages at all (*p*). If the security has been mutilated and rendered valueless by the wrongful act of the defendant, the plaintiff will be entitled to recover what it

513 would have been fairly worth to him had it continued a perfect and complete instrument (*q*).

Remedies—Damages recoverable, where the plaintiff has offered to return the goods, or the defendant has received them back after the commencement of the action.—If in the course of the cause the goods have been returned, the plaintiff is still entitled to proceed for further damages and his costs (*r*). When the goods have been returned and received unconditionally by the plaintiff, after the commencement of the action, and no special damage has been sustained, nominal damages only are recoverable. When substantial damages have been recovered, notwithstanding the return of the goods after the commencement of the action, there has been either an injury to the property converted, or the damage has been the actual and necessary consequence of the conversion; as in the case of the detention or conversion of a riding-horse, where the horse may have been deteriorated by ill-usage, or where the plaintiff could not get back his horse without paying certain

(*o*) *Mercer* v. *Jones*, 3 Campb. 477.

(*p*) *Mathew* v. *Sherwell*, 2 Taunt. 438. *Wills* v. *Wells*, 8 *ib.* 267; 2 Moore, 254.

(*q*) *M'Leod* v. *M'Ghie*, 2 Sc. N. R. 604.

(*r*) *Laugher* v. *Brefitt*, 5 B. & Ald. 765; 1 D. & R. 417. In trover the measure of damages is the value of the goods at the time of conversion. But where the goods have been returned, the measure of damages is the value of the use or service of the goods, and any injury thereto, and reasonable expenses, other than expenses of legal proceedings, in attempting to regain them. If the plaintiff regains the possession of the goods pending the suit, if they have increased in value between the time of conversion and the time when received, the defendant is entitled to a rebatement of the damages to the extent of this value, and judgment only goes for the balance: *Ewing* v. *Blount*, 20 Ala. 694; *Ryburn* v. *Pryor*, 14 Ark. 505. If the action is for certificates of stock or evidences of indebtedness, if no other proof is offered, the measure of damages is the expressed value thereof, with interest thereon, if interest is due: *City of Baltimore* v. *Norman*, 4 Md. 352; *Keaggy* v. *White*, 12 Ill. 99. Where there has been a temporary conversion, a subsequent return of the property is not a bar to an action for the previous damage, but it goes in mitigation: *Wellington* v. *Wentworth*, 8 Met. (Mass.) 548; *John* v. *O'Connell*, 7 Port. (Ala.) 466; *Yale* v. *Saunders*, 16 Vt. 243; *Hunt* v. *Haskell*, 23 Me. 337. For property generally, the measure of damages is the value of the property at the time of conversion, with interest to the time of judgment: *Sturgis* v. *Keith*, 57 Ill. 451; *Turner* v. *Ritter*, 58 *id.* 264; *McCormick* v. *Penn. Central R. R. Co.*, 49 N. Y. 303; *Neiller* v. *Kelly*, 67 Penn. St. 403; *Robinson* v. *Hartridge*, 13 Fla. 501. But see *Matthew* v. *Coe*, 56 Barb. (N. Y.) 430, where the rule was held to be the highest value of the property at any time between the conversion and the day of trial; and, where there has been no wrongful taking, exemplary damages cannot be recovered (*Jones* v. *Rabilly*, 16 Minn. 320); but interest from the time of the conversion is allowed as a matter of course.

charges for his keep (*s*), the payment being a necessary consequence of the conversion. But the plaintiff, although he has taken upon himself to accept the goods without imposing any condition upon the defendant, has a right to go on with the action for the purpose of recovering his costs (*t*). It is no ground for mitigation of damages that very shortly after the conversion the defendant was entitled to issue execution against the plaintiff, and did subsequently issue execution and seize and sell thereunder the very goods (which had all along been in his possession) the conversion of which was complained of (*u*).

Remedies—Damages, in the nature of interest, over and above the value of the goods.—By the 3 & 4 Wm. 4, c. 42, s. 29, it is enacted, that in all actions of trover or trespass *de bonis asportatis*, the jury, on the trial of any issue, or any inquisition of damages, may, if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure thereof.

Remedies—Special damages, far exceeding the value of the goods, are recoverable if shown to be the natural and necessary consequence of the wrongful act. Thus, where the plaintiff complained, not only that the defendant took his goods, but that he did so under a false and unfounded claim of right, and that the plaintiff was thereby much annoyed and prejudiced in his business,

514 and believed to be insolvent, and that by means of the premises certain lodgers were induced to believe that the plaintiff was in embarrassed circumstances, and that the defendant was entitled to seize the goods for a debt, and left the house, it was held that the jury might give vindictive damages for the injury, over and above the value of the goods seized (*x*).

Where a carpenter's tools have been detained or converted, and the carpenter, by reason thereof, has lost a valuable job, or been unable to earn his customary wages, damages far beyond the value of the tools may be recovered (*y*). So if, by reason of the unlawful detention of goods, the owner of them has been prevented from fulfilling a contract, or reaping the benefit of a bargain he has made, he is entitled to compensation for the special damage he has sustained, although performance of the contract or bargain could not have been enforced by compulsion of law (*z*). If, in an

(*s*) *Syeds* v. *Hay*, 3 Burr. 1364; 4 T. R. 264.

(*t*) *Moon* v. *Raphael*, 2 Bing. N. C. 314.

(*u*) *Edmondson* v. *Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102.

(*x*) *Brewer* v. *Drew*, 11 M. & W. 629.

(*y*) *Bodley* v. *Reynolds*, 8 Q. B. 779. *Wood* v. *Bell*, 6 El. & Bl. 355; 25 L. J., Q. B. 153. As to the necessity for giving notice of such damage, see *France* v. *Gaudet*, L. R., 6 Q. B. 199; 40 L. J., Q. B. 121.

(*z*) *Waters* v. *Towers*, 8 Exch. 401; 22 L. J., Ex. 186.

action for the conversion of a horse, the plaintiff claims damages in respect of his being obliged to hire other horses for his use, in consequence of his being deprived of his own horse, he will be entitled to recover the amount expended by him for horse-hire, in addition to the value of his own horse at the time of the conversion (*a*). A person who has wrongfully taken goods, and handed them over to a third person, is, under certain circumstances, bound to pay what it has cost the owner of the goods to get them out of the possession of the person into whose hands they have been wrongfully delivered (*b*).

Remedies—Damages in actions for seizures under the Customs Acts.—By the 39 & 40 Vict. c. 36, s. 267, "in case any action, indictment, or other proceeding shall be brought to trial against any person on account of any seizure (whether any information be brought to trial for the condemnation of the same or not), and a verdict shall be given for the plaintiff, if the judge or justice before whom such action, indictment, information, or other written proceedings shall be tried or heard, shall certify on the record, information, or other written proceeding that there was reasonable or probable cause for seizure, the plaintiff shall not be entitled to more than twopence damages nor to any costs, nor shall the defendant be fined more than one shilling."

Remedy by injunction.—Where specific chattels necessary for conducting a particular business are in the possession of persons who claim a lien upon them, and threaten an immediate sale, the

515 court will interfere by injunction, and give the debtor an opportunity of redeeming his property (*c*). The Court of Bankruptcy also had jurisdiction, under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), to prevent by injunction a third person from dealing with property fraudulently assigned before a bankruptcy (*d*).

Whenever certain specific chattels have been placed in the hands of a depositary or an agent, and the latter, in breach of his duty to his employer or principal, contracts for the sale of these goods to a third party, the depositary or agent will be restrained from parting with the possession of the property (*e*).

Remedies—Replevin of things distrained.—By the common law, whenever the goods of one man had been wrongfully distrained by another (not being a sheriff or his officer acting in execution of the process of a superior court), and the person out of whose possession the goods had been taken wished to have them restored to him,

(*a*) *Davis* v. *Oswell*, 7 C. & P. 804.
(*b*) *Keene* v. *Dilk*, 4 Exch. 388. *Pritchet* v. *Boevey*, 1 Cr. & M. 778.
(*c*) *North* v. *Great Northern Rail. Co.*, 2 Giff. 64; 29 L. J., Ch. 301.
(*d*) *Ex parte Anderson*, L. R., 5 Ch. 473; 39 L. J., Bk. 32. And see now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 102.
(*e*) *Wood* v. *Rowcliffe*, 3 Hare, 308.

and to try the lawfulness of the seizure, he might get back his goods by giving security to the sheriff of the county to prosecute an action with success, and make out the injustice of the taking. The proceeding by which this was accomplished was called a replevin, or the getting back of a chattel taken and detained as a pledge or security, by substituting another pledge in the place of the thing taken (*f*).

The authorities all lay it down that replevin can only be maintained where goods are taken by one man out of the possession of another; not where they have been delivered upon a contract; and this is clear upon the form of pleading, which always was that the defendant "took and detained" the goods, the plea to which allegation was *non cepit* (*g*).

Replevin does not lie for goods which were taken abroad, but are detained here (*h*), as the object of the proceeding is to restore the possession as it was before the taking.

"The writ of replevin," observes Lord Redesdale, "is merely meant to apply to the case where *A* takes goods wrongfully from *B*, and *B* applies to have them re-delivered to him upon giving security, until it shall appear whether *A* has taken them rightfully. But, if *A* is in possession of goods and *B* claims a property, this is not the writ to try that right" (*i*). Where, therefore, a bailee, who had the lawful possession of chattels by delivery from the owner, placed the chattels in the hands of the defendant, who

516 set up a lien upon them, and the plaintiff proceeded to replevy the goods and bring an action of replevin, it was held that he had mistaken his remedy and could not proceed by replevin, but should have proved his prior right in an action for detaining, or for wrongfully converting, the chattels. "The whole proceeding of replevin at common law," observes Coleridge, J., "is distinguished from that in trespass, in this, amongst other things, that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure a restitution of the goods themselves; and this it effects by a preliminary, *ex parte* interference by the officers of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from the action of trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally

(*f*) Co. Litt. 145 b; Spelm. Glos. 485; Gilbert on Replevins.
(*g*) *Galloway* v. *Bird*, 4 Bing. 301.
(*h*) *Nightingale* v. *Adams*, 1 Show. 91.
(*i*) *In re Wilsons*, 1 Sch. & Lef 320, n.

possessed, and out of whose possession the goods were originally taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. As a general rule, it is thought just that a party in the peaceable possession of goods should remain undisturbed, either by the parties claiming adversely or by the officers of the law, until the right is determined and the possession shown to be unlawful. But, where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it is thought just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision" (*k*).

A person from whose possession goods and chattels have been taken is entitled to replevy them, and try the lawfulness of the taking. Thus, he who has the goods of another pledged to him, or who has the cattle of another to manure his land, has a sufficient property to maintain replevin (*l*). Formerly if the cattle of a *feme sole* were taken, and afterwards she married, the husband alone could bring the action; for the cattle vested exclusively in the husband by the marriage. But, if the goods taken were those which the *feme* had as an executrix, she might join with her husband in the replevin (*m*).

517 *Remedies—Replevin of chattels distrained under warrant of justices.*—"Though in ordinary practice," observes Parke, B., "the remedy by replevin is applied only to a distress for rent, yet it is at common law applicable in all cases where goods are improperly taken (*n*); and I find no satisfactory authority to show that it will not lie where goods are improperly taken under a warrant of a justice of the peace. In some cases, no doubt, the court will interfere to prevent a replevin, to save its process from being defeated. The rule is correctly stated in Chief Baron Gilbert's treatise on Replevin (*o*), where it is said, 'If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and, if any person shall pretend to take out a replevin and execute it, the court would commit them for contempt for attempting to defeat the execution, and would punish the sheriff by attachment.' But Chief Baron

(*k*) *Mennie* v. *Blake*, 6 El. & Bl. 851; 25 L. J., Q. B. 401.

(*l*) Co. Litt. 145; Winch, 26; Bac. Abr. REPLEVIN, F. G.

(*m*) *Powes* v. *Marshall*, 1 Sid. 172; Bro. Abr. BAR. AND FEME, pl. 85. *Blackborn* v. *Greaves*, 2 Lev. 107. *Serres* v. *Dod*, 2 B. & P. N. R. 405. But see now Married Women's Property Act, *ante*, p. 235.

(*n*) *Mellor* v. *Leather*, 1 El. & Bl. 619.

(*o*) Page 138.

Gilbert also says that, 'in cases in which the court has no jurisdiction, the goods may be replevied.' If, therefore, goods have been seized under a justice's warrant, and the justice had no jurisdiction to make the warrant, the goods so seized may be replevied" (*p*). "It is true," further observes Alderson, B., "that replevin will not lie for goods seized under the judgment of a superior court; for, if you replevied on the first judgment, you could do so on the judgment upon that also; and so there would be replevin on replevin *ad infinitum*. It is different in the case of an inferior jurisdiction, which is to be set right by the superior" (*q*).

Remedies—Damages in replevin.—In an action of replevin the expenses of the replevin bond are, in general, the only damages recovered, because there is generally no other damage; but whatever damages have been actually sustained may be recovered; and, if the damages are not claimed in the action of replevin, they cannot be recovered in an action of trespass for the same cause of action (*r*). But damages for the trespass to the land cannot be recovered in the action of replevin, and therefore do not fall within this rule (*r*).

Remedies—Re-caption of goods wrongfully seized or stolen.—If *A* has actual possession of a chattel, and *B* takes it from him against his will, *A* may use as much force as is necessary to defend his right and enable him to retake the chattel; and, if a chattel has been seized and carried away by a person

518 who has no colour of title to it, and the owner comes and demands it, and the trespasser refuses to give it up, the owner may use force sufficient to enable him to re-take his property (*s*). A person, therefore, who has been robbed is entitled to retake the stolen property wherever he can find it, provided the person in possession of it has not acquired a title to it by purchase in market overt, without notice of the robbery. He is not justified in committing an assault, or a breach of the peace, in order to possess himself of the property, unless he finds it in the hands of the thief or the felonious receiver; but he must watch his opportunity for recovering possession; and, if he is unable peaceably to re-take it, he must pursue his remedy by writ of restitution, or by action. If there has been no alteration of the right of property in the thing stolen, by sale in market overt, he may at once demand it from the

(*p*) *George* v. *Chambers*, 11 M. & W. 159. *Gay* v. *Matthews*, 4 B. & S. 425; 32 L. J., M. C. 58. *Pease* v. *Chaytor*, 3 B. & S. 620; 32 L. J., M. C. 121. *Morrell* v. *Martin*, 3 M. & G. 590. Parke, B., *Jones* v. *Johnson*, 5 Exch. 875.

(*q*) *George* v. *Chambers*, 11 M. & W. 161.

(*r*) *Gibbs* v. *Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

(*s*) *Blades* v. *Higgs*, 10 C. B., N. S. 713; 12 C. B., N. S. 501; 34 L. J., C. P. 286. *R.* v. *Mitton*, 3 C. & P. 31.

person in possession of it; and, if the latter refuses to deliver it up to him on demand, he may bring his action.

The wrong-doer—Joint conversion.—In order to recover against several persons for a joint conversion, it must be proved that all concurred in some joint act of conversion. If the facts exclude a joint conversion by all the defendants, but show separate acts of conversion, in which some have participated, and others not, some of the defendants may be found guilty, and others may be acquitted (*t*).

The wrong-doer—Conversion by an agent or servant.—Every person who aids and assists in the act of conversion is responsible for the entire damage that has been sustained, although he acted only as the friend of another wrong-doer, the real principal in the transaction, or is merely a servant obeying his master's orders, and had no idea of committing any wrongful act himself. It is no answer that he acted under authority from another, who had himself no authority in the matter (*u*). Every master and employer is, of course, responsible for a conversion by his servant acting in obedience to his master's orders, or in the execution of his duty to his employer. Thus, if a ship-owner gives orders or directions to his shipmaster to detain goods shipped on board, the ship-owner will be responsible for everything done by the ship-master whilst acting in obedience to his orders (*v*). Where a ship captain, *bonâ fide* intending to execute the duties of his employment, made a mistake in disposing of the cargo, which amounted to a conversion of it, it was held that there was a joint conversion by the

519 master and owner (*w*). If a pawnbroker's servant, in the execution of his master's business, refuses to deliver up a pawn to the pawnor, on tender of the money due on it, the refusal of the servant is the refusal of the master, and the latter is responsible in damages for a conversion (*x*). However, no petition of right can be maintained against the Crown for the act of a captain of a man-of-war in seizing a vessel wrongly supposed to be engaged in the slave trade. The remedy for the ship-owner is in the Court of Admiralty (*y*).

The wrong-doer—Conversion by married women.—If a married woman is guilty of a conversion of chattels, she and her husband may be joined as defendants (*z*). But since the Married Women's

(*t*) *Nicoll* v. *Glennie*, 1 M. & S. 589. *Ante*, p. 94.

(*u*) *Parker* v. *Godin*, 2 Str. 813. *Stephens* v. *Elwall*, 4 M. & S. 261. *Hollins* v. *Fowler*, L. R., 7 H. L. 757; 44 L. J., Q. B. 169.

(*v*) *Schuster* v. *M'Kellar*, 7 El. & Bl. 704; 26 L. J., Q. B. 288.

(*w*) *Ewbank* v. *Nutting*, 7 C. B. 808.

(*x*) *Jones* v. *Hart*, 2 Salk. 441.

(*y*) *Tobin* v. *The Queen*, 16 C. B., N. S. 310; 33 L. J., C. P. 199. *Casanova* v. *The Queen*, L. R., 1 P. C. 269.

(*z*) *Keyworth* v. *Hill*, 3 B. & Ald. 688.

Property Act, 1882, the wife can be sued alone (*a*). Where some sheriff's officers, being authorized to seize the goods of *A*, by mistake took the goods of the plaintiff, and lodged them in the defendant's stable, and, when the plaintiff came and demanded the goods, the defendant's wife, in the defendant's absence, refused to give them up, saying, "I am told I shall be borne harmless," it was held that both the husband and wife were responsible for a conversion (*b*).

Division of the right of property in chattels in respect of its quantity.—Like the right of property in land, the right of property in chattels may be divided so that one person may be entitled to the possession, use, and enjoyment of a chattel for a limited period, and another to the possession, use, and enjoyment of it after that period has expired. The person who is entitled to the present possession, with or without the use or enjoyment of the chattel, is said to have a special property in it; while the person who is entitled to the chattel, subject to such right of present possession, use, or enjoyment, is said to have the absolute property.

At common law, however, reversionary interests in chattels are not regarded with the same favour as reversionary interests in land. The person who is entitled to the present possession of a chattel is considered, for some purposes, to possess the whole interest in the chattel, so far as third parties are concerned; and the rights of the reversioner are in many instances treated rather as rights *ex contractu* or *quasi ex contractu*, available only against the present possessor, and not against the public at large. Thus, a person who is shown to be in the actual possession of a chattel is presumed, as against a wrong-doer, to be the absolute owner; but to enable a person who was shown to have the absolute or a special

520 property in a chattel, but who was not shown to be in actual possession, to maintain an action against a wrong-doer, the court had resort to the fiction of constructive possession.

Division of property—Special property.—Persons who have only a special property in goods may maintain an action for damages done to them, or for the conversion, detention, or loss of them: such as a carrier, who is the mere instrument of conveyance, or a workman, to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shopkeeper, to whom they have been sent to sell (*c*), or the master of a vessel, or of a canal boat, who is entrusted with the possession and management of the vessel or boat, and its tackle

(*a*) 45 & 46 Vict. c. 75, s. 1, subs. 2.
(*b*) *Catterall* v. *Kenyon*, 3 Q. B. 310.
(*c*) *Williams* v. *Millington*, 1 H. Bl. 84. *Colwell* v. *Reeves*, 2 Campb. 576.

and furniture (*d*), and many others, to whom goods have been delivered for a special purpose, and who do not pretend to any absolute property in them (*e*). A person entitled to the temporary possession of chattels for a particular purpose may maintain an action for a trespass, or for the conversion of such chattels, against any person who takes possession of them, without having any colour of right so to do (*f*). He may be entitled to sue the owner, if he has a right as against the latter to the temporary possession of the chattel, and the owner refuses to deliver it up on demand (*g*). An auctioneer has a special property as bailee in goods and chattels which are put into his possession for the purpose of sale, whether such goods and chattels are in his own rooms, or in the house of another person. But this is not the case with regard to fixtures. An employment to sell fixtures only authorizes him to sell the right of detaching and removing the fixtures; he has no possession of them as chattels, unless it was intended that he should have possession of them after they were detached. Where, therefore, fixtures sold by an auctioneer were to be detached and removed by the purchaser, it was held that the auctioneer could not maintain an action for their wrongful removal (*h*).

Division of property—Reversionary interest.—If the owner of chattels has, by contract, parted with the possession of them for a certain time, and has only a reversionary interest, he may maintain an action against a wrong-doer, who by negligence or misconduct has caused the goods to be destroyed or permanently injured. Thus, where the owner of a barge, who had let it out to hire to a bailee, brought an action for damages done to it, by reason of the negligence of a third party, it was held that he had a right to sue

521 for the injury, notwithstanding the bailment (*i*). If goods of the plaintiff have been let to hire to a tenant, and have been distrained for rent whilst in the possession of the latter, and impounded, the plaintiff, nevertheless, retains his right of property in the goods whilst they continue in the custody of the law, and, in case of pound breach, against those who take and convert the goods (*j*).

Every hirer has the use, not the dominion, of chattels demised to him; and, therefore, when he alters or changes the nature of the property, or does anything to destroy its identity, his right of using it is at an end, the bailment is determined, and an action is maintainable for the wrongful conversion of the property (*k*). "If I

(*d*) *Pitts* v. *Gaince*, 1 Salk. 10. *Moore* v. *Robinson*, 2 B. & Ad. 817.
(*e*) *Martini* v. *Coles*, 1 M. & S. 147.
(*f*) *Burton* v. *Hughes*, 9 Moore, 339. *Sutton* v. *Buck*, 2 Taunt. 307.
(*g*) *Roberts* v. *Wyatt*, 2 Taunt. 268.
(*h*) *Davis* v. *Danks*, 3 Exch. 435.
(*i*) *Mears* v. *London and South Western Rail. Co.*, 11 C. B., N. S. 850; 31 L. J., C. P. 221. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362. *Hall* v. *Pickard*, 3 Campb. 186.
(*j*) *Turner* v. *Ford*, 15 M. & W. 215.
(*k*) *Bryant* v. *Wardell*, 2 Exch. 482.

lend to one my sheep to tathe his land, or my oxen to plough the land, and he killeth the cattle, I may well," observes Littleton, "have an action of trespass against him, notwithstanding the lending." "And the reason," says Coke, "is that, when the bailee, having but a bare use of them, takes upon him, as owner, to kill them, he loses the benefit of the use of them" (*l*). If the hirer of chattels sends them to an auctioneer to be sold, this is a conversion of the goods to his own use, which at once determines the bailment; and the owner has an immediate right of possession, and may at once sue for the recovery of the goods, or for damages for the loss of them (*m*).

Division of property — Possession. — Possession of chattels is *primâ facie* proof of ownership; and mere proof of possession will entitle a plaintiff to recover in an action of trespass or trover against a wrong-doer (*n*). If a man cuts down wood or rushes, and stores them on the ground ready to be carried away, the things so severed from the realty are in the actual possession of the person who has cut them down; and proof that the act of severance has been committed by the plaintiff is sufficient *primâ facie* evidence of title to enable the plaintiff to maintain an action against another person for seizing them and carrying them away (*o*). Proof that the plaintiff dug out ore, or sand and gravel, and piled it in heaps on the ground, is *primâ facie* proof that he is entitled to the heaps (*p*). Proof that the plaintiff is the owner of a vessel taking in cargo is *primâ facie* evidence that the plaintiff is the owner of the cargo (*q*).

522 When goods have been taken from the actual possession of the plaintiff, and the defendant fails in establishing any title in himself to the property, so as to justify the seizure, he will not be allowed to set up a *jus tertii*, and deny the plaintiff's title to the goods; for, as against a wrong-doer, possession is title; and the presumption of law is that the possession and ownership of chattels go together; and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defence by one who admits that he had no title and was a wrong-doer when he took or converted the goods (*r*). A wrong-doer, therefore, in actual possession of goods, the property of another, can recover their

Holroyd, J., in *Farrant* v. *Thompson*, 5 B. & Ald. 829. *Fenn* v. *Bittleston*, 7 Exch. 159.

(*l*) Co. Litt. 57a—57b.

(*m*) *Loeschman* v. *Machin*, 2 Stark. 312.

(*n*) *Webb* v. *Fox*, 7 T. R. 397.

(*o*) *Rackham* v. *Jesup*, 3 Wils. 332.

(*p*) *Northam* v. *Bowden*, 11 Exch. 70; 24 L. J., Ex. 238. *Rowe* v. *Brenton*, 8 B. & C. 737.

(*q*) *Brancker* v. *Molyneux*, 3 M. & G. 84.

(*r*) *Heath* v. *Milward*, 2 Bing. N. C. 100; 2 Sc. 160. *Carter* v. *Johnson*, 2 M. & R. 265. *Ashmore* v. *Hardy*, 7 C. & P. 505. *Bourne* v. *Fosbrooke*, 18 C. B., N. S. 515; 34 L. J., C. P. 164.

value in an action against another wrong-doer who takes the goods from him (*s*).

Division of property—Constructive possession.—The person in whom the general property in a personal chattel is vested may maintain an action for the taking or injuring of the chattel by a stranger (*t*), although he has never had possession in fact; for the general property draws to it the right of possession (*u*). If the plaintiff shows that he has a right to the possession of chattels, this will enable him to maintain an action for damages without proof that he has ever had actual possession of them, or that he is the owner of them; for a factor to whom goods have been consigned by the owner for sale, and who has never received them, may maintain an action for the conversion of them (*x*). There may be a constructive possession of chattels in respect of the right of property being actually vested in the plaintiff. Such is the case in an action of trespass by the lord for an estray or wreck taken by a stranger before seizure by the lord, where the right is in the lord, who has a constructive possession in respect of the thing being within the manor of which he is lord. So the executor has the right immediately on the death of the testator; and the right draws after it a constructive possession (*y*). If trees growing on land demised to a tenant are cut down, or fixtures attached to a dwelling-house are severed, the landlord has an immediate right of possession of the trees and fixtures so severed from the inheritance; they are his goods and chattels; and, if they are taken away from the demised premises, he may maintain an action for the conversion of them (*z*).

Property in the hands of very young children is in the con-

523 structive possession of the father and master of the house. But watches and books given by a parent to a school-boy or apprentice, and, taken away from home, are the property of the boy; and, if they are taken away, detained, or converted by a wrong-doer, the boy, and not the parent, is the proper person to sue for the injury (*a*).

Where the owner of a furnished house puts a person into the possession of the house to manage a business for him, at a certain agreed rate of remuneration, and gives him the use of the furniture, the occupier is the mere servant of the owner, his possession of the furniture is the possession of the master, and the latter is entitled to take it away at any time (*b*). A mere gratuitous bail-

(*s*) *Jeffries* v. *Great Western Rail. Co.*, 5 El. & Bl. 806; 25 L. J., Q. B. 107.
(*t*) *Beaty* v. *Gibbons*, 16 East, 116.
(*u*) Bro. Abr. *Trespass*, pl. 303, 304; Latch. 214.
(*x*) Eyre, C. J., *Fowler* v. *Down*, 1 B. & P. 47.
(*y*) *Smith* v. *Milles*, 1 T. R. 480. *Brew* v. *Haren*, Ir. Rep., 9 C. L. 29.
(*z*) *Berry* v. *Heard*, Cro. Car. 242. *Farrant* v. *Thompson*, 5 B. & Ald. 828.
(*a*) *Hunter* v. *Westbrook*, 2 C. & P. 578.
(*b*) *Bertie* v. *Beaumont*, 16 East, 36.

ment of a chattel to another does not remove the chattel out of the possession of the bailor, and does not prevent the latter from suing a third person who takes and converts the chattel, with or without the authority of the bailee; for, in cases of gratuitous bailment, the bailee generally holds the chattel merely at the will of the bailor, and is bound to return it whenever required so to do. If, therefore, goods are bailed by *A* to *B*, to be kept by the latter, and *B* bails them to *C*, who uses and wastes the goods, *C* is liable to an action at the suit of *A* for the recovery of compensation for the damage sustained (*c*). If the owner of a chattel gives a gratuitous permission to another to take the chattel and use it, he may, nevertheless, maintain an action against a stranger who takes, damages, or converts the chattel, while it is being used by the person to whom it has been lent (*d*). So, where brewers sell porter in casks, and lend the casks to their customers until they are emptied, they may maintain an action against a wrongdoer for taking and detaining the empty casks (*e*).

However, where there was an absolute assignment of goods by deed, with a covenant to pay a certain debt or demand, and a proviso for redemption on payment of the debt, and a further proviso that the assignor should continue in possession until default, and before any default made the goods were taken in execution and sold by the sheriff, it was held that the assignee had not such a right of immediate possession as would entitle him to maintain an action against the sheriff for a conversion of the goods (*f*).

Division of Property—Assessment of damages, where the plaintiff has only a limited or doubtful interest in the goods.—Where the

524 plaintiff is not the actual owner, but is only a bailee or hirer of goods which have been wrongfully taken out of his possession, he is entitled as against a stranger to recover the entire value of the goods. But, if the action is brought by the hirer or bailee against the owner of the goods, the damages will be limited to the value of the plaintiff's interest in them (*g*); and a defendant who has wrongfully deprived the plaintiff of the possession of goods, may show that he was himself the owner of the goods at the time of the conversion, subject to some temporary or conditional right of possession on the part of the plaintiff, with a view of limiting the damages to the value of the plaintiff's limited interest (*h*). If it

Mayhew v. *Suttle*, 4 El. & Bl. 353. *White* v. *Bailey*, 10 C. B., N. S. 227; 30 L. J., C. P. 253.

(*c*) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5.

(*d*) *Lotan* v. *Cross*, 2 Camp. 465. *Nicolls* v. *Bastard*, 2 C., M. & R. 659. *Turner* v. *Ford*, 15 M. & W. 212.

(*e*) *Manders* v. *Williams*, 4 Exch. 343.

(*f*) *Bradley* v. *Copley*, 1 C. B. 685.

(*g*) *Heydon and Smith's case*, 13 Co. 68. *Waters* v. *Monarch*, 5 El. & Bl. 880; 25 L. J., Q. B. 102.

(*h*) *Brierley* v. *Kendall*, 17 Q. B. 943; 21 L. J., Q. B. 161.

appears that the plaintiff has merely been clothed with the possession and ostensible ownership of the chattels, for the purpose of perpetrating a fraud or defeating a distress, or if he has made a transfer of the chattels, which he has treated at one period as valid and *bonâ fide*, and at another as merely colourable, so as to leave it doubtful what is his real and *bonâ fide* interest in the property, the jury may, if they please, give him merely nominal damages (*i*).

In cases between pawnor and pawnee, where the pawnee has by an illegal dealing with the pledge determined the bailment, and the pawnor has in consequence brought an action for the conversion of the goods, the interest of the pawnee ought to be taken into account; and, if the pawnor did not intend to redeem the pledge, only nominal damages are recoverable (*k*).

Division of property—Joint-tenants and tenants in common of chattels.—Where some engravings had been mortgaged to the plaintiff, and the plaintiff and the mortgagor, after the execution of the mortgage, placed the engravings in the hands of the defendant in their joint names, to be sold by him by a public lottery or raffle, which failed for want of subscribers, and the mortgagor, being greatly in debt, absconded, and the plaintiff then demanded the engravings, but the defendant refused to deliver them to him alone, without an indemnity, it was held by Jervis, C. J., that the refusal was right, and that the plaintiff had no ground of action in respect thereof against the defendant (*l*). But, where one tenant in common of a personal, indivisible chattel brought an action for the conversion of it against a stranger, and the stranger did not plead the tenancy in common in abatement, it was held that he

525 could have no benefit of it in evidence on the general issue (*m*), and that the plaintiff was entitled to recover damages in proportion to the extent and value of his interest, and the damages he had sustained (*n*). If a man brings an action for the conversion of a ship, and upon the evidence it appears that he has but a sixteenth part of it, this will go in reduction of damages, as he has no right to recover the value of the shares of the other part-owners (*o*).

Division of property—Rights and liabilities of tenants in common inter se.—In Littleton (*p*) it is said that, "if two be possessed of chattels personal in common, and one take the whole to himself out

(*i*) *Cameron* v. *Wynch*, 2 C. & K. 264. *Pringle* v. *Taylor*, 2 Taunt. 150.

(*k*) *Johnson* v. *Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130 (diss. Williams, J.).

(*l*) *Burke* v. *Bryant*, C. B. Sittings after Trinity Term, 1852. *Harper* v. *Godsell*, L. R., 5 Q. B. 422; 59 L. J. Q. B. 185.

(*m*) King, C. J., *Barnardiston* v. *Chapman*, cited 1 T. R. 770.

(*n*) *Lockwray* v. *Dickenson*, Skin. 640. *Addison* v. *Overend*, 6 T. R. 770.

(*o*) *Dockwray* v. *Dickenson*, *supra*.

(*p*) Sect. 323.

of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common, &c., when he can see his time" (*q*). Where two have an equal interest in a deed, and each may have occasion to use it, as, for instance, where the same deed grants Whiteacre to *A*, and Blackacre to *B*, it is manifest that both cannot hold the deed at the same time; and, to avoid any unseemly contest for the possession of it, it has been held that he who first gets hold of it is entitled to keep it. For fraud or force which may be used to get possession of the deed, either party may, perhaps, have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it; and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer (*r*).

So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action of tort can lie against him by his co-tenant. Thus the tenant in common of a whale may lawfully make the blubber into oil (*s*); and the tenant in common of grass land may lawfully cut the grass and make it into hay (*t*), subject only to the liability to account to his co-tenant for his share of the proceeds. But, where something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights, there is a violation of right, for which the law will award damages. Thus, "if one of two tenants be of a dove-house, and the one destroys the old doves, whereby the flight is wholly lost, the other tenant

526 in common shall have an action for a trespass" (*u*); "for there can be no tenancy in common of a thing destroyed" (*x*).

The authorities seem to show that one partner or joint-tenant of a chattel cannot maintain an action against his co-tenant for a conversion of the chattel, in consequence of his having taken upon himself to sell the subject-matter of the joint ownership by sale not in market overt, as the sale under such circumstances only transfers to the purchaser the vendor's interest in the chattel, and renders the purchaser co-tenant only with the other part-owners; but, if the chattel is sold in market overt, so as to transfer the entire property in the chattel to the purchaser, and oust the other part-owners of their proprietory rights, the sale will then

(*q*) See *Holliday* v. *Camsell*, 1 T. R. 658.
(*r*) *Foster* v. *Crabb*, 12 C. B. 136.
(*s*) *Fennings* v. *Lord Grenville*, 1 Taunt. 241.
(*t*) *Jacobs* v. *Seward*, L. R., 5 H. L. 464; 41 L. J., C. P. 221.
(*u*) Co. Litt. 200a, 200b.
(*x*) 14 Vin. Abr. 516, JOINT-TENANTS.

amount to a conversion of the property, and the vendor will be answerable in damages to his other co-tenants (*y*). If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion of the property by the pledgor, as he has a right to pledge to the extent of his limited interest, and to create a lien upon the partnership property (*z*). So, where one of two partners became bankrupt, and the solvent partner directed the defendants to sell some partnership property in their hands, and the defendants sold it and received the proceeds, it was held that they were not responsible to the assignees of the bankrupt as for a conversion of the goods (*a*).

Where joint owners pledged a chattel with the defendant as security for the repayment of an advance, and afterwards one of them without the authority of the others tendered to the defendant the amount secured, and demanded the chattel, it was held that the refusal by the defendant to give up the chattel under these circumstances was not a conversion (*b*).

Right to particular chattels—Right to fixtures.—Fixtures are chattels which have been annexed to land. Whether a chattel has been so annexed to land as to become a fixture, depends on the degree of annexation and the object of the annexation. Chattels not otherwise attached to the land than by their own weight, are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, as in the case of a dry stone wall, the *onus* of showing that they

527 were so intended lying on those who assert that they have ceased to be chattels. On the other hand, a chattel affixed to the land even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, as in the case of a carpet nailed to the floor of the room, the onus lying on those who contend that it is a chattel. Where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the article is to enhance the value of the premises to which it is affixed for the purposes to which those premises are applied (*c*). Ordinary trade

(*y*) Cresswell, J., *Mayhew* v. *Herrick*, 7 C. B. 249. *Barnardiston* v. *Chapman*, cited 4 East, 121.

(*z*) *Jones* v. *Brown*, 25 L. J., Ex. 345. *Fennings* v. *Lord Grenville*, 1 Taunt. 248.

(*a*) *Morgan* v. *Marquis*, 9 Exch. 145; 23 L. J., Ex. 21. *Edwards* v. *Hooper*, 11 M. & W. 363.

(*b*) *Harper* v. *Godsell*, L. R., 5 Q. B. 422; 39 L. J., Q. B. 185.

(*c*) *Holland* v. *Hodgson*, L. R., 7 C. P. 328; 41 L. J., C. P. 146. The following articles affixed by the owner of the fee have been held to be fixtures:—A threshing machine placed inside a barn (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth (*Wiltshire* v. *Cotterill*, 1 E. & B. 674; 22 L. J., Q. B. 177);

or tenant's fixtures, which are put up with the intention that they should be removed by the tenant, have always been considered as part of the land, although severable by the tenant, the reason probably being that, although they are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord, yet the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in it (*d*).

Where buildings were exclusively erected for mining purposes, but were attached to the soil so as to be part of it, and so as to be incapable of removal without disturbance of it, it was held that the miners were entitled to remove them, and were not liable to the surface owners for so doing (*e*).

Where such fixtures have been put up by the owner of the freehold, they pass under a mortgage of the freehold to the mortgagee, although they may have been annexed to the freehold for the more convenient using of them, and not to improve the freehold, and although they are capable of being removed without any appreciable damage to the freehold (*f*).

"Questions respecting the right to what are ordinarily called fixtures," observes Lord Ellenborough, "principally arise between three classes of persons. First, between different descriptions of

528 representatives of the same owner of the inheritance, viz., between his heir and executor. In this first case, *i.e.*, between heir and executor, the rule as to severance obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, anything which has been affixed thereto (*g*). Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence have always been allowed in favour of the claim of severance, as against

machinery for the purpose of carrying on a trade on the land (*Mather* v. *Fraser*, 2 K. & J. 536; 25 L. J., Ch. 361); a steam engine and boiler for supplying hot water for the use of baths (*Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97); or for sawing timber (*Climie* v. *Wood*, L. R., 3 Ex. 257; 4 Ex. 386); a hay-cutter fixed into a building adjoining a stable, as an important adjunct to it, and to improve its usefulness as a stable (*Ib.*); a malt-mill and grinding stones (*Ib.*); leathern driving belts (*Sheffield Building Society* v. *Harrison*, 15 Q. B. D. 358; 54 L. J., Q. B. 15).

(*d*) *Boyd* v. *Shorrock*, L. R., 5 Eq. 72, 78; 37 L. J., Ch. 144; *Holland* v. *Hodgson*, L. R., 7 C. P. 328, 336; 41 L. J., C. P. 146.

(*e*) *Wake* v. *Hall*, 8 App. Cas. 195; 52 L. J., Q. B. 494. The rules as to fixtures stated in the text prevail in this country.

(*f*) *Climie* v. *Wood*, L. R., 3 Ex. 257; 4 Ex. 328.

(*g*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312. *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97.

the claim in respect of freehold or inheritance, is the case between landlord and tenant" (*h*).

As between heir and executor, the rule is, that where a fixed instrument, engine or utensil, or a building covering machinery, is accessory to a matter of a personal nature, then it shall itself be considered personalty, and belong to the executor, such as a fire engine accessory to the carrying on the trade of getting and vending coals; or a brew-house furnace and coppers; or a cider-mill, or varnish-house. But salt-pans connected with salt-springs, and erected for the benefit of the inheritance, and barns and agricultural buildings, erected for farming purposes, are not by the common law removable by executors, but belong to the heir (*i*).

The cases regarding the right of removal of fixtures, as between the executor of a tenant for life and the remainderman, will be found to turn each on its own peculiar circumstances; the character of the fixture, the use made of it, the mode of its attachment to the freehold, the facility of severance, the injury to the freehold by severance, and, in regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and the purpose for which it was attached. A building erected by an incumbent, which is in itself mere matter of luxury and ornament, which it would be a burthen to the benefice to keep up, and which the incumbent might have pulled down if he thought fit, and which may be detached without injury to the freehold, passes in general as part of the personal estate to the executors of the deceased incumbent, and may be taken away by them (*k*).

By the 34th section of the Agricultural Holdings Act, 1883, it is enacted that, "Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this

529 Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. Provided as follows:—(1) Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding. (2) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the

(*h*) *Elwes* v. *Maw*, 3 East, 53.
(*i*) *Elwes* v. *Maw*, 2 Smith's L. C. 153, 6th edit.
(*k*) *Martin* v. *Roe*, 7 El. & Bl. 248.

holding. (3) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal. (4) The tenant shall not remove any fixture or building without giving one month's previous notice, in writing, to the landlord of the intention of the tenant to remove it. (5) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal)."

Fixtures—Transfer of fixtures.—By the grant of land, all fixtures attached to the soil and freehold and belonging to the grantor pass with the land as accessorial thereto; and by the grant of a house all things incident and accessorial to the building pass, such as window-frames, windows, doors, and wainscots attached to the house, and furnaces, coppers, vats and tables fastened to the walls or to the ground in the middle of the house, and all fixtures of every description annexed to the building and belonging to the grantor or landlord (*l*). But tenants' fixtures and trade fixtures, which were put up by the tenant or occupier, and which the latter has a right to remove at the expiration of his tenancy or occupation, do not, of course, pass by the grant of the fee, unless the grantor is himself the occupier of the house and owner of the fixtures. Where the owner of the lease of a house, and of certain fixtures in the house, gave a memorandum to the plaintiff to the

530 following effect:—"In consideration of *T* (the plaintiff) discounting for me a bill of exchange for 80*l.*, I have assigned to him the whole of the fixtures as per inventory," &c., it was held that the property in the fixtures passed by this note to the plaintiff (*m*). All fixtures, when separately assigned or charged, and trade-machinery, when assigned with a freehold or leasehold interest in any land or building to which it is affixed, are personal chattels within the Bills of Sale Act (*n*). But no fixtures are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are

(*l*) *Longstaffe* v. *Meagoe*, 2 Ad. & E. 167. *Birch* v. *Dawson*, *ib.* 37. *Hare* v. *Horton*, 5 B. & Ad. 715; 2 N. & M. 428. *Hitchman* v. *Walton*, 4 M. & W. 414, 416. *Mather* v. *Fraser*, 2 Kay & J. 536; 25 L. J., Ch. 361.

(*m*) *Thompson* v. *Pettitt*, 10 Q. B. 101.

(*n*) *Ante*, p. 463.

affixed, without otherwise taking possession of, or dealing with such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same persons (*o*).

Trade-machinery is included in the expression "personal chattels"; and any mode of disposition of trade-machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, is to be deemed to be a bill of sale within the Act. The expression "trade-machinery" means the machinery used in or attached to any factory or workshop, exclusive, 1st, of the fixed motive-powers, such as the water-wheels and steam-engines, and the steam-boilers, donkey-engines, and other fixed appurtenances of the said motive-powers; 2nd, of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and, 3rd, of the pipes for steam, gas,

531 and water in the factory or workshop. The excluded machinery and effects are not to be deemed to be personal chattels within the Act (*p*). The expression "factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the making any article or part of an article, or to the altering, repairing, ornamenting, or finishing any article, or to the adapting any article for sale (*q*).

Fixtures—Damages recoverable in respect of the severance and sale of fixtures.—Where fixtures have been unlawfully detached from the freehold and sold by auction, the measure of damages in an action against a wrong-doer for the seizure and removal of the

(*o*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 7. This rule of construction is to be applied to all deeds or instruments including fixtures executed before the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of the Act. Sect. 7. As this part of the Act is retrospective, it is unnecessary to consider in detail what the law was under the former Acts. The general effect of the decisions was that fixtures which only passed as appurtenant to real property, and could not be severed by the grantee, were not personal chattels within the Acts (*Mather* v. *Fraser*, 2 Kay & J. 558; 25 L. J., Ch. 361. *Boyd* v. *Shorrock*, L. R., 5 Eq. 72; 37 L. J., Ch. 144. *Walmsley* v. *Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97. *Ex parte Barclay*, L. R., 9 Ch. 576; 43 L. J., Bk. 137); but fixtures which were transferred independently of the freehold (*Waterfall* v. *Penistone*, 6 El. & Bl. 890; 26 L. J., Q. B. 100. *Whitmore* v. *Empson*, 23 Beav. 313), or which could be severed by the grantee (*Hawtry* v. *Butlin*, L. R., 8 Q. B. 290; 42 L. J., Q. B. 163. *Ex parte Daglish*, L. R., 8 Ch. 1072; 42 L. J., Bk. 102. *In re E. Eslick*, L. R., 4 Ch. D. 503; 46 L. J., Bk. 30), were held to be personal chattels within the former Acts. The Bills of Sale Amendment Act, 1882 (45 & 46 Vict. c. 43), after providing (s. 4) that bills of sale by way of security shall have effect only in respect of such chattels as are named in the bill, and shall be void (except as against the grantor) in respect of any other chattels, and (s. 5) as to after-acquired chattels, enacts (s. 6) that this shall not affect fixtures separately assigned or brought upon the premises in substitution.

(*p*) Sect. 5.

(*q*) Sect. 5.

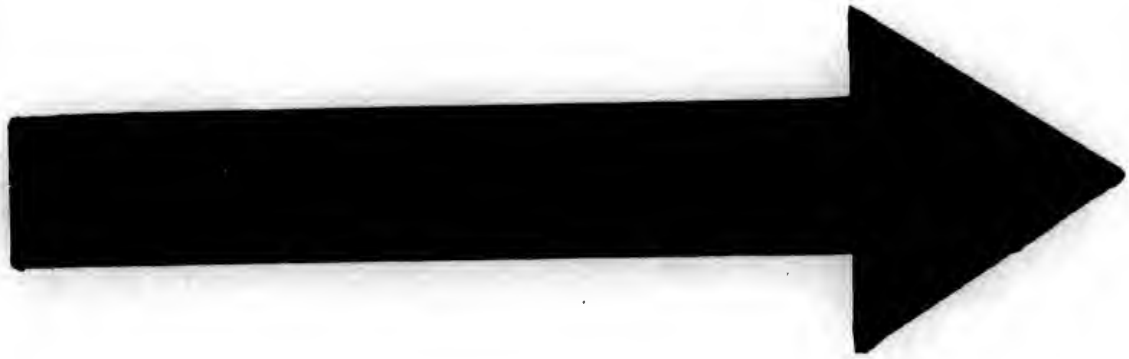
fixtures is the value of the fixtures as between an outgoing and incoming tenant (*r*), in addition to compensation for any intentional wrong, injury, or insult involved in the act of removal, or for any trespass that may have been committed in removing them.

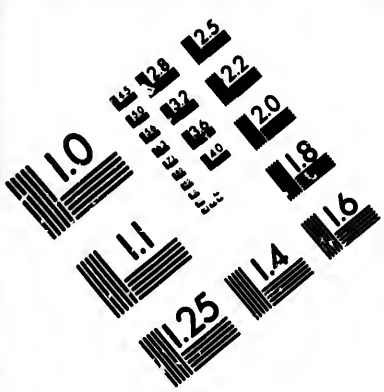
Growing crops.—Fructus industriales, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised each year from fresh plants and seeds, are goods and chattels. If a man by deed "grants to another and his heirs the vesture or herbage of his land, by this grant do pass the corn, grass, underwood, sweepage, and the like." "He that hath the land also may grant all fruits that may arise upon it after; and the property shall pass as soon as the fruits are extant; and, though the words are not words of gift of the corn, but words of licence that it shall be lawful for the grantee to take it to his own use, it is good to transfer the property" (*s*). Where the lessee of a farm, being indebted to his landlord, assigned to the latter, by a bill of sale under seal, all his hay and corn in stock and growing upon the farm, and all his tenant right and interest to come and unexpired in the farm, in trust to sell and pay the debt, and hand over the surplus to such lessee, and full power was given to the landlord to enter upon the farm at any time thereafter, and take and carry away the said corn and hay, it was held that growing crops, not sown at the time of the execution of the deed, passed under the assignment of the "tenant right" to the grantee (*t*). But the general rule of law is that things not in existence at the time of the grant cannot pass thereby; but the grant may operate as a licence to seize and sell after-acquired property (*u*). Although the land itself does not pass by the grant, the grantee has a right, when the grant is under seal, to the use of the soil for the crop to grow in

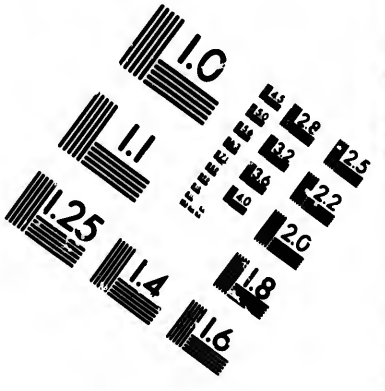
532 until it arrives at maturity, and a right to enter upon the land to secure and carry away the crop (*x*).

Growing crops, when separately assigned or charged, are personal chattels within the Bills of Sale Act, 1878, but not when they are assigned together with any interest in the land on which they grow; nor are any stock or produce upon any farm or lands which, by virtue of any covenant or agreement or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale (*y*).

(*r*) *Thompson* v. *Pettitt*, 10 Q. B. 106.
(*s*) *Grantham* v. *Hawley*, Hob. 132.
(*t*) *Petch* v. *Tutin*, 15 M. & W. 115.
(*u*) *Carr* v. *Allatt*, 27 L. J., Ex. 385.
(*x*) Noy's Maxims, 55; Plowd. 16.
(*y*) *Ante*, p. 463. Growing crops were not specifically mentioned in the former Acts; and, although it had been held in *Sheridan* v. *M'Cartney* (11 Ir., C. L. R. 506; 5 L. T., N. S. 27) that they were within the 17 & 18 Vict. c. 36, where the assignment of them conveyed no estate in the land, yet some doubt had been thrown on that decision by the







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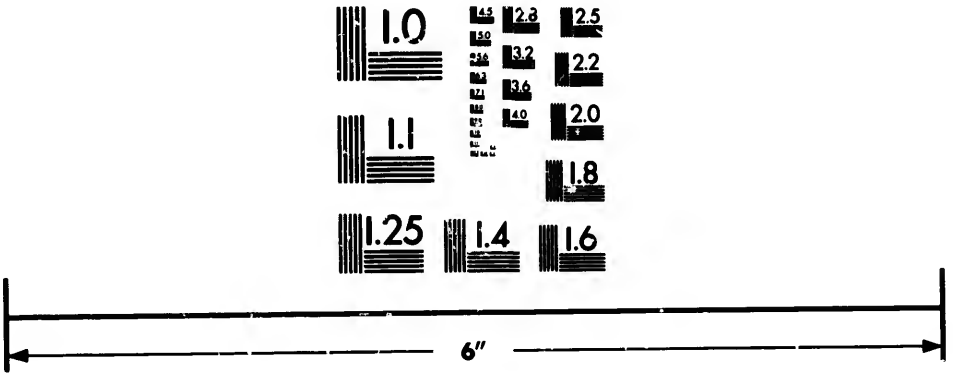

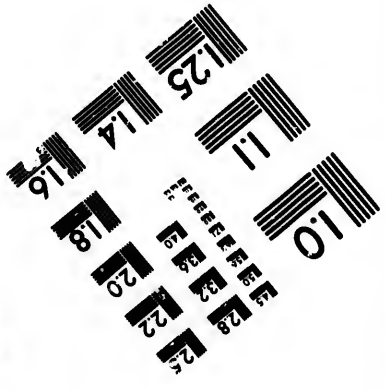

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But no growing crops are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land on which they grow, without otherwise taking possession of or dealing with such land, if by the same instrument any freehold or leasehold interest in the land in which such crops grow is also conveyed or assigned to the same person (*z*). A bill of sale is not void as respects growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed, by reason that such crops are not specifically described in the schedule, or, if specifically described, by reason that the grantor is not the true owner (*a*).

Right to compensation for improvements.—According to the custom of the country, in some of the counties of England, the tenant was entitled to the value of his waygoing crops and tillages, and other matters; but recently an Act, called the Agricultural Holdings (England) Act, 1883 (*b*), has been passed, which extends the rights of the tenant to compensation for improvements. These improvements are specified in the three parts of the first schedule of the Act. The first part of the schedule relates to improvements to which the consent of the landlord is required (*c*), and may be called "alterations of the holding"; the second part to improvements in

533 respect of which notice to the landlord is required—or "drainage" (*d*); and the third part to improvements to which the consent of the landlord is *not* required, which may be called "cultivation." For any improvements in this schedule which the tenant makes he will be entitled on quitting (or upon resumption by the landlord) (*e*) to such sum as fairly represents its value to an incoming tenant, not reckoning what is justly due to the inherent capabilities of the soil (*f*).

Where compensation is provided for under an agreement existing before the Act, the agreement will prevail (*g*), and also in the case of improvements specified in part 3 of the schedule, where the

remarks of Bramwell, B., in *Gough* v. *Everard* (2 H. & C. 9; 32 L. J., Ex. 212); and in *Brantom* v. *Griffiths* (L. R., 2 C. P. D. 212; 46 L. J., C. P. 408), and *Ex parte Payne* (L. R., 11 Ch. D. 539), it was held that they were not within the Act. See also *Ex parte National Bank*, 16 Ch. D. 104; 50 L. J., Ch. 221.

(*z*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 7. This rule of construction is to be applied to all deeds or instruments, including growing crops, executed before the commencement of the Act (January 1st, 1879), and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court which may take place or be issued after the commencement of the Act. Sect. 7.

(*a*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 4, 5, 6.

(*b*) The Act is rendered compulsory by 46 & 47 Vict. c. 61, s. 55. It only applies to agricultural or pastoral holdings or market gardens.

(*c*) See sect. 3.

(*d*) See sect. 4.

(*e*) Sect. 41.

(*f*) Sect. 1. For improvements made before the Act he cannot, with certain exceptions, obtain compensation. Sects. 2, 62.

(*g*) Sect. 5.

tenancy begins after the Act (*h*). Sect. 6 provides for certain reductions of augmentations in ascertaining the amount of compensation; and sects. 7—29 provide for procedure by reference and arbitration.

Ships and shares in ships.—The ownership and right of property in ships and shares in vessels are authenticated and regulated by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), part 2, and the Acts amending it (*i*). Whenever there is more than one owner, the right of property in the vessel is required to be divided into shares, and the number of shares held by each owner to be registered. But partners in any house or co-partnership may hold any vessel, or any shares therein, in the name of such house or co-partnership as joint-owners, without distinguishing the proportionate interest of each. No greater number than thirty-two persons, however, are entitled to be legal owners, at one and the same time, of any ship or vessel as tenants in common, or to be registered as such; but any number of persons may hold or enjoy equitable interests, and have an equitable claim or title, as against the registered legal owners. Joint-stock companies, also, formed for the purpose of owning ships or vessels, may appoint any number of their members, not being less than three, to be trustees of the property in such ships or vessels, who are to subscribe the declaration of ownership required before registry, stating the name and description of the company to which the vessels belong. If a person who has no title as owner gets his name put upon the register, the court will rectify the error, and cause the ship to be registered in the name of the legal owner (*k*). After

534 all the particulars necessary to ascertain the ownership, build, and description of the vessel have been duly declared and registered, a certificate of such registry, embodying such particulars, is to be granted, and on the back of this certificate is to be endorsed the names of the owners and the number of shares they hold. If this certificate is lost, mislaid, or detained, the vessel may be registered *de novo*. Copies of the declaration of ownership, and of the ship's register, are made evidence without production of the originals; and provision is made for registration *de novo*, in certain cases where the bill of sale or instrument of transfer cannot be produced. Examined copies of the register, or copies purporting to be certified under the hand of the person having the custody of the

(*h*) Sect. 5. This last clause is to apply to a tenancy current at the date of the Act where specific compensation is not provided by any agreement in writing, or custom, or the Act of 1875; but the meaning of the provision is obscure.

(*i*) 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 34 & 35 Vict. c. 110; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 85; 39 & 40 Vict. c. 80; 43 & 44 Vict. cc. 18, 43; 46 & 47 Vict. c. 42.

(*k*) *Holderness* v. *Lamport*, 30 L. J., Ch. 489.

original, and all certificates of registry purporting to be signed as required by law, are *primâ facie* evidence of all matters contained or recited in the registers, or indorsed on the certificates (*l*). The certificate of registry, therefore, affords evidence of the ownership and right of property of every registered vessel, and should be produced to every intended purchaser of the vessel, or of any share or shares therein, and be compared with the register. If the vendor of a vessel is not himself the builder or the original owner, but derives his title by purchase after registry, the bill of sale or instrument of transfer under which he claims should be produced, as well as the certificate of registry.

By the Merchant Shipping Act of 1862 (*m*), interests arising under contract and other equitable interests are recognised; and, without prejudice to the provisions of the Act of 1854, for preventing notices of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition, and of giving receipts conferred by that Act on registered owners and mortgagees, and to the provisions relating to the exclusion of unqualified persons from the ownership of British ships, equities are to be enforced against owners and mortgagees of ships in respect of their interests therein, in the same manner as equities may be enforced against them in respect of any other personal property.

The master of a vessel has no authority to sell the vessel except under very special circumstances of urgent necessity (*n*).

Transfers of registered ships and of shares in such ships must be made by bill of sale containing such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of

535 the registrar, according to the form given in the Merchant Shipping Act, 1854 (*o*). The duty of registering a transfer of ownership rests with the vendee; and immediately on the execution of the bill of sale the vendee becomes entitled to all the benefits and liabilities of ownership (*p*). A ship is not like an ordinary chattel which passes by delivery; and there is no market overt for ships. The purchaser of a foreign ship is, therefore, bound to make inquiries as to the title, and will take subject to existing rights and equities (*q*). A ship built to be sold to a foreigner, and to be delivered to him at a foreign port, is not a British ship within the meaning

(*l*) 17 & 18 Vict. c. 104, part 2.
(*m*) 25 & 26 Vict. c. 63, s. 3.
(*n*) *The Eliza Cornish*, 1 Spinks, 36; 17 Jur. 738. *The Bonita and The Charlotte*, 1 Lush. 252; 30 L. J., Adm. 145. *Lapraik* v. *Burrows*, 13 Moo. P. C. 132.
(*o*) 17 & 18 Vict. c. 104, s. 55.
(*p*) *The Spirit of the Ocean*, 34 L. J., Adm. 74. *Stapleton* v. *Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170.
(*q*) *Hooper* v. *Gumm*, L. R., 2 Ch. 282; 36 L. J., Ch. 282.

of the Merchant Shipping Act, 1854; and an assignment of her need not be by bill of sale registered under that statute (*r*).

Grants of arms, title-deeds, and leases.—A deed of grant of arms from the Heralds' College is a sort of family document in which every member of the family whose claim to arms is dependent upon it, has an interest. Whatever member of the family, therefore, has got possession of it is entitled to keep it, but may be called on to produce it (*s*). But, if the grant is taken out at the joint expense of three members of the family, the deed belongs to the survivor.

The owner of a freehold estate has, in general, a right to the title-deeds, the right to the deeds following the right to the land (*t*). Where, therefore, a man conveyed his freehold estate by way of mortgage to the plaintiff, and handed over to the plaintiff forged and counterfeit title-deeds, and then deposited the genuine deeds with a banker as security for a loan, and the plaintiff brought an action against the banker for the deeds, it was held that he was entitled to recover them (*u*). The tenant for life has a right to the title-deeds of the estate, except in cases where he has been guilty of misconduct, so that the safety of the deeds has been endangered, or where the rights of others intervene, and it becomes necessary for the court to take charge of the title-deeds in order to carry out the administration of the property (*x*). The tenant for life, therefore, may maintain an action against a remainderman who has them in his possession, and refuses to give them up (*y*); but on the death of the tenant for life

536 the remainderman is entitled to the deeds (*z*). A lessee, to whom a lease has been delivered, has a right to the possession of the lease, both during the term and after its expiration, so that the lessor has no right to claim possession of it from the lessee (*a*).

Right to documents and securities for money.—The obligee of a bond, to whom the bond has been delivered, is not bound to deliver it up to the obligor on being tendered the amount due upon it. The obligor is entitled to an acquittance or an acknowledgment of the receipt of the money due upon the bond, but not to the possession

(*r*) *Union Bank of London* v. *Lenanton*, L. R., 3 C. P. D. 243; 47 L. J., C. P. 409.

(*s*) *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J., Ex. 510.

(*t*) *Searle* v. *Law*, 15 Sim. 390.

(*u*) *Newton* v. *Beek*, 3 H. & N. 220; 27 L. J., Ex. 272.

(*x*) *Leathes* v. *Leathes*, 5 Ch. D. 221; 46 L. J., Ch. 562.

(*y*) *Allwood* v. *Heywood*, 1 H. & C. 745; 32 L. J., Ex. 153. See *Newton* v. *Newton*, L. R., 4 Ch. 143; 38 L. J., Ch. 145. And as between trustee and *cestui que trust*, see *Stanford* v. *Roberts*, L. R., 6 Ch. 307.

(*z*) *Easton* v. *London*, 33 L. J., Ex. 34. As to the rights of two persons jointly interested, see *Wright* v. *Robotham*, 35 Ch. D. 106.

(*a*) *Hall* v. *Ball*, 3 M. & G. 242. *Elworthy* v. *Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.

of the instrument itself (*b*). Neither is the payee of a note not negotiable bound to deliver up possession of the note to the maker on receiving the amount due upon it (*c*). The person entitled to the beneficial interest in a contract or security for money is, in general, entitled to the custody of the document or writing by which the beneficial interest or money is secured. If, therefore, the defendant has obtained possession of a policy of insurance to which the plaintiff is equitably entitled, he is responsible for the conversion of the property if he fails to restore it after demand, as the person entitled to the equitable interest in the document is legally entitled to the custody of it (*d*).

Right to letters.—The right of property in letters is in the receiver, or person to whom they are addressed and delivered, so far as regards the paper on which they are written. If, therefore, they get back into the hands of the writer, the receiver is entitled to have them returned to him; but he has no right to publish them without leave from the writer (*e*), or, in case of his death, without leave from his executor (*f*). He cannot, however, refuse to produce them in a court of justice on the ground that the writer forbids their production (*g*).

Right to bills, notes, and cheques.—Bank-notes are treated as money or cash in the ordinary course of business by the common consent of mankind. If, therefore, a man finds a bank-note, and pays it away *bonâ fide* in the ordinary course of business, the owner has no remedy for the recovery of the lost property; but if he demands the note while it still remains in the hands of the finder, the latter will be responsible for the non-delivery of it (*h*).

537 In the case of the loss of a bill, note, or cheque (*i*), by theft or accident, if the instrument is assignable by mere delivery, the thief or finder may confer a title by transferring it to a person who takes it *bonâ fide*, and who gives value for it without notice of any infirmity of title at the time he receives it. But, if the

(*b*) Littledale, J., in *Wain* v. *Bailey*, 10 Ad. & E. 618.

(*c*) *Wain* v. *Bailey*, *supra*.

(*d*) *Oliver* v. *Oliver*, 11 C. B., N. S. 139; 31 L. J., C. P. 4.

(*e*) *Watson* v. *Maclean*, El. Bl. & El. 77.

(*f*) *Thompson* v. *Stanhope*, Ambl. 737.

(*g*) *Hopkinson* v. *Lord Burleigh*, L. R., 2 Ch. 447; 36 L. J., Ch. 504.

(*h*) *Miller* v. *Race*, 1 Burr. 452. *Grant* v. *Vaughan*, 3 Burr. 1524. By sect. 69 of Bills of Exchange Act, 1882, where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill he may be compelled to do so. By sect. 70, in any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

(*i*) As to what is a bill, and what bills are negotiable and what payable to bearer or order or on demand, see Bills of Exchange Act, 1882, ss. 3—10; and as to what is a promissory note, see sect. 83.

instrument is assignable only by indorsement, neither the thief nor the finder can make a valid indorsement (*k*). Whenever a person discounts, or receives into his possession by way of deposit, a bill, or note, or negotiable security, knowing that the person from whom he receives it is not the owner of it, he cannot lawfully detain it from the true owner (*l*).

When a bill, note, or cheque has been proved to have been stolen or lost, or to have been obtained by fraud, this affords a presumption that the thief, or the finder, or the fraudulent possessor of the security would dispose of it, and would place it in the hands of another person to sue upon it; and such proof on the part of the defendant casts upon the plaintiff the burthen of showing that he gave value for the note (*m*). If he has given full value for the instrument, that is, in general, conclusive evidence of *bona fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that will be evidence the other way (*n*). The whole burthen of impeaching the title of the holder of the instrument falls upon the plaintiff, who disputes that title (*o*). It is not enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in the possession of the defendant (*p*). The latter is not bound, from proof of those circumstances alone, to account for his possession of the security (*q*). But, if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and the latter declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he

538 will be required to prove that he gave value for the instrument (*r*); and, if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder,

(*k*) See Bills of Exchange Act, 1882, s. 32. *Johnson* v. *Windle*, 3 Bing. N. C. 225; 3 Sc. 608. *Whistler* v. *Forster*, 14 C. B., N. S. 248; 32 L. J., C. P. 169. As to cheques payable to order, see the 16 & 17 Vict. c. 59, s. 19; and see Bills of Exchange Act, 1882, s. 60; and as to crossed cheques, see sects. 76—82.

(*l*) *Lovell* v. *Martin*, 4 Taunt. 799. *Burn* v. *Morris*, 2 Cr. & M. 579.

(*m*) *Bailey* v. *Bidwell*, 13 M. & W. 76.

(*n*) *Raphael* v. *Bank of England*, 17 C. B. 173.

(*o*) *Worcester County Bank* v. *Dorch. and Milt. Bank*, 10 Cush. 489. *Wyer* v. *Dorch., &c. Bank*, 11 Cush. 51.

(*p*) *Miller* v. *Race*, *supra*.

(*q*) *King* v. *Milsom*, 2 Campb. 5.

(*r*) *Bailey* v. *Bidwell*, 13 M. & W. 76.

where he has given value for the security (*s*); but gross negligence may be evidence of *mala fides*, though it is not the same thing (*t*).

Any admission on the part of the defendant that the plaintiff's property has come into his hands, or under his control, and has then been wrongfully dealt with by him, will be evidence of a conversion. Thus, where a defendant, in answer to a demand made upon him by the plaintiff for the delivery of a bill of exchange, said that he could not give it up, because it had been burnt, it was held that this was evidence of a conversion by him of the bill (*u*). Formerly, the holder of a bill might renounce his title by word of mouth (*x*), but now such renunciation must be by writing (*y*).

If a cheque payable to bearer is lost, and is tendered a few days after the loss to a shopkeeper in payment of goods purchased, and the shopkeeper takes it without any inquiry, and without any knowledge of the name or address of the person tendering the cheque, he will, nevertheless, be entitled to recover the amount from the maker, unless the latter can prove that the shopkeeper knew that the cheque was a lost cheque at the time he took it (*z*).

The question is, whether the holder took the cheque under circumstances which ought reasonably to have aroused his suspicion, and the lapse of time since the cheque was drawn is one circumstance upon which suspicion would arise (*a*).

By sect. 24 of the Bills of Exchange Act, 1882, it is enacted

539 that, subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

(*s*) Bayley, J., *Backhouse* v. *Harrison*, 5 B. & Ad. 1105. *Raphael* v. *Bank of England*, 17 C. B. 161, overruling *Snow* v. *Leatham*, 2 C. & P. 317; *Snow* v. *Peacock*, 3 Bing. 406; 11 Moore, 286; and *Easley* v. *Crockford*, 10 Bing. 243; 3 M. & Sc. 701.

(*t*) *Goodman* v. *Harvey*, 4 Ad. & E. 876. *Arbouin* v. *Anderson*, 1 Q. B. 504.

(*u*) *M'Kewen* v. *Cotching*, 27 L. J., C. P. 41.

(*x*) *Lacy* v. *Kinaston*, 1 Ld. Raym. 690.

(*y*) Bills of Exchange Act, 1882, s. 62.

(*z*) Ld. Kenyon, *Lawson* v. *Weston*, 4 Esp. 57. "The cases of *Gill* v. *Cubitt*, 3 B. & C. 566, and *Down* v. *Halling*, 4 B. & C. 330, which were considered to have gone far to overrule the case of *Lawson* v. *Weston*, are no longer law; and the opinion of Ld. Kenyon is set up and supported by all the lawyers." Ld. Brougham, in *Bank of Bengal* v. *Macleod*, 7 Moore, P. C. 35. *Bank of Bengal* v. *Fagan*, *ib.* 72. Willes, J., *Raphael* v. *Bank of England*, 17 C. B. 161, 175. *Watson* v. *Russell*, 3 B. & S. 38; 31 L. J., Q. B. 304.

(*a*) *London and County Banking Co.* v. *Groome*, 8 Q. B. D. 288; 51 L. J. 224. As to overdue bills, see sect. 36 of Act of 1882.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

Where the defendant accepted a bill in blank, and it was drawn and indorsed by the person to whom the defendant gave the bill subsequently, and by forgery, it was held that the plaintiffs who took the bill without notice might recover from the defendant (*b*). With respect to the proviso to this section, it seems that although before the passing of the Act a person whose name is used without authority may ratify the act (even though known to be a crime), and thus make himself civilly responsible just as if he had originally authorized it (*c*), yet it is not so since the passing of the Act.

A person whose name has been forged must not lie by and allow others to assume that his signature is genuine; but his mere silence for a fortnight, during which the position of the holder was not altered, cannot be held to be an adoption of liability or an estoppel (*d*).

By sect. 29—(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

540 (3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor, and all parties to the bill prior to that holder.

By sect. 30—(1) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *primâ facie* deemed to be a holder

(*b*) *L. & S. W. Bank* v. *Wentworth*, 5 Ex. D. 96; 49 L. J. 657.

(*c*) Per Ld. Blackburn in *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82, p. 99; but see *Brook* v. *Hook*, L. R., 6 Ex. 89; 40 L. J., Ex. 50.

(*d*) *M'Kenzie* v. *British Linen Co.*, *supra*.

in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (*e*).

By sect. 31—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

541 (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

By sect. 38, the rights and powers of the holder of a bill are as follows:—

(1) He may sue on the bill in his own name:

(2) Where he is a holder in due course (*f*), he holds the bill free from any defect of title of prior parties, as well as from mere

(*e*) By sect. 90, a thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not. The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance: he is precluded from denying to a holder in due course (see sects. 29 and 30) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill. Sect. 54. And similarly of a bill to the order of drawer, and to the order of a third person. Sect. 54 (b) and (c). The drawer of a bill by drawing it engages that on due presentation it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided the requisite proceedings are taken; and he is precluded from denying to a holder in due course (see sects. 29 and 30) the existence of the payee, and his then capacity to indorse. The indorser of a bill by indorsing it engages it shall be accepted, and if dishonoured to compensate the holder or subsequent indorser. He is precluded from denying to a holder in due course (sects. 29, 30) the genuineness and regularity in all respects of the drawer's signature and all previous indorsements, and to an indorsee that the bill was, at the time of indorsement, a valid and subsisting bill, and that he had then a good title thereto. Sect. 55. By sect. 56, where a person signs a bill otherwise than as drawer or accepter, he incurs liabilities of an indorser to a holder in due course. With respect to promissory notes, it is enacted, that when a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. Sect. 86. The maker of a promissory note by making it engages that he will pay it according to the tenor, and is precluded from denying to a holder in due course (sects. 29, 30) the existence of the payee, and his then capacity to indorse.

(*f*) See sects. 29, 30, *ante*, p. 539.

personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill (*g*).

Right to wild birds and animals ferœ naturæ—*Right to game.*—So long as animals *ferœ naturæ* remain upon a man's land they belong to him; but the moment they leave his land his possessory property is gone: and this is so, even if they are hunted out of his land by a trespasser, and although they are killed by the trespasser on another man's land. The property in wild grouse is not absolute in any one. So long as the wild bird is upon a man's land, he has a possessory property in it; but, as soon as it flies or goes off his land, his property is gone (*h*). If *A* starts a hare in the ground of *B*, and hunts it and kills it there, the property continues all the while in *B;* but, if *A* starts a hare in the ground of *B*, and hunts it into the ground of *C*, and kills it there, the property has been held to be in *A*, the hunter, although he is liable to actions of trespass on the lands both of *B* and *C* (*i*). Where rabbits were snared and killed in Lord Exeter's land by poachers, and were sold by them to a dealer in game, it was held that the rabbits were the property of Lord Exeter, on whose land they were started and killed, and not the property of the dealer in game (*k*); and, where rabbits are bred in a warren, the owner of the warren has a right of property in the rabbits so long as they

542 remain on his land; but, as soon as they leave his land, his right of property in them is gone (*l*).

Where the Bishop of London granted to the defendant a lease of land for a term of years, excepting the trees and the herons and shovellers making their nests in the trees, and the defendant, during the lease, took some of the herons, and the bishop brought an action of trespass against him, it was held that he was entitled to recover the value of the herons; for, although they were *ferœ*

(*g*) By sect. 58—(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

(*h*) *Rigg* v. *Lonsdale*, 1 H. & N. 923, affirming *Lonsdale* v. *Rigg*, 11 Exch. 654; 25 L. J., Ex. 81.

(*i*) Holt, C. J., *Sutton* v. *Moody*, 1 Ld. Raym. 250. *Churchward* v. *Studdy*, 14 East, 249.

(*k*) *Blades* v. *Higgs*, 12 C. B., N. S. 501; 31 L. J., C. P. 151; 32 *ib.* 182; 34 *ib.* 286.

(*l*) Bro. Abr. Property, pl. 4. *Hadesden* v. *Gryssell*, Cro. Jac. 195.

naturæ, he had an interest in them by reason of the trees in which they built (*m*).

Right to fish.—If a whale has been struck by a harpooner, the whale, so long as the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, is a fast fish, though during that time it is struck by a harpooner of another ship; and, if the whale afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But, if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it (*n*). But, although the harpoon comes out of the fish, or is detached from the line, yet, if the whale is so entangled in the rope as to give the first striker the same power over it as if the harpoon were fixed, the fish will still continue a fast fish, and be the property of the first striker (*o*); and, if the fish is unlawfully liberated by the wrongful interference of another person, who afterwards harpoons it and secures it, it will, nevertheless, be the property of the first striker (*p*). But, if the interference of such other person takes place before the fisherman has got the fish into his power, or under his dominion and control, there can be no right of property in, or title to, the fish (*q*). Thus, where the plaintiff, while fishing for pilchards, had nearly encompassed a vast quantity of fish with a net, and would have captured the whole of them but for the interference of the defendant, who came with boats and sailors, and drove the fish into his own nets, and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his dominion and control, but ought to have sued the defendant for interfering with
543 his nets, and unjustifiably preventing the plaintiff from exercising his occupation and calling of a fisherman, and catching the fish (*r*).

Right to servant's livery.—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them, until he had served a year (*s*).

(*m*) *Bishop of London's case*, 14 Hen. 8, f. 1.
(*n*) *Littledale* v. *Scaith*, 1 Taunt. 243, note (a). *Aberdeen Artic Co.* v. *Sutter*, 4 Macq. H. L. 355.
(*o*) *Hogarth* v. *Jackson*, M. & M. 58.
(*p*) *Skinner* v. *Chapman*, M. & M. 59, n.
(*q*) Erle, J., *Stevens* v. *Jeacocke*, 11 Q. B. 741.
(*r*) *Young* v. *Hichens*, 6 Q. B. 606.
(*s*) *Crocker* v. *Molyneux*, 3 C. & P. 470.

Parish property.—Churchwardens represent the parish in respect of its movable property; and in that capacity they have succession, and may maintain an action even against the incumbent (*t*).

SECTION IV.

INJURIES TO RIGHTS OF PROPERTY NOT HAVING A CORPOREAL OBJECT.

Incorporeal property—Right of ferry.—A ferry has been said to be a continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side; and, as such, the existence of a ferry is obviously for the benefit of the public. The advantage to the public is so great that the Crown has from time to time granted rights of ferry; and all common ferries have their origin in Royal grant, or in prescription, which presumes such grant.

The owner of a ferry is the owner of a particular description of monopoly. He has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry. The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality; and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits (*u*). The right is an incorporeal right, unaccompanied, in general, by any property

544 in the soil (*x*). A right to take tolls for the passage of a ferry or a bridge must be transferred by deed (*y*).

Incorporeal property—Disturbance of a ferry.—The owner of a ferry has a cause of action against every intruder who carries in the line of the ferry, whether it is done directly or indirectly. He has a right to the transport of the passengers using the way, and whoever makes a landing-place near the ferry, so as to be in substance the same as the ferry landing-place, making no

(*t*) *Turner* v. *Baynes*, 2 H. Bl. 559; *Wilkinson* v. *Verity*, L. R., 6 C. P. 206; 40 L. J., C. P. 141.

(*u*) *Hopkins* v. *Great Northern Rail. Co.*, 2 Q. B. D. 224; 46 L. J., Q. B. 265.

(*x*) *Peter* v. *Kendal*, 6 B. & C. 710.

(*y*) *Reg.* v. *Marquis of Salisbury*, 8 Ad. & E. 739.

material difference to travellers, is guilty of a tort. This is on the ground that the owner of the ferry is bound to maintain proper boats, boatmen, and all other things necessary to maintain the ferry in an efficient state for the use of the public. It does not, therefore, necessarily apply to a monopoly of passage created by a statute (*z*). However, if the public convenience requires a new passage at such a distance from the old ferry as makes such new passage a real convenience to the public, the proximity seems not to be a ground of action. The area for the monopoly of a ferry, therefore, depends on the need of the public for a new passage (*a*). Where a railway company constructed across a river, half a mile above an ancient ferry, a railway bridge and a footbridge, and, in consequence of the footbridge being used by persons going to the railway station and to other places, the traffic across the ferry fell off, and the ferry was given up, it was held that no action could be maintained for disturbance of the ferry, on the ground that, the general change of circumstances in the country at large from the introduction of railways having rendered the new highway necessary, it was not a violation of the plaintiff's right to continue the new highway across the river (*b*).

The right to a market.—Originally it was considered a great benefit to towns to give them a fair or market; and this was thought so beneficial that it was thought right, not only to give the fair or market, but also to grant a charter so as to prevent persons from disturbing the market. The mere grant of a market does not of itself confer the right to prevent persons from selling marketable goods on market days in their private houses, though within the town or manor where the market may be held (*c*). But such a right may be acquired by immemorial enjoyment or prescription (*d*); and, under ever so modern a grant of a market by

545 virtue of the royal prerogative, if a rival market is set up, that will be a disturbance of the franchise (*e*).

A market without metes or bounds may extend over adjoining streets, which will be presumed to have been dedicated to the public, subject to the exercise of the market rights; and the Paving Acts will not be construed as interfering with such rights (*f*).

Market—Market tolls.—A toll imposed on the occupier of every

(*z*) *Letton* v. *Goodden*, L. R., 2 Eq. 123; 35 L. J., Ch. 427.

(*a*) *Newton* v. *Cubitt*, 12 C. B., N. S. 32; 31 L. J., C. P. 246.

(*b*) *Hopkins* v. *Great Northern Rail. Co.*, 2 Q. B. D. 224; 46 L. J., Q. B. 265.

(*c*) *Mayor of Macclesfield* v. *Chapman*, 12 M. & W. 18. *Mayor of Manchester* v. *Lyons*, 22 Ch. D. 287; 47 L. T. 677.

(*d*) *Mosley* v. *Walker*, 7 B. & C. 40; 9 D. & R. 863. *Mayor of Macclesfield* v. *Pedley*, 4 B. & Ad. 397. *Mayor of Penryn* v. *Best*, 3 Ex. D. 292.

(*e*) Blackburn, J., *Fearon* v. *Mitchell*, L. R., 7 Q. B. 690; 41 L. J., M. C. 170.

(*f*) *Att.-Gen.* v. *Horner*, 11 Ap. Cas. 66; 55 L. J., Q. B. 193. *Great Eastern Rail. Co.* v. *Goldsmid*, 9 Ap. Cas. 927; 54 L. J., Ch. 162.

stall erected for the sale of articles is a toll on the stall itself in respect of the use of the soil, and not on the articles sold at the stall; for the occupier is to pay the toll whether he brings the article to the market or not; and he pays in respect of the space his stall occupies, and not in respect of the articles he sells (*g*). But, when the toll is placed on the specific article, such as a toll on every horse admitted into or sold within the limits of the market, then the toll is a market toll, and the article cannot be lawfully sold without payment of the toll (*h*). An immemorial toll may be sustained as a claim to a reasonable toll, varying in amount from time to time with the value of money; and its lawful origin may be presumed within legal memory, by means of a dedication of the streets to the public, and a contemporaneous reservation of the toll on the part of the Crown between the time of Henry III. and Charles I. (*i*).

Market—Disturbance of a market.—If people come to a market to sell their wares, they are subject to toll, which is payable to the owner of the market (*k*); and, if they come near the boundary of the market, and avail themselves of the concourse of persons coming to and fro, to find customers, and sell without the boundary of the market, so as to avoid the payment of the toll, an action is maintainable against them by the owner of the market for a disturbance of the market (*l*). But it must be proved that the thing was done wilfully and intentionally (*m*). It is not necessary that

546 the defendant should actually have sold anything; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient (*n*). A new market held on the same day as the old is a disturbance by intendment of law; but if held on a different day, it is only evidence of disturbance (*o*).

Under certain circumstances, an old franchise of market will be

(*g*) *Caswell* v. *Cook*, 11 C. B., N. S. 637; 31 L. J., M. C. 185.

(*h*) *Reg.* v. *Casswell*, L. R., 7 Q. B. 328; 41 L. J., M. C. 108. See *Llandaff, &c. Market Co.* v. *Lyndon*, 8 C. B., N. S. 515; 30 L. J., M. C. 105, as to the sale of horses by a licensed auctioneer; and, as to penalties for carrying things for sale from house to house within the boundaries of a market, *Caswell* v. *Cook*, *supra*. As to the right to a stall in an ancient market, and the right of shopkeepers to place stalls in the street in front of their houses on market days, see *Ellis* v. *Mayor, &c. of Bridgnorth*, 15 C. B., N. S. 52; 32 L. J., C. P. 273. *Ashworth* v. *Heyworth*, L. R., 4 Q. B. 316; 38 L. J., M. C. 91.

(*i*) *Lawrence* v. *Hitch*, L. R., 3 Q. B. 521; 37 L. J., Q. B. 209; and see as to reasonable fees, *Mills* v. *Mayor of Colchester*, L. R., 3 C. P. 476; 37 L. J., C P. 278.

(*k*) *Great Yarmouth* (*Mayor, &c.*) v. *Groom*, 1 H. & C. 102; 32 L. J., Ex. 74.

(*l*) *Bridgland* v. *Shapter*, 5 M. & W. 375.

(*m*) *Brecon* (*Mayor, &c.*) v. *Edwards*, 1 H. & C. 51; 31 L. J., Ex. 368.

(*n*) *Mayor, &c. of Dorchester* v. *Ensor*, L. R., 4 Ex. 335; 39 L. J., Ex. 11.

(*o*) *Yard* v. *Ford*, 2 Wms. Saund. 174. *Mayor of Lorchester* v. *Ensor*, *supra*. *Elwes* v. *Payne*, 12 Ch. D. 468; 48 L. J., Ch. 831.

extinguished by the creation of a new market by Act of Parliament (*p*).

According to Fleta, a new market, opened within seven miles of an existing, legally established market, is actionable (*q*). Such a limit may be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns, where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished, and would now depend upon the public need for it (*r*).

The grantee of a market, who takes a toll for his own benefit, incurs an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. If, therefore, he erects any obstruction in the market of such a nature as to be dangerous to cattle, he is responsible for any injury thereby caused to the cattle of those who attend the market (*s*).

Literary and artistic property.—Every one has at common law a right to the exclusive possession and enjoyment of his intellectual and manual labours, so that, if a man devotes his private hours to literary composition or artistic works, another person has no right to appropriate to himself the produce of his labour without his consent. The unpublished manuscript of the author, for example, cannot be used, copied, or published, without his authority (*t*); nor the unpublished lectures of a lecturer (*u*); nor the picture, etching, or portrait of the painter or photographer (*x*). If, therefore, a geologist gets a fossil engraved or photographed, in order to send it to his friends, or the owner of a picture or a portrait lends it to a friend to get it engraved, any one who gets possession of the photograph or the engraving has no right at common law to take copies of it for sale; and whoever handles or deals with

547 photographs, without the consent of the owner of them, in order to get negatives from them, or for any other purpose, is guilty of an act of trespass (*y*).

Copyright in books, &c.—It is now held that copyright in a published work only exists by statute (*z*). To put an end to the doubts

(*p*) *Mayor, &c. of Manchester* v. *Lyons*, 22 Ch. D. 287.

(*q*) Fleta, lib. 4, c. 28, s. 13.

(*r*) Willes, J., *Newton* v. *Cubitt*, 12 C. B., N. S. 32; 31 L. J., C. P. 254.

(*s*) *Lax* v. *Corporation of Darlington*, 5 Ex. D. 29; 49 L. J., Ex. 105.

(*t*) *Queensberry* (*Duke of*) v. *Shebbeare*, 2 Eden, 329. *Macklin* v. *Richardson*, Ambl. 694.

(*u*) *Post*, p. 552.

(*x*) *Prince Albert* v. *Strange*, 1 Mac. & G. 42; 18 L. J., Ch. 126.

(*y*) *Mayall* v. *Higby*, 1 H. & C. 148; 31 L. J., Ex. 329.

(*z*) *Reade* v. *Conquest*, 11 C. B., N. S. 479; 30 L. J., C. P. 213; 31 *ib.*, 153; *Wheaton* v. *Peters*, 8 Pet. (U. S.) 591; *Boucicault* v. *Hart*, 13 Blatchf. (U. S. C. C.) 47. But the author at the common law has the property in his manuscript and its contents before publication, and an unauthorized publication thereof does not defeat this right, and such publica-

which formerly existed as to the extent and duration of the rights of authors of published works (*a*), the 8 Ann. c. 19, was passed, defining those rights. That statute, however, has been repealed by the 5 & 6 Vict. c. 45, sect. 2 of which enacts that the word "copyright" as used in that Act shall be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies" (*b*) of any book, sheet of letterpress, sheet of music, dramatic piece, map, chart, &c., or any subject to which the word is therein applied; and (s. 3) that the copyright in books published after the passing of the Act (*c*), in the lifetime of the author, shall endure for the author's life, and for seven years after his death; but, if the seven years expire before the end of forty-two years from the first publication, the copyright is to last for forty-two years. If the book is published after the author's death, the copyright is to endure for forty-two years from the first publication thereof. Authors and proprietors of books in which there was an existing copyright at the time of the passing of the Act may (s. 4) by arrangement between themselves extend the benefit of the Act to such existing copyright. All copyright is (s. 25) personal property, and transmissible as such. Where seven persons, acting under the direction of trustees for a charity, compiled a book, which was registered in their names, but was published by and for the profit of the charity, it was held that the executor of the survivor of the seven compilers had not obtained the benefit of the extended term of copyright granted by the 5 & 6 Vict. c. 45, s. 4 (*d*). The proprietor of the copyright in books must (s. 13) make an entry in the register of the Stationers' Company of the title of such book, the time of its first publication (*dd*), and the name and place of abode of the publisher and proprietor of the copyright, in the form given in the schedule. The proprietor of a book or periodical

tion will be enjoined (*Bartlett* v. *Crittenden*, 5 McLean (U. S. C. C.), 32); but a publication by the author's consent, without having first secured a copyright, operates as a dedication to the public.

(*a*) *Donaldson* v. *Beckett*, 2 Bro. P. C. 129. *Jefferys* v. *Boosey*, 4 H. L. C. 846; 24 L. J., Ex. 81. Section 4952 of the Rev. Stat. of the United States provides that, "Any citizen of the United States or resident therein, who shall be the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same: and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors may reserve the right to dramatize or to translate their own works."

Copyrights are granted for twenty-eight years from the time the title thereof is recorded, and may be continued, either by the author or his "widow or children" for fourteen years.

(*b*) *Novello* v. *Sudlow*, 12 C. B. 177. *Millar* v. *Taylor*, 4 Burr. 2303.

(*c*) 1st July, 1842.

(*d*) *Marzials* v. *Gibbons*, L. R., 9 Ch. 518; 43 L. J., Ch. 774.

(*dd*) *Thomas* v. *Turner*, 33 Ch. D. 292.

has no copyright therein, if it is not actually published at the date of its registration at Stationers' Hall. Where, therefore, the proprietor of a periodical had registered the first number at Stationers' Hall before publication, it was held that he was not entitled to an injunction to restrain an alleged infringement, although he had

548 entered on the register the date of the intended publication, and the first number was afterwards published on the date so given (*e*). The name of the publisher registered must be that of the first publisher (*f*).

No copyright can be gained in a work which is founded on fraudulent representation and deceit, and professes to be written by some celebrated author when it is not so written, or in a work which is subversive of good order, morality, or religion; for, if there is no right to sell the book, no loss can be sustained by an injury to the sale (*g*). Copyright is divisible, and may be obtained in respect of certain chapters of a work only (*h*).

In order to entitle the author to copyright, the book must be first published in the United Kingdom; but it is sufficient if the author is an alien friend sojourning in a colony. Copyright, when acquired, extends over the whole of the British dominions (*i*).

The Act applies to magazines; and the publication in a separate form of a serial which has appeared in successive numbers of a magazine may be restrained, if the first number of the magazine has been registered, although neither the serial nor the first number in which it appeared has been separately registered (*k*). The Act also applies to newspapers (*l*). An album for photographs is not a book (*ll*).

It is doubtful whether there can be any copyright in the title of a book (*m*). But if the name of a publication is fraudulently adopted, an action for infringement of a trade mark will lie (*n*).

Copyright—Transfer of copyright.—Every registered proprietor of copyright may assign his interest, or any portion thereof, by making an entry in the register of the assignment, and of the

(*e*) *Henderson* v. *Maxwell*, 5 Ch. D. 892; 46 L. J., Ch. 891.

(*f*) *Coote* v. *Judd*, 23 Ch. D. 727.

(*g*) *Wright* v. *Tallis*, 1 C. B. 907; 14 L. J., C. P. 283. *Stockdale* v. *Onwhyn*, 5 B. & C. 173.

(*h*) *Low* v. *Ward*, L. R., 6 Eq. 415; 37 L. J., Ch. 841.

(*i*) *Routledge* v. *Low*, L. R., 3 H. L. 100; 37 L. J., Ch. 454. As to copyright in works and dramatic pieces, &c. published abroad and afterwards published in this country, see *Boucicault* v. *Delafield*, 1 H. & N. 597; 33 L. J., Ch. 38; and see 49 & 50 Vict. c. 33 (The International Copyright Act, 1886). This Act, by sect. 8, applies the Copyright Acts to literary or artistic work (see sect. 11) first produced in a British Possession, unless otherwise provided under sect. 9.

(*k*) *Henderson* v. *Maxwell*, 4 Ch. D. 163.

(*l*) *Walter* v. *Howe*, 17 Ch. D. 708; 50 L. J., Ch. 621; disapproving of *Cox* v. *Land and Water Journal Co.*, L. R., 9 Eq. 324.

(*ll*) *Schove* v. *Schmincke*, 33 Ch. D. 546.

(*m*) *Dicks* v. *Yates*, 18 Ch. D. 76. See *Schove* v. *Schmincke*, *supra*.

(*n*) See *post*, p. 573.

name and place of abode of the assignee, in the form given in the schedule to the Act; and the assignment so entered is expressly exempted from stamp duty, and is of the same force and effect as if it had been made by deed (*o*). The assignment of the copyright of a book consisting of or containing a dramatic piece does not, in the absence of an expressed intention that it should do so, pass

549 the right of representing or performing it, which may be the subject of a subsequent assignment to a third person (*p*). In the absence of any contract to the contrary, the assignor of the copyright is still entitled to sell copies of the work printed before assignment (*q*).

If the assignment is made abroad, it must be a valid transfer according to the law of the country in which it is made, to constitute the transferee "an assign" of the author within the meaning of the statute of Victoria (*r*).

Where an agreement in writing was entered into between an author and a publisher, whereby the publisher was to publish at his own expense and risk a certain work written by the author, and, after deducting from the produce of the sale of the work the charges for printing, paper, advertisements, and other incidental expenses, and the publisher's commission, the profits remaining of any edition that should be printed were to be divided equally between the author and the publisher, it was held that this did not amount to an agreement for the sale of the copyright, but that it was a mere personal contract, a kind of special agency which could not be assigned so as to give the benefit of it to any other publisher (*s*). So long, however, as the publisher performed his part of the contract, he would be entitled to prevent the author from publishing a fresh edition, which might interfere with the sale of an edition on hand, or from putting an end to the agency without recompensing the publisher for all the expenses he had incurred (*t*).

An assignment of a copyright under the 5 & 6 Vict. c. 45, must be in writing. Where the author of a song agreed verbally with *S* to part with his copyright, but subsequently by an instrument in writing assigned it to *L*, who entered it at Stationers' Hall, it was held that the title of *L* must prevail, and that he

(*o*) See, as to the requisites of registration, *Wood* v. *Boosey*, L. R., 2 Q. B. 340; 3 Q. B. 223; 37 L. J., Q. B. 84. An assignment of a copyright must be recorded in the office of the Librarian of Congress within sixty days after its execution, or it will be void against any subsequent purchaser without notice. Sect. 4955, R. S. U. S.

(*p*) *Marsh* v. *Conquest*, 17 C. B., N. S. 418; 33 L. J., C. P. 319.

(*q*) *Taylor* v. *Pillow*, L. R., 7 Eq. 418.

(*r*) *Cocks* v. *Purday*, 5 C. B. 860.

(*s*) *Stevens* v. *Benning*, 1 K. & J. 174; 6 De G., M. & G. 223; 24 L. J., Ch. 153. *Hole* v. *Bradbury*, 12 Ch. D. 886; 48 L. J., Ch. 673.

(*t*) *Reade* v. *Bentley*, 3 K. & J. 278.

could maintain an action to restrain *S* from infringing his copyright (*u*).

Copyright—Infringement of copyright.—The 5 & 6 Vict. c. 45 (*x*), provides for the recovery of damages from any person who causes a book to be printed for sale or for exportation without the consent in writing of the proprietor of the copyright; or who imports for sale or hire any such unlawfully printed book, or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in

550 his possession for sale or hire, any such book, without the consent of the proprietor (*y*). The Act guards against piracy of words and sentiments; but it does not prohibit writing on the same subject. Thus, in the case of histories, a man may give a relation of the same facts and in the same order of time; and, in the case of dictionaries, an interpretation may be given of the same words. 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 (*z*); and there is no monopoly of the subject here any more than in the other instances; the jury must decide whether it is a servile imitation or not (*a*). If, however, the great bulk of the work consists of a mere mass of pirated matter, or the appropriation is such that the effect must be to injure or supersede the sale of the original work, the author or composer of the work will be liable to an action for damages, and also to an injunction to prevent the sale of the work (*b*); and it is no answer to say that the appropriation was fully acknowledged, and made without any dishonest intention (*c*). The compiler of a guide-book or directory is not entitled to avail himself of the information contained in previous works on the same subject, but must obtain and arrange the requisite information independently for himself (*d*); and it is not sufficient for him to cut the

(*u*) *Leyland* v. *Stewart*, 4 Ch. D. 419; 46 L. J., Ch. 103.

(*x*) This statute repeals the 41 Geo. 3, c. 107, and the 54 Geo. 3, c. 156.

(*y*) Penalties are also imposed (sect. 17) upon unauthorized parties unlawfully importing books reprinted abroad, or knowingly selling, publishing, &c., such books, or having them in their possession for sale or hire: as to "*unlawfully* importing" and "*knowingly* selling," see *Cooper* v. *Whittingham*, 15 Ch. D. 501; 49 L. J., Ch. 752. These penalties are cumulative upon the remedy by way of action. *Novello* v. *Sudlow*, 12 C. B. 188. As to forfeiture of copies of piratical editions, see *Delfe* v. *Delamotte*, 3 K. & J. 581; and *Hole* v. *Bradbury*, *supra*; and as to the protection in the colonies of works entitled to copyright in England, 10 & 11 Vict. c. 95; and as to international copyright, 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 49 & 50 Vict. c. 33. *Avanzo* v. *Mudie*, 10 Exch. 203. *Wood* v. *Chart*, L. R., 10 Eq. 193; 39 L. J., Ch. 641.

(*z*) Subject to the qualification stated in *Kelly* v. *Morris*, *infra*.

(*a*) *Cary* v. *Longman*, 1 East, 362. *Cary* v. *Kearsley*, 4 Esp. 168. *Jarrold* v. *Houlston*, 3 Kay & J. 708.

(*b*) *Campbell* v. *Scott*, 11 Sim. 38. *Bohn* v. *Bogue*, 10 Jur. 420. *Tinsley* v. *Lacy*, 1 H. & M. 747; 32 L. J., Ch. 535. *Hotten* v. *Arthur*, 1 H. & M. 603; 32 L. J., Ch. 771. See *Ager* v. *Peninsular Telegraph Co.*, 26 Ch. D. 637; 53 L. J., Ch. 589.

(*c*) *Scott* v. *Stanford*, L. R., 3 Eq. 718; 36 L. J., Ch. 729.

(*d*) *Kelly* v. *Morris*, L. R., 1 Eq. 697; 35 L. J., Ch. 423.

slips from the rival directory, and send persons round to ascertain their correctness (*e*). He may, however, use such slips for the purpose of directing his canvassers to the persons from whom the required information is to be obtained (*f*). An author who has been led by a former author to refer to older writers may, without committing piracy, use the same passages from the older writers which were used by the former author (*g*). The true principle is that, where one man for his own profit puts into his work an

551 essential part of another man's work, from which that other, but for the act of the first, might have derived profit, there is evidence of a piracy (*h*). If a person, under the pretence of writing a criticism upon an author's work, copies out the most attractive parts of it, and so large a quantity of the text as to injure and interfere with the sale of the work, the author or proprietor is entitled to an injunction (*i*). But, where the reviewer or critic takes no more than is reasonably sufficient for a mere review or critique, an injunction will be refused (*k*). A fair abridgment is in certain cases allowable, but not where it is merely colourable or evasive, and is so far a reproduction of the original work as to injure the sale of it (*l*).

Copyright—Injunction.—An injunction to restrain an infringement of copyright may be obtained by the grantee or assignee of a printed work, although he has not paid the author the price agreed upon for the writing of the work (*m*); but, before the court will interfere in his favour, it must be shown that he has a good legal title to the copyright (*n*). Where a person, being about to publish a periodical publication under a certain title, and knowing another publisher was engaged in the production of a periodical under a similar title, allowed the latter to continue his preparations without

(*e*) *Morris* v. *Ashbee*, L. R., 7 Eq. 34.

(*f*) *Morris* v. *Wright*, L. R., 5 Ch. 279.

(*g*) *Pike* v. *Nicholas*, L. R., 5 Ch. 251; 38 L. J., Ch. 529.

(*h*) *Bradbury* v. *Hotten*, L. R., 8 Ex. 1; 42 L. J., Ex. 28. One author may copy from another, provided such copying does not amount to more than fair quotations. But if this is exceeded to such an extent as to sensibly diminish the value of the original, or so as to substantially diminish the value of the author's labour, there is an infringement of the copyright: *Greene* v. *Bishop*, 1 Cliff. (U. S. C. C.) 186; *Webb* v. *Powers*, 2 W. & M. (U. S. C. C.) 514; *Folsom* v. *Marsh*, 2 Story (U. S. C. C.) 100. So a *bonâ fide* abridgment is punishable: *Lawrence* v. *Dana*, 4 Cliff. (U. S. C. C.) 1.

(*i*) *Campbell* v. *Scott*, 11 Sim. 31. *Saunders* v. *Smith*, 3 Myl. & Cr. 711. *Bramwell* v. *Halcomb*, 3 *ib.* 737.

(*k*) *Bell* v. *Walker*, 1 Bro. Ch. C. 450.

(*l*) *Tonson* v. *Walker*, 3 Swanst. 672.

(*m*) *Cox* v. *Cox*, 11 Hare, 118.

(*n*) *Stevens* v. *Benning*, 6 De G., M. & G. 223; 24 L. J., Ch. 153. An injunction will not be granted in the first instance, where there is a doubt as to whether there has been an infringement (*Blunt* v. *Patten*, 2 Paine (U. S. C. C.) 397), nor if there is any doubt as to the existence of a copyright: *Miller* v. *McElroy*, 1 Am. L. Reg. 198. In other words, in order to entitle a person to an injunction, his rights and their violation must be clear: *Scribner* v. *Stoddart*, 19 Am. L. Reg. (U. S.) 433; *Lodge* v. *Stoddart*, 9 Rep. 825. Nor will an injunction be granted where the publisher has been led into the violation by encouragement and acquiescence of the author: *Cooper* v. *Mattheys*, 8 Law Rep. 413.

objection, and himself advertised it, it was held that he could not restrain the latter from using the title, although as a matter of fact his periodical was published first (*o*).

Copyright—Plot of a novel.—Where the defendant represented the incidents of a published novel in a dramatic form upon the stage, it was held that this was not an infringement of the copyright in the novel, as the defendant had neither printed nor multiplied copies of the work (*p*). But a person who prints a drama constructed out of a novel, infringes the copyright in the novel (*q*).

Copyright—Limitation of actions.—All actions for offences committed against the Act must be commenced within twelve months after the commission of the offence (*r*). This, however, does not prevent an action for an injunction to restrain a piracy of copyright by the sale of a book published more than twelve months before action brought (*s*).

552 *Copyright in lectures.*—In all lectures printed and published by the author or his assigns, there is the same copyright as in printed books (*t*); and an injunction may be obtained to prevent persons attending lectures from taking notes and publishing such lectures for profit without the author's consent (*u*). Whether the lecture has been committed by the lecturer to writing or not, the audience are only at liberty to take notes for their own personal purposes, and they may not publish the lecture for profit (*x*).

Copyright—Published dramas and musical compositions.—By the Copyright (Musical Compositions) Act, 1882 (*y*), the proprietor of the copyright in any musical composition first published after the 10th of August, 1882, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of

(*o*) *Maxwell* v. *Hogg*, L. R., 2 Ch. 307; 36 L. J., Ch. 433.

(*p*) *Reade* v. *Conquest*, 9 C. B., N. S. 755; 30 L. J., C. P. 209. *Cumberland* v. *Copeland*, 1 H. & C. 194; 31 L. J., Ex. 353.

(*q*) *Tinsley* v. *Lacy*, 1 H. & M. 747; 32 L. J., Ch. 535.

(*r*) 5 & 6 Vict. c. 45, ss. 24, 26. As to articles published in magazines and periodical works, see *Mayhew* v. *Maxwell*, 1 Johns. & H. 312.

(*s*) *Hogg* v. *Scott*, L. R., 18 Eq. 444; 43 L. J., Ch. 705. In this country the action must be commenced within two years from the date of the infringement.

(*t*) 5 & 6 Vict. c. 45. By the 5 & 6 Wm. 4, c. 65, vesting the sole right of printing and publishing lectures in the author and his assigns, penalties are imposed upon all persons taking down, or making a copy of such lectures, and printing or otherwise copying and publishing them, without leave of the author or his assigns, and upon all persons selling or publishing copies, &c., or exposing them for sale without consent, &c. These penalties are cumulative upon the common law remedy by way of action (*Beckford* v. *Hood*, 7 T. R. 627); but it is provided (sect. 5), that the Act shall not extend to lectures of which notice in writing has not been given to two justices, in manner therein mentioned, nor to lectures delivered in a university or public school or college, or on a public foundation, &c.

(*u*) *Abernethy* v. *Hutchinson*, 1 H. & Tw. 40; 3 L. J., Ch. 209.

(*x*) *Nicols* v. *Pitman*, 26 Ch. D. 374; 53 L. J., Ch. 552.

(*y*) 45 & 46 Vict. c. 40.

every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved (*z*).

Where one man employs another, for reward, to compose a musical or dramatic piece, the composition becomes, upon payment, the property of the employer (*a*). But a mere contract to write a play will not vest the copyright in the employer, although part of the price agreed upon is paid; nor will the employer become joint owner with the writer by reason of alterations, even to the extent of a whole scene, having been made by others at the suggestion and expense of the employer (*b*). To constitute a joint authorship of a dramatic piece or other literary work, it must be the result of a preconcerted joint design (*b*). A dramatic production, to be entitled to copyright, must be an original work, and not a mere copy of novels or works of fiction, in which there is an existing copyright. If, however, the drama is partly made up of new

553 matter, the composer will be entitled to copyright in such new original matter (*c*).

If a musical composer adapts words of his own to an old air, he acquires a copyright in the combination (*d*). So, if he arranges an opera for the pianoforte, such an arrangement is an independent musical composition, of which he, and not the composer of the opera, is the author for purposes of registration, although it does not follow that he would not infringe the copyright of the original author by such an arrangement (*e*). 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 representing or performing it (*f*).

The author of a dramatic work which had been first represented in a foreign country was not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a publication of it within the meaning of the 7 Vict. c. 12, s. 19 (*g*). But the English assignee of the copyright of a foreign musical composer was within the protection of the statutes; and so, it would seem, was a foreigner who resided and published in

(*z*) If the right of public performance and the copyright are vested in different owners, the owner of the right of public performance may require the owner of the copyright to print the notice on any copy of the music to be thereafter published; and the owner of the copyright must print such notice or be liable to a penalty of 20*l*. 45 & 46 Vict. c. 40, ss. 2, 3.

(*a*) *Hatton* v. *Kean*, 7 C. B., N. S. 268; 29 L. J., C. P. 20.

(*b*) *Levy* v. *Rutley*, L. R., 6 C. P. 523; 40 L. J., C. P. 244.

(*c*) *Cary* v. *Longman*, 1 East, 360.

(*d*) *Lover* v. *Davidson*, 1 C. B., N. S. 182.

(*e*) *Wood* v. *Boosey*, L. R., 2 Q. B. 340; 3 Q. B. 223; 37 L. J., Q. B. 84.

(*f*) *Chappell* v. *Boosey*, 21 Ch. D. 232; 51 L. J., Ch. 625.

(*g*) *Boucicault* v. *Chatterton*, L. R., 5 Ch. D. 267; 46 L. J., Ch. 305.

England (*h*); but not a foreigner who resided and published abroad (*i*).

Dramatic and musical compositions are within the new statute (49 & 50 Vict. c. 33) (*k*), and authors of works first published in one of the countries, parties to the convention of the international conference at Berne, 1885, have copyright in such works throughout the other countries; and by sect. 5 (1), where a book or dramatic piece is first produced in a foreign country, it is protected from being published in a translation in the United Kingdom. The Copyright Acts are also, by sect. 8, made applicable under certain conditions to "literary or artistic works" (*k*), first produced in a British Possession.

To constitute an infringement of dramatic copyright a material and substantial part of the plaintiff's dramatic production must be pirated. Though an appreciable part is taken, it does not follow as a consequence of law that the plaintiff's right is infringed, if such part is of a very unessential nature, or very unimportant and trifling in relation to the effect of the whole composition (*l*).

554 To publish, in the form of quadrilles and waltzes, the airs of an opera is an act of piracy (*n*).

Copyright—Unlawful representation of dramatic pieces and musical compositions.—The 5 & 6 Vict. c. 45, ss. 20, 21, and 3 & 4 Wm. 4, c. 15, vesting the sole and exclusive right of representing or performing dramatic pieces or musical compositions in the author and his assigns, impose penalties on all persons who, during the continuance of the right, represent or cause to be represented, without the consent in writing of the author or proprietor, such dramatic pieces or musical compositions at any place of dramatic entertainment. These penalties are given as an alternative remedy, the author or proprietor having the option of either suing for the penalty or bringing an action for all the profit accruing from the representation, or all the loss he has sustained, at his election; but the action must be brought within twelve calendar months (*o*). An assignment of the copyright of a book consisting of, or containing, a dramatic piece or musical composition, does not convey the right of representation to the assignee, unless the intention of the parties to that effect is duly registered (*p*). But an express assignment of the right of representation, although joined with an

(*h*) *D'Almaine* v. *Boosey*, 1 Y. & C. (Ex.) 288.
(*i*) *Delondre* v. *Shaw*, 2 Sim. 237.
(*k*) Sect. 11.
(*l*) *Chatterton* v. *Cave*, L. R., 10 C. P. 572; 2 C. P. D. 42; 3 Ap. Cas. 483; 47 L. J., C. P. 545.
(*n*) *D'Almaine* v. *Boosey*, 1 Y. & C. (Ex.) 288.
(*o*) 3 & 4 Wm. 4, c. 15, ss. 2, 3. Where not more than 40*s.* penalty or damages are recovered the costs are in the discretion of the court. 45 & 46 Vict. c. 40, s. 4.
(*p*) 5 & 6 Vict. c. 45, s. 22.

assignment of the copyright, does not require registration to entitle the assignee to sue for penalties (*q*). The part-owner of a dramatic entertainment cannot grant a license for its representation without the consent of all the other owners (*r*).

No one can be considered an offender against these statutes so as to be liable to an action at the suit of an author or proprietor, unless, by himself or his agent, he actually takes part in the representation (*s*). But the lessee of a theatre, who lets the same, together with the actors, properties, &c., to a third person, for one night, for the purpose of taking a benefit, will be liable, if by the direction of such person a piece is performed without the consent of the author (*t*).

In the case of the infringement of copyright of a musical composition, the person having the sole liberty of representing it under 5 & 6 Vict. c. 45, s. 20, is entitled to recover the penalty of 40*s.* given by 3 & 4 Wm. 4, c. 15, s. 2, although such musical composition has not been "represented at any place of dramatic enter-

555 tainment" (*u*). But in infringements of copyright of dramatic representation no penalty can be recovered unless the representation took place at a place of public entertainment; and a room in a hospital, to which nurses and attendants were admitted free of charge, was held not to be such a place (*x*).

A dramatic representation in which a substantial and material part of the music of an opera has been performed, constitutes an infringement of the sole right of performing that music, even though the operatic score of the representation complained of may have been obtained by independent labour bestowed upon an unprotected pianoforte arrangement of the original operatic score (*y*).

Where *A* wrote and published a novel which he afterwards dramatised, but the drama was never printed, published, or represented upon the stage, and *B*, in ignorance of *A*'s drama, also dramatised the novel, and assigned his drama to the defendant, who represented it upon the stage, it was held that the representation of *B*'s drama was not a representation of *A*'s drama (*z*); but, where the plaintiff published a drama called "Gold," and then printed and published the drama in the form of a novel, and the defendant's son dramatised the novel without having seen or known of the plaintiff's drama "Gold," but the consequence was

(*q*) *Lacy* v. *Rhys*, 4 B. & S. 873; 33 L. J., Q. B. 157. *Marsh* v. *Conquest*, 17 C. B., N. S. 418; 33 L. J., C. P. 319.
(*r*) *Powell* v. *Head*, 12 Ch. D. 686; 48 L. J., Ch. 731.
(*s*) *Russell* v. *Briant*, 8 C. B. 836; 12 L. J., C. P. 33. *Lyon* v. *Knowles*, 5 B. & S. 751; 32 L. J., Q. B. 71.
(*t*) *Marsh* v. *Conquest*, *supra*.
(*u*) *Wall* v. *Taylor*, 11 Q. B. D. 102; 52 L. J., Q. B. 558.
(*x*) *Duck* v. *Bates*, 13 Q. B. D. 843; 53 L. J., Q. B. 338.
(*y*) *Boosey* v. *Fairlie*, 7 Ch. D. 301; 47 L. J., Ch. 186.
(*z*) *Toole* v. *Young*, L. R., 9 Q. B. 523; 43 L. J., Q. B. 170.

that much of the drama, which the defendant caused to be represented, was the same as the plaintiff's, it was held that this representation was an infringement of the stage copyright in the drama (*a*).

Copyright—Sculpture.—The Sculpture Copyright Act, 1814 (*b*), vests the sole right of property in every new, original sculpture, model, copy, cast, and bust, for a certain term, in the person who makes or causes it to be made, provided the name of such person, and the date of publication, are put on the work before it is put forth or published. A remedy for the infringement of the right of property by persons making or importing copies, or exposing for sale, or disposing of, pirated copies, or pirated casts, without the consent of the proprietor, is provided; but the action must be brought within six calendar months after the discovery of the offence (*c*).

Copyright—Paintings, drawings, and photographs.—The 25 & 26 Vict. c. 68, s. 1, confers upon the authors of paintings, drawings,

556 and photographs, and their assigns, the sole and exclusive right, for the life of the author and seven years after his death, of copying, engraving, reproducing, and multiplying them, and the designs thereof, and photographs, and the negatives thereof, and penalties are imposed upon persons who repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause to be repeated, &c., any painting, drawing, or photograph, in which there shall be subsisting copyright, without the consent of the proprietor of the copyright; also for knowingly importing, selling, &c., repetitions, copies, &c., unlawfully made; also for fraudulently affixing names, &c. to any painting, drawing, or photograph, and doing various other specified things in derogation of the rights of the owner of the copyright. All these penalties are cumulative upon the remedy by action, and upon any other remedy to which any person aggrieved may be entitled (*d*). To make a photograph of an engraving which is itself engraved from the original picture is an infringement of the copyright in the original picture (*e*). But the owner of the copyright of a painting may assign the copyright to another to produce an engraving of one size, retaining the right of engraving copies of other sizes or by other means, and he may assign such right to any other person (*f*).

(*a*) *Reade* v. *Conquest*, 11 C. B., N. S. 479; 31 L. J., C. P. 153. *Reade* v. *Lacy*, 1 Johns. & H. 524; 30 L. J., Ch. 655.

(*b*) See International Copyright Act, 1886, 2nd schedule; 54 Geo. 3, c. 56. The stat. 38 Geo. 3, c. 71, has been repealed by the 24 & 25 Vict. c. 101.

(*c*) Sects. 3, 4. The International Copyright Act, 1886, applies, see s. 11.

(*d*) See sect. 11 of 25 & 26 Vict. c. 68.

(*e*) *Ex parte Beal*, L. R., 3 Q. B. 387; 37 L. J., Q. B. 161. *Graves's case*, L. R., 4 Q. B. 715; 39 L. J., Q. B. 31.

(*f*) *Lucas* v. *Cooke*, 13 Ch. D. 872.

Where two partners registered themselves under 25 & 26 Vict. c. 68, as the proprietors and authors of a photograph, the negative of which had been taken by one of the artists in their employ, it was held that the artist, and not the firm, was the author of the photograph, and that they should have registered themselves as proprietors of the copyright only (*g*).

Registration of the proprietorship of the copyright is made a condition precedent to the maintenance of any action (*h*), and to the recovery of any penalties under the statute (*i*), which penalties apply to each copy sold (*j*). But it is not necessary for the original proprietor to register his title. If he assigns it, his assignee's title is good; and such assignee, on a due registration of the assignment, is entitled to sue for an infringement of the copyright, or for penalties, &c. (*k*). It is not sufficient to enter the month in which the first publication takes place; the day of the first publication must be stated (*l*).

When any painting or drawing, or the negative of any photo-

557 graph, is sold or disposed of for the first time, or is made or executed for any other person, for good consideration, the person selling or disposing of, or making or executing the same, cannot retain the copyright thereof, unless it is expressly reserved to him by agreement in writing, by the vendee or assignee of the painting, or drawing, or negative, or the person for whom it has been executed; nor can the vendee or assignee claim the copyright, except by virtue of an agreement in writing, signed by the person selling or disposing of the same, or by his duly authorized agent (*m*).

Copyright—Prints and engravings.—The statutes of 8 Geo. 2, c. 13, and 7 Geo. 3, c. 38, vesting the sole right and liberty of printing and reprinting historical and other prints in the persons who invent and design them, or cause them to be designed and engraved from their own works and inventions, impose penalties upon all persons who engrave, etch, or in any manner copy and sell, in the whole or in part, by varying, adding to, or diminishing from, the main design, any historical or other print engraved with the name of the proprietor on each plate, and printed on every such print, &c. (*n*), or print, reprint, or import for sale, &c., any such print, without the written consent of the proprietor,

(*g*) *Nottage* v. *Jackson*, 11 Q. B. D. 627; 52 L. J., Q. B. 760.
(*h*) Sect. 4. See *Stannard* v. *Lee*, L. R., 6 Ch. 346; 40 L. J., Ch. 489.
(*i*) See *Elwood* v. *Christy*, 17 C. B., N. S. 754; 34 L. J., C. P. 130.
(*j*) See note (*c*), *supra*.
(*k*) *Graves's case*, L. R., 4 Q. B. 715; 39 L. J., Q. B. 31.
(*l*) *Mathieson* v. *Harrod*, L. R., 7 Eq. 270; 38 L. J., Ch. 139.
(*m*) 25 & 26 Vict. c. 68, ss. 1—3. See *Lucas* v. *Cooke*, *supra*; the International Copyright Act, 1886, applies, see sect. 11.
(*n*) *Colnaghi* v. *Ward*, 12 L. J., Q. B. 1.

attested as therein mentioned, or publish, sell, &c., without such consent. These penalties are cumulative upon the right of action (*o*); but the provision as to double costs of suit has been repealed (*p*); and the proceedings must be instituted within the time limited by the statutes (*q*).

Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Acts by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business (*r*). Where there is a sole proprietor, the surname alone without the christian name is sufficient (*s*); but the addition of the words "and company" in such a case makes the registration invalid (*t*).

The copying of prints and engravings by photography, or by any other process by which prints or engravings may be imitated or copied, is within the mischief intended to be provided against (*u*); and so is the selling of a copy with colourable variations (*x*).

558 But where the proprietors of a periodical issued a pattern for woolwork, consisting of the figures in Sir John Millais' picture, "The Huguenot," with a different background, it was held that this did not infringe the copyright of the engravings of the picture (*y*).

A book in the nature of an illustrated advertising catalogue may be the subject of copyright (*z*).

Books containing designs and prints which are mere illustrations of the letter-press, are protected by the 5 & 6 Vict. c. 45 (*a*).

The 8 Geo. 2, c. 13, made it necessary to prove knowledge in proceedings against a person for selling a pirated engraving or print. The 17 Geo. 3, c. 57, which was passed to amend the former Act, omits the word "knowingly," and enables the person having a copyright in a print or engraving to maintain an action against persons found selling pirated copies of it, without proof of guilty knowledge (*b*).

Copyright—Useful and ornamental designs (*c*).—The 46 & 47 Vict. c. 57 (amended by 48 & 49 Vict. c. 63), consolidating the laws

(*o*) 17 Geo. 3, c. 57.
(*p*) 24 & 25 Vict. c. 101.
(*q*) 8 Geo. 2, c. 13, s. 1; 7 Geo. 3, c. 38, ss. 2—8.
(*r*) *Rock* v. *Lazarus*, L. R., 15 Eq. 104; 42 L. J., Ch. 105.
(*s*) *Newton* v. *Cowie*, 4 Bing. 234.
(*t*) *Graves* v. *Ashford*, L. R., 2 C. P. 410; 36 L. J., C. P. 139.
(*u*) *Gambart* v. *Ball*, 14 C. B., N. S. 306; 32 L. J., C. P. 166. *Graves* v. *Ashford*, L. R., 2 C. P. 410; 36 L. J., C. P. 139.
(*x*) *West* v. *Francis*, 5 B. & Ald. 742.
(*y*) *Dicks* v. *Brooks*, 15 Ch. D. 22; 49 L. J., Ch. 812.
(*z*) *Maple* v. *Junior Army and Navy Stores*, 21 Ch. D. 369; 52 L. J., Ch. 67.
(*a*) *Ante*, p. 552. *Bogue* v. *Houlston*, 5 De G. & S. 273; 21 L. J., Ch. 470.
(*b*) *Gambart* v. *Sumner*, 5 H. & N. 8; 29 L. J., Ex. 98. The International Copyright Act, 1886, applies, see sect. 11.
(*c*) *Mallingen* v. *Picken*, 1 C. B. 799; 14 L. J., C. P. 254. *Reg.* v. *Bessel*, 16 Q. B. 810.

relating to patents, designs, and trade-marks, by Part III. ss. 47, 48, 49, 55, provides for the registration of designs. By sect. 50, where the design is registered, the proprietor is to have a copyright for five years, to be forfeited if he fails to furnish to the comptroller the prescribed number of specimens of the design before delivery on sale of any article (sect. 50); or if he fails to mark each article, unless he can show that he took all proper steps to insure the marking (sect. 51) (*d*). The copyright also ceases where a registered design is used in manufacture in any foreign country, and is not used in this country, within six months of its registration in this country (sect. 54) (*e*).

A penalty, not exceeding 50*l.*, to be recovered as a debt, or an action for damages, is the remedy provided for piracy of designs by sects. 58 and 59.

A design to be registered must involve a substantial novelty between it and any design previously in use (*f*).

If the inventor, instead of describing the design in words, prefers to place the design itself upon the register in the shape of part of the article designed, the design will be infringed by the

559 sale of an article to all appearance the same, though not actually identical (*g*). Copies of drawings, photographs, or tracings of the design must be furnished to the comptroller (*h*).

A combination of old designs must, in order to obtain the statu-

(*d*) *Wittman* v. *Oppenheim*, 27 Ch. D. 260. An innocent infringer will have to pay the costs of a motion for injunction. *Ibid.* By section 4929 of Rev. Stat. of U. S., relating to patents, it is provided that "Any person who, by his own industry, genius, efforts and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto relievo, or bas relief; any new and original design for the printing of woollen, silk, cotton, or other fabrics; any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture; or any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the fee prescribed and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor.

Section 4931. Patents for designs may be granted for the term of three years and six months, or for seven years, or for fourteen years, as the applicant may, in his application, elect.

Section 4932. Patentees of designs issued prior to the 2nd day of March, 1861, shall be entitled to extension of their respective patents for the term of seven years, in the same manner and under the same restrictions as are provided for the extension of patents for inventions or discoveries issued prior to the 2nd day of March, 1861.

Section 4933. All the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries not inconsistent with the provisions of this title, shall apply to patents for designs.

(*e*) As to the exhibiting at industrial and international exhibitions, &c., not invalidating registration, see sect. 57; and as to such exhibitions held out of the United Kingdom, see 49 & 50 Vict. c. 37, s. 3.

(*f*) *Le May* v. *Welch*, 28 Ch. D. 24; 54 L. J., Ch. 279.

(*g*) *McCrea* v. *Holdsworth*, L. R., 6 Ch. 418.

(*h*) See sect. 48, "exact representations or specimens of the design."

tory protection, be one new design, forming a new and original combination, and not a mere multiplication of old designs (*i*).

The proprietor of a design duly registered loses the benefit of the Acts, unless the proper registration marks are attached to all articles and substances to which the design is applied, whether the same are sold abroad or in the British dominions (*k*).

No one is entitled to register a design and to sue for an infringement, unless he is either himself the designer or has bought the design for valuable consideration. Where, therefore, the plaintiff had bought an article abroad, and had registered the design, it was held that he was not entitled to sue for an infringement (*l*). The proprietor of the design is the person who has the right to apply it to the manufactured article (*m*).

A partial assignment of, or license to use, a design must be in writing, and can only be made by a registered proprietor (*m*).

Patent right.—An inventor of a new design has no right at common law to the exclusive property in his own invention. He may, of course, conceal his discovery from the world, but the moment he publishes it his exclusive right to it is gone (*n*). However, "where any man by his own charge or industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm, in such cases the king may grant to him a monopoly patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not" (*o*). This prerogative of the Crown, which is the original source from which the existing law and practice of letters

(*i*) *Norton* v. *Nicholls*, 1 El. & El. 761. *Harrison* v. *Taylor*, 3 H. & N. 301.

(*k*) *Sarazin* v. *Hamel*, 32 Beav. 151; 32 L. J., Ch. 380.

(*l*) *Lazarus* v. *Charles*, L. R., 16 Eq. 117; 42 L. J., Ch. 105. As to what is "a new and original design," see *Adams* v. *Clementson*, 12 Ch. D. 714; *Morton* v. *N. Y. Eye Infirmary*, 5 Bl. (U. S. C. C.) 116. The patentee may experiment, for the perfection of his invention: *Cox* v. *Griggs*, 2 Fisher (U. S.) 174; *Kendall* v. *Winson*, 21 How. (U. S.) 322; *Wyeth* v. *Stone*, 1 Story (U. S.) 273; *Winans* v. *R. R. Co.*, 2 Bl. (U. S. C. C.) 279; but if he suffers it to go into public use by any means whatever, without an immediate assertion of his right, he is not entitled to a patent: *Whittemore* v. *Cutter*, 1 Gall. (U. S.) 478; *Shaw* v. *Cooper*, 7 Pet. (U. S.) 292; *Bedford* v. *Hunt*, 1 Mass. (U. S.) 302; *Parker* v. *Stiles*, 5 McLean (U. S.) 44; *Watson* v. *Bladen*, 4 Wash. (U. S. C. C.) 580; *Brooks* v. *Jenkins*, 3 McLean (U. S.) 432. As to what constitutes a public use, see *Treadwell* v. *Bladen*, 4 Wash. (U. S. C. C.) 703; *Ryan* v. *Goodwin*, 3 Sum. (U. S.) 514; *Bedford* v. *Hunt*, 1 Mass. (U. S.) 302; *Sanders* v. *Logan*, 2 Fisher, 167.

(*m*) *Jewitt* v. *Erckhardt*, 8 Ch. D. 404.

(*n*) *Duvergier* v. *Fellows*, 10 B. & C. 829. See *Canham* v. *Jones*, 2 V. & B. 218. The communication of his secret to one person, however, in confidence, is not a publication (*Morgan* v. *Seaward*, 2 M. & W. 544), and will not, therefore, if it goes no further, prevent another person taking out a patent subsequently for the same invention. *Jones* v. *Pearce*, 1 Webst. R. 122, 542. *Lewis* v. *Marling*, 10 B. & C. 22; and as to publishing by exhibiting at exhibitions, see *ante*, p. 558.

(*o*) *Darcy* v. *Allin*, Noy, 182. And see 3 Inst. 184.

patent for inventions are derived, and on which (subject to the
560 modifications subsequently introduced by statute) they still rest (*p*), was confirmed by the Statute of Monopolies (21 Jac. 1, c. 3), which is now repealed.

It results from the principles mentioned above that a patent was a kind of equitable contract made by the Sovereign with the patentee, or a purchase made by the discoverer of an invention from the Sovereign acting on behalf of the public, the consideration for such purchase being the novelty and utility of the invention discovered or first introduced into this country by the patentee (*q*), and the condition precedent to the validity of such contract or purchase being, that after the lapse of the prescribed period the inventor shall make public his invention for the general benefit (*r*). Now, however, a patent has to all intents the like effect against the Crown as it has against a subject (*s*); but the authorities of the Crown may use the invention for the services of the Crown by agreement or on terms settled by the Treasury after hearing the parties (*t*). Provisions are also made for the assignment to the Secretary for War of certain inventions for improving instruments or munitions of war (*u*).

Any person, whether a British subject or not, may make an application for a patent; and two or more persons may make a joint application (*x*).

Patent—First inventor.—An application must be by "the true and first inventor" (*y*). "It is a material question," says Tindal, C. J., "to determine whether the party who got the patent was the real and original inventor or not, because these patents are granted

(*p*) See *Feather* v. *The Queen*, 6 B. & S. 257; 35 L. J., Q. B. 200.

(*q*) See *Williams* v. *Williams*, 3 Mer. 160; 11 East, 107. *Cartright* v. *Eamer*, cited 14 Ves. 131, 133.

(*r*) Lord Tenterden, C. J., *Crompton* v. *Ibbotson*, Dan. & Lloyd, 33. Gibbs, C. J., *Wood* v. *Zimmer*, Holt, 58. Abbott, C. J., in *Savory* v. *Price*, Ry. & M. 1.

(*s*) 46 & 47 Vict. c. 57, s. 27 (i).

(*t*) Sect. 27 (2).

(*u*) Sect. 44.

(*x*) 46 & 47 Vict. c. 57, s. 4, consolidating the law; and 48 & 49 Vict. c. 63, s. 5. Section 4886 of Revised Statutes of United States, provides that "Any person who has *invented or discovered* any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

The fact that a patent for the same invention has been obtained in a foreign country does not prevent the granting of a patent here, unless the invention has been introduced into public use for more than two years prior to the application. But where a patent is granted here for an invention also patented in a foreign country, it must be so limited as to expire at the same date with the foreign patent, or if there are more than one, at the same time with the one having the shortest time to run. Section 4887.

(*y*) 46 & 47 Vict. c. 57, s. 5 (2); *Hovey* v. *Stevens*, 3 W. & M. (U. S. C. C.) 17; *Evans* v. *Eaton*, 3 Wheat. (U. S.) 454; *Barrett* v. *Hall*, 1 Mass. (U. S.) 447; *Woodcock* v. *Parker*, 1 Gall. (U. S.) 438.

as a reward, not only for the benefit that is conferred upon the public by the discovery, but also to the ingenuity of the first inventor; and, although it is proved that it is a new discovery so far as the world is concerned, yet, if anybody is able to show that, although that was new, the party who got the patent was not the man whose ingenuity first discovered it; that he had borrowed it from *A* or *B* (*z*), or taken it from a book that was publicly circulated in England (*a*), and which was open to all the world; then, although the public had the benefit of it, it would become an important question whether he was the first and original inventor

561 of it" (*b*). There is nothing, however, to prevent him from employing his servants in assisting him to bring a design to perfection, or to work out an idea first suggested by him (*c*), or from employing third persons for such a purpose (*d*). He is still the true and first inventor. If there are two persons, actual inventors in this country, who invent the same thing simultaneously, he who first takes out the patent is the first and true inventor (*e*). In the case of a joint application, it is sufficient if one or more of the applicants are the true and first inventors (*f*).

If a person possessed of an invention dies without making application for a patent, a patent may be obtained by his legal representative (*g*). Such application must be made within six months, and the applicant must declare that he believes the deceased to be the "true and first inventor" (*h*).

A question arose whether a man could be called a first and true inventor, who, in the popular sense, had never invented anything,

(*z*) *Barber* v. *Walduck*, cited 1 C. & P. 567.

(*a*) *Stead* v. *Williams*, 7 M. & G. 818; 2 Webst. P. R. 126. *Heurteloup's Case*, 1 Webst. R. 553. *Plimpton* v. *Malcolmson*, 3 Ch. D. 531, 558; 45 L. J., Ch. 505.

(*b*) *Cornish* v. *Keene*, 1 Webst. R. 507.

(*c*) *Minter* v. *Wells*, 1 Webst. R. 132.

(*d*) *Bloxam* v. *Elsee*, 1 C. & P. 558. The fact that the inventor has made inquiries or sought information from scientific persons, does not defeat an inventor's right to a patent (*O'Reilley* v. *Morse*, 15 How. (U. S.) 62); nor does the circumstances that *suggestions* were made to him by others, unless the idea of the principle was suggested to him. *Thomas* v. *Weeks*, 2 Paine (U. S. C. C.) 92; *Allen* v. *Dewey*, 1 Story (U. S.) 336; *Matthews* v. *Skates*, 1 Fisher, 602; *Pitts* v. *Hall*, 2 Bl. (U. S. C. C.) 229.

To defeat a patent it must appear that the invention was substantially communicated to the patentee by some other person, so that, without the exercise of any inventive power of his own, he could have applied it to practice. *Matthews* v. *Skates*, 1 Fish. 602. See *Forbush* v. *Cook*, 2 Fish. 668.

It will not render a patent void that, at the time it was issued, experiments were being made by others, which resulted in the same discovery. *Allen* v. *Hunter*, 6 McLean (U. S. C. C.) 303; *Cox* v. *Griggs*, 2 Fish. 174. The rule is, that whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, though others may have had the idea, and made experiments towards putting it into practice; and although all of the component parts may have been known under a different combination, or used for a different purpose. *Washburn* v. *Gould*, 3 Story (U. S.) 122; *Many* v. *Sizer*, 1 Fish. 17; *Singer* v. *Walmsley*, *id.* 558; *Matthews* v. *Skates*, *id.* 602.

(*e*) *Plimpton* v. *Malcolmson*, 3 Ch. D. 531, 556; 45 L. J., Ch. 505.

(*f*) 46 & 47 Vict. c. 57, s. 5 (2). As to the declaration to be made, see 48 & 49 Vict. c. 63, s. 2.

(*g*) 46 & 47 Vict. c. 57, s. 34 1

(*h*) Sect. 34 (2).

but who, having learned abroad (that is, out of the realm, in a foreign country) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. It was decided, that, if an invention is new in England, the person who introduces it into the realm is the first and true inventor, although it may have been practised out of the realm before (*i*). But, if the invention is publicly known in any part of the realm, in Ireland, for instance, or the colonies, he is not the true and first inventor (*k*). A patent granted to a British subject, in his own name, for an invention communicated to him by a foreigner, the subject of a state in amity with this country, is not void, although such patent is in truth taken out, and held by the grantee, in trust for such foreigner (*l*).

Where an arrangement is made by the government of this country with that of a foreign state (to which the section has been declared applicable) (*m*) for mutual protection of inventions, designs, and trade marks, any person who has applied in such foreign state shall be entitled to a patent, &c., in priority to other applicants, and such patent, &c. shall have the same date as the date of the foreign protection (*n*).

562 If the invention is new and useful, it is not material whether it results from long experiment, profound research, and great expense, or from some sudden and lucky thought, or mere accidental discovery (*o*).

By sect. 11, any person, within two months of the advertisement of a complete specification, may give notice of opposition on the ground of the applicant having obtained the invention from him, or on the ground that the invention has been patented in this country, or that the specification appears to the examiner to comprise the same invention as one already patented (*p*).

Patents can be granted for one invention only, but may contain more than one claim. No objection can be taken to a patent on the ground that it comprises more than one invention (*q*). A

(*i*) *Edgeberry* v. *Stephens*, 2 Salk. 466. *Plimpton* v. *Malcolmson*, 3 Ch. D. 531, 555; 45 L. J., Ch. 505. See *Otto* v. *Steel*, 31 Ch. D. 241; 55 L. J., Ch. 196; *post*, p. 565.

(*k*) *Brown* v. *Annandale*, 1 Webst. R. 433. *Roebuck* v. *Stirling*, 1 Webst. R. 45, 451.

(*l*) *Beard* v. *Egerton*, 3 C. B. 97.

(*m*) Sub-sect. 4, of sect. 103, *infra*.

(*n*) 46 & 47 Vict. c. 57, s. 103. The application must be within the time limited by the section (see also sect. 6 of 48 & 49 Vict. c. 63), and the publication here during such period will not invalidate the patent. The above section is made applicable to the colonies and India in certain cases by sect. 104.

(*o*) *Crane* v. *Price*, 4 M. & G. 605, per Tindal, C. J.

(*p*) The patent is in general to be sealed within fifteen months from the date of application, but to be dated and sealed as of the day of application, and provisional protection is given during the period between the date of application and the date of sealing. Sects. 12—15. See also sect. 3 of 48 & 49 Vict. c. 63.

(*q*) Sect. 33.

patent granted to the first inventor is not invalidated by an application in fraud of him.

Patents—Duration.—By sect. 17, the duration of a patent is fourteen years; but it ceases where the patentee fails to make proper payments; and the term may be extended for a further term upon application (*r*).

Patents—The subject-matter.—The subject-matter of the grant is "any manner of new manufactures" (*s*). The word "manufac-

(*r*) Sect. 25.

(*s*) 46 & 47 Vict. c. 57, s. 46. A new and improved method of producing a useful result or effect is as much the subject of a patent as an entirely new machine: *Wintermute* v. *Redington*, 1 Fish. 239; *Eames* v. *Cook*, 3 Fish. 146.

A patentee need not take a separate patent for each new patentable matter; he may, if he desire, limit his right to their use in combination: *Bain* v. *Morse*, 6 West. L. J. 372; and if he borrowed the idea of the different parts which go to constitute his invention, and for the first time brought them together into one whole, which is materially different from any whole that existed before, he is the original and first inventor: *Many* v. *Sizer*, 1 Fish. 17. A combination, though simple and obvious, yet, if entirely new, is patentable; and it is no objection that up to a certain point it makes use of old machinery: *Earle* v. *Sawyer*, 4 Mass. 1. And this is so whether the machines be old or new: *Barrett* v. *Hall*, 1 Mass. 447; *Pitts* v. *Whitman*, 2 St. 609; *Evans* v. *Eaton*, Pet. C. C. 323; *Pennock* v. *Dialogue*, 4 W. C. C. 58; *Bain* v. *Morse*, 6 West. L. J. 372; *Carr* v. *Rice*, 1 Fish. 198; *Wintermute* v. *Redington*, *id.* 239; *Latta* v. *Shawk*, *id.* 465; *Lee* v. *Blandy*, 2 Fish. 89.

A patent for a combination of materials is good, if substantially new, though none of the ingredients be new or unused before for the same purpose: *Ryan* v. *Goodwin*, 3 Sum. 514. But a patent for a combination cannot be supported by evidence of novelty of one of its parts. To be patentable, it must effect a new result, or an old result by a new mode of action; there must be novelty either of product or process: *Batten* v. *Clayton*, 2 Whart. Dig. 408. And where one part of a combination is new, the combination is a new one, though the other parts may be old: *Hall* v. *Wiles*, 2 Bl. (U. S. C. C.) 194.

If a combination includes new patentable matter with old matter not patentable, it makes a new patentable combination: *Bain* v. *Morse*, 6 West. L. J. 372; *Lee* v. *Blandy*, 2 Fish. 89; and it is immaterial whether the elements composing it be new or old, if novelty exists: *Buck* v. *Hermance*, 1 Bl. C. C. 398; *Lee* v. *Blandy*, 2 Fish. 89. But a change from a former one must be substantial, and must involve skill, ingenuity and mind: *Hall* v. *Wiles*, 2 Bl. (U. S. C. C.) 194; *Hovey* v. *Henry*, 3 West. L. J. 153.

The new article must differ from the old one, not only in its mechanical contrivances and construction, but in its practical operation and effect in producing the useful result.

To support a patent for a combination, the combination itself of the machinery must be novel; it is not enough that it brings a newly discovered principle into practical application, which was not claimed as part of the discovery: *Le Roy* v. *Tatham*, 14 How. (U. S.) 156; *Hovey* v. *Henry*, 3 West. L. J. 153. Thus a claim for a combination of several devices, so combined as to produce a particular result, is not valid as a claim for "any mode of combining those devices which would produce that result:" and can only be sustained as a valid claim for the peculiar combination of devices invented and described: *Case* v. *Brown*, 2 Wall. 320. And see *Burr* v. *Duryee*, 1 Wall. 531; *Stone* v. *Sprague*, 1 St. 270.

It is decisive evidence that a new mode of operation has been introduced, that in consequence of a new combination of parts, it is a materially better machine: *Forbush* v. *Cook*, 2 Fish. 668.

A patent for a combination of three distinct things is not infringed by combining two of them with a third, which is substantially different from the third element described in the specification: *Prouty* v. *Ruggles*, 16 Pet. 336; *Silsby* v. *Foote*, 14 How. (U. S.) 219; *McCormick* v. *Talcott*, 20 How. (U. S.) 403; *Vance* v. *Campbell*, 1 Bl. 427; *Eames* v. *Godfrey*, 1 Wall. 78; *Brooks* v. *Jenkins*, 3 McLean, 432; *Brooks* v. *Bicknell*, 4 McLean, 70; *Parker* v. *Haworth*, *id.* 370; *Pitts* v. *Wemple*, 6 McLean, 558; *Latta* v. *Shawk*, 1 Fish. 465; *Singer* v. *Walmsley*, *id.* 558; *Lee* v. *Blandy*, 2 Fish. 89; *Dodge* v. *Card*, *id.* 116.

To constitute an infringement of a patent for a combination, the defendant must have used the same combination, constructed and operated substantially in the same way (*Gorham* v. *Mixter*, 1 Am. L. J. 539); and where a patent is granted for a combination of mechanical devices, none of which are an original

ture" in the statute may be construed in one of two ways. It may mean the machine when completed, or the mode of constructing the machine (*t*). "The word 'manufacture,'" said

invention, the use of a part only of the combination is no infringement: *McCormick* v. *Talcott*, 20 How. 403; *Pitts* v. *Wemple*, *id.* 558; *Lee* v. *Blandy*, 2 Fish. 89; *Howe* v. *Abbott*, 2 Story, 190.

It is no infringement of a patent for a combination to use either of the machines separately (*Barrett* v. *Hall*, 1 Mass. 447; *Evans* v. *Eaton*, Pet. C. C. 323; *Pitts* v. *Wemple*, 6 McLean, 558); nor unless all the essential parts of it are substantially imitated (*Bell* v. *Daniels*, 1 Fish. 372); but if there is a patent for a combination, part of which is old and part new, it is an infringement to use the new part only: *Latta* v. *Shawk*, 1 Fish. 465; *Lee* v. *Blandy*, 2 Fish. 89.

Where a claim for a combination does not designate the particular elements which compose it, but only declares, as it may, that the combination is made up of so much of the described machinery as effects a particular result, it is a question of fact for the jury, which of the described parts are essential to produce such result: *Silsby* v. *Foote*, 14 How. 219.

If a patentee is the original inventor of a device to accomplish a particular result, he may claim an exclusive right to the use of it; otherwise, if he is not such original inventor, but only of a combination of such devices with others: *Carr* v. *Rice*, 1 Fish. 198.

The patentee of a combination cannot treat another as an infringer, who has also improved the original machine, by the use of a substantially different combination, though it produce the same result: *Union Sugar Refinery* v. *Matthiessen*, 2 Fish. 600; *S. C.* 2 Cliff. 304.

(*t*) Parke, B., *Morgan* v. *Seaward*, 2 M. & W. 558. Invention is the finding out, contriving, discovering, or creating by an operation of the mind something new and useful which did not exist before: *Magie Ruffle Co.* v. *Douglass*, 2 Fisher, 330; *Ransom* v. *New York*, 1 *id.* 252. The principle or essential character of a patent involves two elements—1st, the object attained; and 2nd, the means by which it is attained: *Wilson* v. *R. R. Co.*, 2 Whart. Dig. 408. If no more ingenuity and skill is necessary to construct the new article than is possessed by an ordinary mechanic acquainted with the business, a patent therefor is invalid: *Hotchkiss* v. *Greenwood*, 11 How. (U. S.) 156; *Teese* v. *Phelps*, 1 McAll. (U. S. C. C.) 48; *Treadwell* v. *Parrott*, 5 Blatchf. (U. S. C. C.) 369.

A principle, unless applied to some useful purpose, is not patentable: *Le Roy* v. *Tatham*, 14 How. (U. S.) 156; *O'Reilley* v. *Morse*, 15 *id.* 62; *Burr* v. *Duryee*, 1 Wall. (U. S.) 531; *Sullivan* v. *Redfield*, 1 Paine (U. S. C. C.) 442; *Foote* v. *Silsby*, 14 How. (U. S.) 218. But, if put into a definite and useful form, no one will be permitted to steal its essence by changing its form: *Detmold* v. *Reeves*, 1 Fish. 127; *Rich* v. *Lippincott*, 2 *id.* 1.

One who had discovered a new application of some property in nature, never before known or in use, by which he has produced a new and useful result, is entitled to a patent therefor, independently of any peculiar arrangement of machinery for the purpose of applying it: *Foote* v. *Silsby*, 20 How. (U. S.) 378; *Parker* v. *Hulme*, 1 Fish. 44.

The substantial means used and specified to produce an end or result is patentable, but not the end or result itself: *Burr* v. *Cowperthwaite*, 4 Bl. (U. S. C. C.) 163; *Sickles* v. *Falls Co.*, 2 Fish. 202; *Case* v. *Brown*, *id.* 268; *Sangster* v. *Miller*, *id.* 563. But when a party has discovered a result, as well as the machinery which produces it, he has a right to invoke the doctrine of equivalents in reference to infringers: *Singer* v. *Walmsley*, 1 Fish. 558; *Goodyear* v. *Central R. R. Co.*, *id.* 626. But this is not so if he is only the inventor of a device; in such case, he can only recover against one who has substantially copied his invention.

Where a result or effect is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, the discovery of such mode, method, or operation, is patentable as a process: *Corning* v. *Burden*, 15 How. (U. S.) 252. And he who first practically applies such principle, by mechanical contrivances, to the purpose intended, is entitled to the patent.

A new adaptation and arrangement of applying and using old articles for a certain purpose, may be the subject of a patent right: *Blake* v. *Sperry*, 2 N. Y. Leg. Obs. 251; *Park* v. *Little*, 2 Wash. (U. S. C. C.) 196. But the mere application of an old organization to a new one is not patentable: *Philipps* v. *Page*, 24 How. 164; *Bean* v. *Smallwood*, 2 Story (U. S.) 408; *Winans* v. *Boston and Providence R. R. Co.*, *id.* 412.

An art is entitled to protection, as well as the machinery or processes which it teaches, employs, and makes useful: *French* v. *Rogers*, 1 Fish. 133. But the word "art" means a useful art, or manufacture which is beneficial, and which is described with exactness in its mode of operation; such an art is pro-

Abbott, C. J. (*u*), "has been generally understood to denote, either 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 to mean 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 in some other useful purpose, as a stocking-frame, or a steam-engine for raising water from mines; or it may, perhaps, extend also to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing

563 it in a cheaper or more expeditious manner, or of a better or more useful kind. No merely philosophical or abstract principle can answer to the word 'manufactures.' Something of a corporeal and substantial nature—something that can be made by man

tected only in the mode and to the extent described: *Smith* v. *Downing*, 1 Fish. 64.

Thus copper-plate printing on the back of bank notes is an art for which a patent may issue: *Kneass* v. *Schuylkill Bank*, 4 Wash. (U. S. C. C.) 9.

The word "machine" includes every mechanical device, or combination of mechanical powers and devices, to perform some function, and produce a certain effect or result: *Corning* v. *Burden*, 15 How. (U. S.) 252.

It is the machine itself, and not its product, that is protected by letters patent: *Pitcher* v. *United States*, 1 N. & H. 7; and a patent cannot be had for the function or abstract effect of a machine, but only for the machine which produces it: *Corning* v. *Burden*, 15 How. (U. S.) 252; *Burr* v. *Duryee*, 1 Wall. 531; *Blanchard* v. *Sprague*, 3 Sum. 535; *Stone* v. *Sprague*, 1 Story, 270; *Bain* v. *Morse*, 6 West. L. J. 372; *Sickels* v. *Falls Co.*, 2 Fish. 202; *Morris* v. *Barrett*, 1 Fish. 461.

A mere change of form is not patentable, but to change the form of an existing machine, and thus introduce a new mode of operation, and thereby attain a new and useful result, is the subject of a patent: *Winans* v. *Denmead*, 15 How. 341; *Turrill* v. *Michigan Southern and Northern Indiana Railroad Co.*, 1 Wall. 49; *Gray* v. *James*, Pet. (U. S. C. C.) 394; *Gorham* v. *Mixter*, 1 Am. L. J. 539.

But although a mere change of form is not patentable, it is otherwise if form is a part of the thing invented, and essential to its value (*Many* v. *Jagger*, 1 Bl. (U. S. C. C.) 372; *Bain* v. *Morse*, 6 West. L. J. 372); or if a change of form or proportion produces a new effect, it is patentable: *Davis* v. *Palmer*, 2 Brock. (U. S.) 299.

The mere introduction of mechanical equivalents is not patentable: *McCormick* v. *Seymour*, 16 How. (U. S.) 480; *Tracey* v. *Torrey*, 2 Bl. (U. S. C. C.) 275; *Smith* v. *Downing*, 1 Fish. 64; *Johnson* v. *Root*, *id.* 351; *Cahoon* v. *Ring*, *id.* 397; *Pitts* v. *Edmonds*, 2 Fish. 52; *Burden* v. *Corning*, *id.* 477. But the use of a mechanical equivalent may still be an infringement, though, besides being an equivalent, it produces a further useful result: *Foss* v. *Herbert*, 2 Fish. 31.

The doctrine of equivalents should be critically scanned, where there may be a difference in relation to two machines which, in some respects, operate by equivalent devices, and in others do not, to ascertain whether one has become a practical machine, while the other is not: *Sayles* v. *Chicago and North Western Railroad Co.*, 2 Fish. 523.

The substitution of one mechanical power for another, in a machine, as a wheel and axle for a screw, is not patentable: *Blanchard's Gun Stock Turning Factory* v. *Warner*, 1 Bl. (U. S. C. C.) 258. But the duplication of parts, producing new and useful results, may be patentable. *Parker* v. *Hulme*, 1 Fish. 44. The propulsive effect of the vertical motion of water, in a reaction wheel, operating by its centrifugal force, and so directed by mechanism as to operate in the appropriate direction, is patentable: *Wintermute* v. *Redington*, 1 Fish. 239.

There is no substantial difference between a patent for an improved machine, and one for an improvement on a machine. *Evans* v. *Eaton*, 3 Wheat. (U. S.) 454.

Novelty and utility in an improvement are the only conditions requisite to the granting of a patent: *McCormick* v. *Seymour*, 2 Bl. (U. S. C. C.) 240; *Evans* v. *Eaton*, Pet. (U. S. C. C.) 322; *Stanley* v. *Whipple*, 2 McLean (U. S.) 35.

(*u*) *R.* v. *Wheeler*, 2 B. & Ald. 949.

from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is required to satisfy this word" (*x*). A patent cannot be taken out for a principle; but it can be taken out for a principle coupled with the mode of carrying the principle into effect (*y*); and it is now perfectly well established that a method or process in itself, and apart from its produce or results, or from the substances used in the process, may be the subject of a patent privilege, provided some beneficial result, such as the cheaper or better production of the product, is attained from the use of such method or process (*z*). A patent may be granted, not only in respect of a whole and complete thing described, but in respect, also, of a subordinate integer of that whole, provided the invention is so described as to make it clear in respect of what the patent has been granted (*a*). There may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials (*b*), or for the mere omission of one of several parts of the process, by which the article is better or more cheaply manufactured (*c*); for a new method of lessening the consumption of fuel in fire-engines (*d*); for a method of securing buildings from fire (*e*); for an improvement in the construction of chairs (*f*); for a method of giving fire to artillery and all kinds of fire-arms (*g*), and the like. So a patent may be sustained for a combination of processes, each of which was previously well known, provided the combination is new and produces a beneficial result (*h*), that is, a new article, or a better article, or a cheaper article, to the public than that produced before by the old method (*i*). But the use of

(*x*) And see *Boulton* v. *Bull*, 2 H. Bl. 481, 492, per Eyre, C. J., and Heath, J. *Huddart* v. *Grimshaw*, Dav. P. C. 278.

(*y*) *Jupe* v. *Pratt*, 1 Webst. R. 136. *Badisch Anilin Fabrik* v. *Levinstein*, 24 Ch. D. 15; 52 L. J., Ch. 704; reversed on other grounds, 29 Ch. D. 366.

(*z*) *Crane* v. *Price*, 4 M. & G. 580.

(*a*) *Clark* v. *Adie*, L. R., 2 App. Cas. 315; 46 L. J., Ch. 585.

(*b*) *Hall* v. *Thompson*, 3 Mer. 629, per Lord Eldon, C. See *Parkes* v. *Stevens*, L. R., 9 Eq. 36.

(*c*) *Russell* v. *Cowley*, 1 Webst. R. 464.

(*d*) *Hornblower* v. *Boulton*, 8 T. R. 95.

(*e*) *Boulton* v. *Bull*, 2 H. Bl. 493, per Eyre, C. J.

(*f*) *Minter* v. *Wells*, 1 Cr. M. & R. 505.

(*g*) *Forsyth's case*, 1 Webst. R. 95.

(*h*) *Cornish* v. *Keene*, 3 Bing. N. C. 570. *Cannington* v. *Nuttall*, L. R., 5 H. L. 205; 40 L. J., Ch. 739.

(*i*) *Murray* v. *Clayton*, L. R., 7 Ch. 570. If a patent is taken out for the whole of the machine, when the patentee merely improved on an existing machine, it is not valid: *Evans* v. *Eaton*, 7 Wheat. 356; *Evans* v. *Hettick*, 3 Wash. C. C. 409; *Lowell* v. *Lewis*, 1 Mass. 182; *Hovey* v. *Stevens*, 3 W. & M. 17; *Stanley* v. *Whipple*, 2 McLean, 35; *Tyler* v. *Devel*, 1 Am. L. J. 248; *contra*, *Goodyear* v. *Mathews*, 1 Paine, 300.

The rule is, that if a patentee knowingly claim more than his own invention, his patent is void: *Singer* v. *Walmsley*, 1 Fish. 558. But the validity of a patent does not depend on the amount of inventive genius involved in its discovery; if the device be new and useful, it is enough: *Potter* v. *Holland*, 1 Fish. 382; *Forbush* v. *Cook*, 2 Fish. 668; *Many* v. *Sizer*, 1 Fish. 17; *Carr* v. *Rice*, *id.* 198; *Clark Patent Steam and Fire Regulator Co.* v. *Copeland*, 2 Fish. 221; *Magic Ruffle Co.* v. *Douglass*, *id.* 330.

Superior utility, resulting in changes in an existing machine, and not from mere superiority in its construction, is

a new material to produce a known article cannot be the subject of a patent, unless some invention and ingenuity are displayed in the

564 adaptation (*k*); nor can a man claim the use of materials discovered subsequently to his patent (*l*).

Letters patent may be granted for an improvement on an existing patent (*m*); but the user of such, without a licence, or before the expiration of the term, will be an infringement on the first patent (*n*), provided that is useful. If the original patent is useless, and therefore not the subject of an infringement, it does not follow that the improvement upon it is useless (*o*).

Patents—Novelty.—Novelty is an essential condition of the grant; for, if the invention were not new, one of the main considerations upon which the exclusive use of the invention is granted would

evidence that some new principle, or mechanical power, or new mode of operation, producing a new kind of result, has been introduced: *Many* v. *Sizer*, 1 Fish. 17.

To sustain a patent, the invention must be substantially different from any machine or thing in use (*Stanley* v. *Whipple*, 2 McLean, 35; *Roberts* v. *Ward*, 4 McLean, 565); and must effect the same object in a better, cheaper, more expeditious, or more beneficial manner, than the instrument improved; or it must effect some further or other beneficial object in connection with the former: *Huggins* v. *Hubby*, 3 West. L. Mo. 347.

The fact that old instruments, placed in a new and different organization, thereby produces different results, or the same results by a new and different mode of operation, does not prevent a newly organized mechanism, producing the same result, from being patentable: *Clark Patent Steam and Fire Regulator Co.* v. *Copeland*, 2 Fish. 221.

He who first invents is entitled to the prior right if he is using reasonable diligence in adapting and perfecting the same, though the second inventor has, in fact, first perfected the same, and first reduced it to practice in a positive form: *Johnson* v. *Root*, 1 Fish. 351: *White* v. *Allen*, 2 Fish. 440. The rule is, that he who is first in time has a prior exclusive right to a patent for the invention: *Reed* v. *Cutter*, 1 Story, 590. But a prior invention, to defeat a subsequent patent, must have been reduced to practical use: *Many* v. *Jagger*, 1 Bl. C. C. 373; *Parkhurst* v. *Kinsman*, *id.* 488; *Goodyear* v. *Day*, 2 Wall. Jr. C. C. 283; *Parker* v. *Hulme*, 1 Fish. 44; *Howe* v. *Underwood*, *id.* 160; *Ransom* v. *New York*, *id.* 252; *Rich* v. *Lippincott*, 2 Fish. 1; *Pitts* v. *Edmonds*, *id.* 52; *Poppenhusen* v. *New York Gutta Percha Comb Co.*, *id.* 62; *Ellithorpe* v. *Robertson*, *id.* 83; *Cox* v. *Griggs*, *id.* 174.

It is not enough that the idea of it was conceived, nor is an abortive or abandoned experiment sufficient: *Many* v. *Sizer*, 1 Fish. 17; *Howe* v. *Underwood*, *id.* 160; *Ransom* v. *New York*, *id.* 252; *Johnson* v. *Root*, 2 Fish. 291; *Union Manufacturing Co.* v. *Lounsbury*, *id.* 389; *White* v. *Allen*, *id.* 440; *Waterman* v. *Thomson*, *id.* 461.

The original inventor, who had reduced his invention to practice, is entitled to a priority, though subsequently the same machine is invented by another: *Woodcock* v. *Parker*, 1 Gall. 438; *Phelps* v. *Brown*, 1 Fish. 479.

In a race of diligence, he who first reduces his invention to a fixed, positive, and practical form, has a priority of right: *Ellithorpe* v. *Robertson*, 2 Fish. 83.

The prior construction of an experimental machine, similar to that of the plaintiff, of which but a single specimen was manufactured, and which was never made public, will not invalidate the patent of a subsequent inventor: *Cahoon* v. *Ring*, 1 Fish. 397. Nor is it enough to defeat the originality of an invention that prior contrivances are produced, which might, by a little change, have been made into the patented contrivance, though not so intended: *Livingston* v. *Jones*, 1 Fish. 521. And a machine which, if used after the grant of letters patent, would not be an infringement of the improvement claimed, cannot be invoked to destroy the patent, if used before it: *Stainthorp* v. *Elkinton*, 1 Fish. 349.

(*k*) *Rushton* v. *Crawley*, L. R., 10 Eq. 522.

(*l*) *Badisch Anilin Fabrik* v. *Levinstein*, *supra*.

(*m*) *Morris* v. *Branson*, Bull. N. P. 76 c.

(*n*) *Ex parte Fox*, 1 V. & B. 67.

(*o*) *Lewis* v. *Davis*, 3 C. & P. 502.

fail; and, further, there would be no benefit to the public, so that the grant would be void by the common law (*p*). The patentee must have invented every part of what he claims to have invented (*q*); for, if any part of an invention comprised in a patent and claimed in the specification is not new, although the remainder is, the patent will be void (*r*); for the consideration for the grant of a patent being what is termed in law entire, if any part of it fails, the patent is void (*s*). If the contrivance, or process, or art (whichever term is used) is new, although applied to an old object, the patent is valid; but, if the contrivance, or any essential part of it, is old, it is void, although applied to a new object (*t*). So the mere application of an old contrivance in the old way to an analogous subject, without any novelty in the mode of applying such old contrivance to the new purpose, is not a valid subject-matter of a patent (*u*), *e. g.*, the substitution of wooden planking on an iron frame for the construction of ships, instead of, as previously, similar planking on a wooden frame (*x*).

But the new application of an old contrivance may be the subject of a patent, if it lies so much out of the track of the former as not naturally to suggest itself, but to require some application of thought and study (*y*).

Experiments made upon the same line, and almost, if not entirely, tending to the same result, although they are known to many persons, if they rest in experiment only, and have not

565 attained the object for which a patent is subsequently taken out —mere experiment, afterwards supposed by the parties to be fruitless, and abandoned because not brought to a complete result—will not prevent another person availing himself of their discoveries, as far as they have gone, and, by adding the last link of improvement, bringing it to perfection (*z*). The prior use of an invention need not be general: a single instance would, it seems, suffice (*a*): but it must be public (*b*); and the meaning of public use is this, that a man shall not, by his own private invention which he keeps locked up in his own breast, or in his own desk, and never communicates,

(*p*) *Amory* v. *Brown*, L. R., 8 Eq. 663; 38 L. J., Ch. 593.
(*q*) *Tennant's case*, 1 Webst. R. 125.
(*r*) *Kay* v. *Marshall*, 5 Bing. N. C. 492; 4 M. & G. 193 n. *Losh* v. *Hague*, 1 Webst. R. 203. *R.* v. *Arkwright*, Dav. P. C. 61.
(*s*) *Brunton* v. *Hawkes*, 4 B. & Ald. 541.
(*t*) *Losh* v. *Hague*, 1 Webst. R. 297, per Lord Abinger, C. B.
(*u*) *Harwood* v. *Great Northern Rail. Co.*, 11 H. L. C. 654; 35 L. J., Q. B. 27.
(*x*) *Jordan* v. *Moore*, L. R., 1 C. P. 624; 35 L. J., C. P. 268.
(*y*) *Penn* v. *Bibby*, L. R., 2 Ch. 127; 36 L. J., Ch. 455.
(*z*) *Galloway* v. *Bleaden*, 1 Webst. R. 529, per Tindal, C. J. *Jones* v. *Pearce*, 1 Webst. Pat. Cas. 122. *Murray* v. *Clayton*, L. R., 7 Ch. 570.
(*a*) *Carpenter* v. *Smith*, 1 Webst. R. 534.
(*b*) *Lewis* v. *Marling*, 4 C. & P. 52.

take away the right that another man has to a patent for the same invention (*e*). It must be new at the time of the grant (*d*).

If an invention becomes known to the public, no subsequent patent can be granted for it, although it cannot be shown that it was ever put in use (*e*). If the invention has already been made public in England, by a description contained in a work, whether written or printed, which has been publicly circulated, the invention is not new (*f*). The book must be made public to such an extent as to be generally known among persons practising in such matters (*g*). Proof that the book has been published and exposed for sale is *primâ facie* proof that it has become generally known; but, if all the copies can be accounted for, and it can be shown that in point of fact the book never got into the hands of the public, although it may have been in a public library, the presumption is rebutted (*h*). It is further necessary, to avoid the invention on the ground of want of novelty, that the book should contain such a description as would enable a person of ordinary skill in the trade to make the article described (*i*). A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification; and, therefore, where a provisional specification contained an incomplete description, part of which was omitted in the final specification, it was held that the statement in the provisional specification of the

566 part omitted in the final specification was not such a prior publication as to vitiate a subsequent patent of a similar invention on the ground of want of novelty (*k*).

Patents—Utility.—Utility is an essential condition of the validity of letters patent; for a monopoly in an invention altogether useless would be mischievous to the State, and to the hurt of trade, and generally inconvenient, by precluding all improvements thereon until the expiration of the patent (*l*); and, if the utility of the invention is denied, affirmative evidence of utility

(*e*) Ld. Abinger, C. B., *Carpenter* v. *Smith*, 1 Webst. R. 534.

(*d*) 21 Jac. 1, c. 3, s. 6. This is otherwise in the United States, where the question is whether it was new at the time of the discovery. Phillips on Patents, pp. 152 *et seq.*, 188 *et seq.*

(*e*) *Patterson* v. *Gas Light and Coke Co.*, L. R., 3 App. Cas. 239; 47 L. J., Ch. 402.

(*f*) *Stead* v. *Williams*, 2 Webst. P. R. 126, 142; 7 M. & G. 818.

(*g*) *Stead* v. *Anderson*, 2 Webst. P. R. 147, 149. *United Telephone Co.* v. *Harrison & Co.*, 21 Ch. D. 720; 51 L. J., Ch. 705.

(*h*) *Plimpton* v. *Malcolmson*, 3 Ch. D. 531; 45 L. J., Ch. 505. *Plimpton* v. *Spiller*, 6 Ch. D. 412; 47 L. J., Ch. 211. *Otto* v. *Steel*, 31 Ch. D. 241; 55 L. J., Ch. 196.

(*i*) *Plimpton* v. *Malcolmson*, 3 Ch. D. 531, 567; 45 L. J., Ch. 505.

(*k*) *Stoner* v. *Todd*, 4 Ch. D. 58; 46 L. J., Ch. 32.

(*l*) *Morgan* v. *Seaward*, 2 M. & W. 562, per Parke, B.

must be given (*m*). But a small amount of utility is sufficient (*n*); and the inutility of part, if on the whole a beneficial effect is produced, will not vitiate the patent. If a machine is useful in the majority of cases, its inutility in some instances will not vitiate the patent (*o*). If, however, several distinct inventions are comprised in a patent, and one of them is useless, the whole patent is void, for reasons that have been previously given (*p*). If the article produced by the machine is old, it must be furnished to the public at a cheaper rate, or in some way rendered a better commodity for trade. The community must receive some benefit from the invention (*q*).

Patents — The specification.—As the title and terms of the letters patent in most cases convey but very imperfect information as to the real subject-matter of the patent, and as one of the fundamental principles upon which a patent rests is (as has been mentioned before) that the public shall have the benefit of the invention after the prescribed period has elapsed, a sufficient description of the nature of the invention, and in what manner the same is to be performed (called the specification (*r*)), has to be given within a given time, so as to enable any person of moderate skill and knowledge in that department of manufacture to which it relates, to practise and enjoy the invention at the expiration of the term in as ample and beneficial a manner as the patentee himself (*s*). It follows from this, that the specification forms an essential part of the patent contract, if such a term is allowable, and that an incorrect or imperfect or ambiguous specification (*t*),

(*m*) *Manton* v. *Parker*, Dav. P. C. 327. In the United States it is sufficient, it seems, if the invention is not injurious, and may be a useful. *Bedford* v. *Hunt*, 1 Mason, 302. To sustain a patent, the invention must be a "useful," in contradistinction to a frivolous or mischievous, one: *Lowell* v. *Lewis*, 1 Mas. (U. S.) 182; *Bedford* v. *Hunt*, *id.* 302; *Landon* v. *De Groot*, 1 Paine (U. S. C. C.) 203; *Stanley* v. *Whipple*, 2 McLean (U. S.) 35; *Roberts* v. *Ward*, 4 *id.* 565; *Parker* v. *Stiles*, 5 *id.* 44; *Wintermute* v. *Redington*, 1 Fish. 239; *Page* v. *Ferry*, *id.* 298; *Whitney* v. *Emmett*, Bald. (U. S. C. C.) 303; *Parker* v. *Stiles*, 5 McLean (U. S. C.C.) 44; *Bell* v. *Daniels*, 1 Fish. 372; *Eames* v. *Cook*, 2 *id.* 146; *Cox* v. *Griggs*, *id.* 174. If the invention is a useful one, it is of no consequence whether its utility is general or limited to a few cases: *Bedford* v. *Hunt*, 1 Mas. (U. S.) 302; *Many* v. *Jagger*, 1 Bl. (U. S. C. C.) 373; *Wintermute* v. *Redington*, 1 Fish. 239; *Johnson* v. *Root*, *id.* 351.

(*n*) *Neilson* v. *Harford*, 1 Webst. P. R. 295. *The Household Coal and Iron Co.* v. *Neilson*, 1 Webst. P. R. 675.

(*o*) *Haworth* v. *Hardcastle*, 1 Bing. N. C. 189.

(*p*) And see *Hill* v. *Thompson*, 8 Taunt. 401, Dallas, J.

(*q*) *Murray* v. *Clayton*, L. R., 7 Ch. 570.

(*r*) See, as to the provisional and complete specification, 46 & 47 Vict. c. 57, ss. 5—11; and 48 & 49 Vict. c. 63, s. 3; 49 & 50 Vict. c. 37, s. 2. *Ex parte Mauceaux*, L. R., 5 Ch. 518; 6 *ib.* 272. *Ex parte Scott and Young*, *ib.* 274.

(*s*) *Campion* v. *Benyon*, 3 B. & B. 12, per Parke, J. Buller, J., *R.* v. *Arkwright*, Dav. P. C. 106. *Crossley* v. *Beverley*, 9 B. & C. 63. *Morgan* v. *Seaward*, 1 Webst. P. R. 174.

(*t*) *Campion* v. *Benyon*, 3 B. & B. 5. *Turner* v. *Winter*, 1 T. R. 602. *Simpson* v. *Holliday*, L. R., 1 H. L. 315.

The patent does not cover a claim not embraced in the specification: *Booth* v. *Garelley*, 1 Blatchf. (U. S. C. C.) 247; *Rich* v. *Lippincott*, 2 Fish. 1. It must disclose the secret; give the best mode known to the inventor; and contain nothing defective or that would mislead artists of competent skill in the particular manufacture: *Page* v. *Ferry*, 1 Fish. 298; *Judson* v. *Moore*, *id.* 544; *Wayne* v. *Holmes*, 2 *id.* 20. The patentee is required to set forth the most beneficial

567 or one calculated to mislead (*u*), or materially differing from the letters patent, will, if such ambiguity, incorrectness, &c., has not been removed by disclaimer or alteration (*x*), be sufficient to defeat the plaintiff's claim or avoid the patent (*y*). Mere generality of the title, however, if not inconsistent with the specification, will not do so; and, indeed, the specification generally limits the description of the patent (*z*). Nor, on the other hand, will a small and immaterial variation entitle a person to infringe a patent (*a*).

Any part of the provisional specification of a patent may be

modo of applying his principle that is known to him; but he is not required to set out all contrivances which may illustrate it less beneficially: *Blanchard* v. *Eldridge*, 2 Whart. Dig. 409.

It is not necessary that he should describe all possible modes by which the thing patented might be varied, but only the most important, and a mere formal variation therefrom would be an infringement: *Carver* v. *Braintree Manufacturing Co.*, 2 Story, 432.

If he has so described his new article that it can be made without invention, and has then, *bonâ fide*, attempted to describe the best machine for making it, but has failed to describe a practical device, this does not avoid the patent, unless there was a fraudulent intent: *Magic Ruffle Co.* v. *Douglas*, 2 Fish. 330. He must describe in his specification each substantially different modification of his invention: *Sargent* v. *Carter*, 1 Fish. 277.

Where he claims a machine, he must explain the principles and contemplated modes of operation which distinguish it from other inventions, but he need not specify such well-known substitutes as any expert fully understands will accomplish the same function: *Union Sugar Refinery* v. *Matthiessen*, 2 Fish. 600.

If he does not disclose his entire invention he will not be allowed subsequently to expand into a general expression what was before limited in a particular form: *Detmold* v. *Reeves*, 1 Fish. 127.

If the patentee fails to mention in his specification an addition which is indispensable to the use of his machine, it is fatal to his title; but it is otherwise if it is not an indispensable part of it: *Carr* v. *Rice*, 1 Fish. 198.

The specification constitutes a part of the patent, and they must be construed together: *Hogg* v. *Emerson*, 6 How. (U. S.) 437; *Turrill* v. *Michigan Southern and Northern Indiana Railroad Co.*, 1 Wall. (U. S.) 491. It is immaterial what is the claim of an inventor in his summary, if the foundation for such claim is not made in the descriptive part of the specification: *Huggins* v. *Hubby*, 3 West. L. Mo. 347.

The drawings, as well as the entire specification, may be referred to in explanation (*Hogg* v. *Emerson*, 11 How. (U. S.) 587; *Brooks* v. *Fiske*, 15 How. (U. S.) 215; *Earle* v. *Sawyer*, 4 Mas. 1; *Kittle* v. *Merriam*, 2 Curt. 475; *Foss* v. *Herbert*, 2 Fish. 31), even though not referred to in the specification: *Washburn* v. *Gould*, 3 Story, 122; *Brooks* v. *Bicknell*, 3 McLean, 250.

The patentee must describe in his patent in what his invention consist with reasonable certainty, or it is void for ambiguity: *Lowell* v. *Lewis*, 1 Mas. 182; *Barrett* v. *Hall*, *id.* 447; *Hovey* v. *Stevens*, 1 W. & M. 291; *Sullivan* v. *Redfield*, 1 Paine, 441; *Whitney* v. *Emmett*, Bald. 303; *Carr* v. *Rice*, 1 Fish. 325; *Wintermute* v. *Redington*, *id.* 239.

But no defect or concealment in the specification is sufficient to avoid a patent, unless it is with intent to deceive the public: *Whittemore* v. *Cutter*, 1 Gall. 429; *Lowell* v. *Lewis*, 1 Mas. 182; *Gray* v. *James*, Pet. C. C. 394; *Whitney* v. *Carter*, Fess. Pat. 139.

But an omission to state that a certain function of one of the parts was a leading feature of the invention, is material, in considering whether the patentee has sufficiently claimed anything more than a described mode of operation: *Burden* v. *Corning*, 2 Fish. 477.

(*u*) *Savory* v. *Price*, Ry. & Moo. 1.

(*x*) 46 & 47 Vict. c. 57, ss. 18—21. See *Cropper* v. *Smith*, 28 Ch. D. 148; 54 L. J., Ch. 287. *Ralston* v. *Smith*, 11 H. L. C. 223; 35 L. J., C. P. 49. The patent must not by the operation of the disclaimer be made to include or comprehend something which was not originally contained in the patent. Whether, if this rule is violated, the disclaimer is void or the patent is void, appears uncertain. *Foxwell* v. *Bostock*, 4 De G., J. & S. 298.

(*y*) *R.* v. *Wheeler*, 2 B. & Ald. 345. *Jessop's case*, cited 2 H. Bl. 489. See *Wegmann* v. *Corcoran*, 13 Ch. D. 65.

(*z*) *Forsyth's case*, 1 Webst. R. 95.

(*a*) *Gibbs* v. *Cole*, 3 P. Wms. 255.

omitted in the complete specification, if there is no fraud, and if the effect of the remainder is not altered by the omission (*b*).

All the claiming clauses may be struck out of the specification by a disclaimer, if there remain in the body of the specification words sufficiently distinguishing what the invention is which is claimed (*b*).

Where the patent is for a combination, the combination itself is *ex necessitate* the novelty and the merit; and a claim of the combination is in itself a sufficient description of the novelty (*c*). Where the claim is for a combination, the patentee may claim, not merely the combination of the parts as a whole, but also certain subordinate and subsidiary parts of the combination, on the ground that those parts are new and useful (*d*); and in that case the specification must carefully distinguish those parts, so as not to leave it doubtful what claim to parts, in addition to the claim for the combination, he means to assert (*e*).

The words used in a patent must be construed, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found; and, consequently, words will be construed in their popular, and not in their scientific, sense, if from the context it is clear that the former meaning, and not the latter, was intended to be conveyed (*f*).

The provisional specification need not describe the mode in which the invention is to be worked or carried out; and its generality affords no grounds for avoiding the patent after it is

568 granted; nor is it necessary that the complete specification should extend to everything comprehended within the provisional specification. There must, however, be nothing in the complete specification which is at variance with the provisional (*g*).

By the 46 & 47 Vict. c. 57, s. 13, "every patent shall be dated and sealed as of the day of the application; provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification: provided, also, that in case of more than one application for a patent for the same invention the sealing of a patent on one of these applications shall not prevent the sealing of a patent on an earlier application" (*h*). A person must not make a provisional specification, and then,

(*b*) *Thomas* v. *Welch*, L. R., 1 C. P. 192; 35 L. J., C. P. 200.

(*c*) *Harrison* v. *Anderston Foundry Co.*, 1 App. Cas. 574.

(*d*) *Lister* v. *Leather*, 8 El. & Bl. 1004; 27 L. J., Q. B. 295.

(*e*) *Harrison* v. *Anderston Foundry Co.*, 1 App. Cas. 574.

(*f*) *Clark* v. *Adie*, 2 App. Cas. 423; 46 L. J., Ch. 598.

(*g*) *Penn* v. *Bibby*, L. R., 2 Ch. 127; 36 L. J., Ch. 455.

(*h*) The old practice is referred to in the following cases: *Saxby* v. *Hennett*, L. R., 8 Ex. 210; 42 L. J., Ex. 137. *Ex parte Bates*, L. R., 4 Ch. 577; 38 L. J., Ch. 501. *Ex parte Bailey*, L. R., 8 Ch. 60; 42 L. J., Ch. 264. *In re Dering's Patent*, 13 Ch. D. 393. *Ex parte Scott*, L. R., 6 Ch. 274.

after making a new discovery forming an integral part of his patent, make a final specification without disclosing his new discovery, and then take out another patent afterwards; nor can he put his new discovery into his final specification, for that would render his patent void (*i*).

By the 48 & 49 Vict. c. 63, s. 4, specifications and drawings are not to be made public when the application for the patent has been withdrawn.

Patents—Transfer of letters patent.—The letters patent are granted to the patentee and his personal representatives or assigns (*k*). The assignments which may be made are of two kinds, either by the act of the party (*l*), or by act and operation of law, as in the case of death or bankruptcy (*m*). As patent right is an incorporeal right, it can only be assigned by deed, in accordance with the ancient rule of law that "a thing which of its own nature cannot be created without deed cannot be assigned without deed" (*n*). Such assignment confers as absolute a title as the patentee himself possessed; and the assignee may sue for any infringement, either in his own name only (*o*), or together with the patentee (if the patentee retains any interest in the patent); for, though the interest is several, the damage by infringement is joint (*p*). Each co-owner of a patent, however, may sue for an infringement (*q*); for he may use the invention without the consent of the other owners, and is entitled to all the profit he can make by working

569 it (*r*). The assignment may be absolute, conditional, or defeasible on the happening of a given event (*s*); but, if the patent right is dealt with contrary to a condition upon which it may happen to have been granted, the right is extinguished and gone for ever. A patentee may assign his patent for any particular place as effectually as if the patent were originally granted for that place (*t*). It is no ground of objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of assignment, though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate (*u*).

Patents—Licensees.—The patentee may also license others to

(*i*) *Edison Light Co.* v. *Woodhouse*, 32 Ch. D. 520.
(*k*) See *Duvergier* v. *Fellows*, 10 B. & C. 829, and the form given in the schedule to the 46 & 47 Vict. c. 57.
(*l*) *Cartwright* v. *Amatt*, 2 B. & P. 43.
(*m*) *Hesse* v. *Stevenson*, 3 B. & P. 565.
(*n*) *Lincoln College's case*, 3 Coke, 63 a
(*o*) *Bloxam* v. *Elsee*, 6 B. & C. 169.
(*p*) 2 Wm. Saund. 115, 116 a.
(*q*) *Dunnicliff* v. *Mallet*, 7 C. B., N. S. 209; 29 L. J., C. P. 70. *Walton* v. *Lavater*, 8 C. B., N. S. 162; 29 L. J., C. P. 275.
(*r*) *Mathers* v. *Green*, L. R., 1 Ch. 29; 35 L. J., Ch. 1.
(*s*) *Cartwright* v. *Amatt*, 2 B. & P. 43.
(*t*) 46 & 47 Vict. c. 57, s. 36.
(*u*) *Elwood* v. *Christy*, 17 C. B., N. S. 754; 34 L. J., C. P. 130.

exercise the invention, provided the terms of the grant authorize such licence; and such licences may be either common or exclusive (*x*). The only right, however, which such licensee (whether a common or exclusive one) obtains being one of user, he cannot sue for any infringement. He may, however, recover for any special damage which he may have sustained from those exercising the invention without licence, if the letters patent are valid (*y*). The patentee is estopped from denying the validity of the patent as between himself and his assignee or licensee (*z*); and so may the assignee or licensee be estopped as between himself and the patentee (*a*). If the owner of a patent manufactures and sells the patent article both in this country and abroad, the sale of the article in one country implies a licence to use it in the other. But, if he has assigned it in either country, the article cannot be sold in that country so as to defeat the rights of the assignee (*b*). A licence to use a patent process in another country will not give a right to sell the manufactured article in this country (*c*).

Patents—Compulsory licences.—Where a patentee unreasonably refuses to grant licences the Board of Trade may grant them (*d*).

Patents—Prolongation.—The term of letters patent may be further extended (*e*). In determining whether to recommend the prolongation of a patent or not, even where the claim to a first discovery and the beneficial nature of that discovery are both conceded, it will still be proper to consider, both the degree of

570 merit as inventor, and the amount of benefit to the public flowing directly from the invention (*f*). A monopoly limited to a certain term is properly the reward which the law assigns to the patentee for the invention and disclosure to the public of his mode of proceeding. Whether that term shall be extended, in effect whether a second patent shall be granted for the same consideration, and the enjoyment by the public of its vested right be postponed, is to depend on the exercise of a discretion, judicial indeed, yet to be influenced by every such circumstance as would properly weigh on a sensible and considerate person in determining whether an extraordinary privilege, not of strict right, but rather of equitable reward, should be conferred. A person may be an inventor within

(*x*) *Protheroe* v. *May*, 5 M. & W. 675.
(*y*) *George* v. *Beaumont*, cited in Webster on Patents, pp. 24, 128.
(*z*) *Oldham* v. *Langmead*, 3 T. R. 439.
(*a*) *Baird* v. *Neilson*, 8 Cl. & F. 726. *Bowman* v. *Taylor*, 2 Ad. & E. 278.
(*b*) *Betts* v. *Wilmott*, L. R., 6 Ch. 239.
(*c*) *Société des Manuf. de Glaces* v. *Tilghman's Patent Blast Co.*, 25 Ch. D. 1; 53 L. J., Ch, 1.
(*d*) 48 & 49 Vict. c. 63, s. 22.
(*e*) 46 & 47 Vict. c. 57, s. 25 (1).
(*f*) See sect. 25 (4). A patent can only be extended in this country for seven years, and, even for that time, only upon a showing which satisfies the Commissioner of Patents that the patentee has not realized from his invention as much as he ought to have done under the first issue.

the legal meaning of that term—no one before him may have made or disclosed the discovery in all its terms as described in his specification—but this may have been the successful result of long and patient labour, and of great and unaided ingenuity, without which, for all that appears, the public would never have had the benefit of the discovery; or it may have been but a happy accident, or a fortunate guess; or it may have been very closely led up to by earlier, and in a true sense more meritorious, but still incomplete, experiments. Different degrees of merit must be attributed to an inventor under these different circumstances. The moral claim to an extension of the term may in this way be indefinitely varied, according as the circumstances approach nearer to one or the other of the above suppositions. The same principle will apply to the consideration of the benefit conferred on the public. The extent of the benefit conferred must vary in each case with the circumstances. The principal question always is, has the individual patentee, under all the circumstances, received what in equity and good conscience may be considered a sufficient remuneration? (*g*).

Patents—Infringement.—A person is guilty of a breach of patent privilege who, directly or indirectly, by himself or his servants, has used the art or invention which has been made the subject of the privilege, or applied it in any way for his own profit or benefit (*h*); and, if the defendant has employed means colourably different to produce the same or a similar result, yet he is guilty of an infringement, if he has in fact used the art which is the subject of the privilege (*i*).

571 Where a man has obtained a patent for a new invention or a discovery which he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances the nature or subject-matter of that discovery, to use it without the leave of the patentee (*k*). Although machinery is employed, the machinery may not be of the essence of the invention, but only incidental to it (*l*); and it therefore follows, that an invention may be infringed by adopting the same general idea, although it may be carried out by different means (*m*). A patent for a new combination or arrangement is

(*g*) *In re Hill's Patent*, 1 Moo. P. C., N. S. 258; *M'Dougal's Patent*, L. R., 2 P. C. 1.

(*h*) *Neilson* v. *Betts*, L. R., 5 H. L. 1; 40 L. J., Ch. 317, in which case the user was simply by transmission through this country. *Upmann* v. *Elkan*, L. R., 12 Eq. 140; 7 Ch. 130; 40 L. J., Ch. 475; 41 L. J., Ch. 216.

(*i*) Hindmarch on Patents, 257. See *Gillett* v. *Wilby*, 9 C. & P. 334. *Jupe* v. *Pratt*, 1 Webst. R. 146; *Thorn* v. *Worthing Rink Co.*, 6 Ch. D. 415, n.

(*k*) *Walton* v. *Potter*, 1 Webst. P. R. 586, 587. *Dudgeon* v. *Thompson*, L. R., 3 App. Cas. 34.

(*l*) *Boulton* v. *Watt*, 2 H. Bl. 496, per Eyre, C. J.

(*m*) *Jupe* v. *Pratt*, 1 Webst. R. 146.

entitled to the same protection, and on the same principles, as every other patent. Where the patent is for the entire combination only, and not for its parts, there is, or may be, an essence or substance of the invention underlying the mere accident of form; and that invention may be infringed by a theft in a disguised or mutilated form. In every such case it will be a question of fact whether the alleged infringement is the same in substance and effect, or is a substantially new or different combination (*n*). Where the claim is for a combination and nothing but a combination, there is no infringement, unless substantially the whole combination is used; and it is immaterial whether any and which of the parts are new (*o*).

The vending of the patented article is prohibited by the terms of the grant, and is an infringement, though done in ignorance (*p*); and so is the importation and sale in England of articles manufactured abroad according to the specification of an English patent (*q*). But this does not extend to an exposure for sale only (*r*); nor is the sale of a patented article, as part of the effects of a bankrupt or deceased person, it would seem, within the objects intended to be prohibited by the grant (*s*). The making of a patented article simply for the purpose of *bonâ fide* experiment is not necessarily actionable (*t*); but any user for advantage is an infringement (*u*). The possession of machines protected by patent, although dismantled and not in a state fit for immediate use, is

572 an infringement for which an injunction can be obtained (*x*). Where a patent is for a process producing a known result, any person may use another process arriving at the same result without an infringement; but where the patent is for a new result it is otherwise (*y*).

Patents—Remedies for infringement—Action.—It was held that letters patent, so long as they exist, that is, until cancelled by the judgment on a *scire facias*, entitled the patentee to assert his right, although he might have been defeated in other actions (*z*).

The proceeding by *scire facias* to repeal a patent is abolished, and the revocation of a patent may be obtained on petition to the

(*n*) *Clark* v. *Adie*, L. R., 10 Ch. 667; *Dudgeon* v. *Thompson*, 3 Ap. Cas. 34.

(*o*) *Lister* v. *Leather*, 8 El. & Bl. 1004; 27 L. J., Q. B. 295.

(*p*) *Wright* v. *Hitchcock*, L. R., 5 Ex. 37; 39 L. J., Ex. 97.

(*q*) *Elmslie* v. *Boursier*, L. R., 9 Eq. 217; 39 L. J., Ch. 328; *Von Heyden* v. *Neustadt*, 14 Ch. D. 230.

(*r*) *Minter* v. *Williams*, 4 Ad. & E. 251.

(*s*) *Sawin* v. *Guild*, 1 Gallison, U. S. R. 485. And see *Holmes* v. *London & North-Western Rail. Co.*, Macr. P. C. 12, 21 *et seq.*

(*t*) *Frearson* v. *Loe*, 9 Ch. D. 48.

(*u*) *Nobel's Explosives Co.* v. *Jones*, 8 Ap. Cas. 5; 52 L. J., Ch. 339; *United Telephone Co.* v. *Sharples*, 29 Ch. D. 164.

(*x*) *United Telephone Co.* v. *London Telephone Co.*, 26 Ch. D. 766.

(*y*) *Badisch Anilin Fabrik Co.* v. *Levinstein*, 24 Ch. D. 156; reversed on other grounds, 29 Ch. D. 366.

(*z*) *R.* v. *Arkwright*, Dav. P. C. 61.

court; and every ground available for petition or defence under the old practice is reserved, and certain rules of procedure are provided (*a*).

Where a disclaimer had been filed, unless the law officer had specially granted permission, no action could be brought for an infringement committed before the disclaimer (*b*). Nor can an injunction granted before the disclaimer be enforced (*c*).

The patentee, upon proof of an infringement, is not entitled to have both an account of profits and an inquiry into damages, but must elect which of the two forms of relief he will adopt (*d*).

If the plaintiff, a patentee, and also a manufacturer, has been in the habit of licensing others to use his patent, at a fixed royalty, the loss of that royalty is the measure of damages against a person who has infringed the patent; and the plaintiff cannot claim, in addition, manufacturer's profit, on the supposition that the articles made by the defendant, and in which the infringement took place, might have been sent to him to be fitted with the patent (*e*).

The money recoverable by a patentee, in respect of profits made by infringing his patent, is recoverable as money had and received to his use and not as damages, and can therefore be proved for at the bankruptcy of the infringer (*f*).

Patents—Remedies—Injunction.—If a plaintiff is in a position to support by proper evidence his title to a patent, and to prove

573 the fact of its having been infringed, he is entitled to an injunction to stop the mischief (*g*), both against the manufacturer and the person who uses the patented article (*h*), and to an account of the profits they may have made by their invasion of the plaintiff's privilege, or to an inquiry as to damages, at his option (*i*). But it is not the practice of the courts to grant a perpetual injunction to restrain the infringement of a patent, unless the validity of the patent has been conclusively established (*k*). If, after the decree

(*a*) Sect. 26. See also sects. 28—32 for legal proceedings. And as to sect. 32, see *Barney* v. *United Telephone Co.*, 28 Ch. D. 394; 54 L. J., Ch. 633. *Driffield Cake Co.* v. *Waterloo Cake Co.*, 31 Ch. D. 638. *Kurtz* v. *Spence*, 33 Ch. D. 579.

(*b*) 15 & 16 Vict. c. 83, s. 39 (repealed).

(*c*) *Dudgeon* v. *Thompson*, 3 Ap. Cas. 34.

(*d*) *Neilson* v. *Betts*, L. R., 5 H. L. 1; 40 L. J., Ch. 317. *De Vitrè* v. *Betts*, L. R., 6 H. L. 319.

(*e*) *Penn* v. *Jack*, L. R., 5 Eq. 81; 37 L. J., Ch. 136.

(*f*) *Watson* v. *Holliday*, 20 Ch. D. 780; 52 L. J., Ch. 545.

(*g*) *Gardner* v. *Broadbent*, 2 Jur. N. S. 1041. *Bacon* v. *Jones*, 4 Myl. & Cr. 433. *Davenport* v. *Rylands*, L. R., 1 Eq. 302. If the validity of the patent has been established in another action, the defendant is not thereby precluded from disputing it, but the plaintiff is entitled to an injunction to restrain an infringement until its invalidity has been proved. *Bovill* v. *Goodier*, L. R., 2 Eq. 195; 35 L. J., Ch. 432.

(*h*) *Penn* v. *Bibby*, L. R., 3 Eq. 308; 2 Ch. 127; 36 L. J., Ch. 455.

(*i*) *Neilson* v. *Betts*, L. R., 5 H. L. 1; 40 L. J., Ch. 317. See *Saxby* v. *Easterbrook*, L. R., 7 Ex. 207; 41 L. J., Ex. 113.

(*k*) *Hills* v. *Evans*, 31 L. J., Ch. 457. As to the legal validity of patent rights, see *Lang* v. *Gisborne*, *ib.* 771.

has been pronounced, the patent becomes void, by the decision of a court of competent jurisdiction or otherwise, the injunction becomes of no effect (*l*). Where the patentee manufactures and sells the patent both in this country and abroad, the *onus* lies upon him to show, not only that the article of which the sale is complained of was not made by him in this country, but also that it was not made by him or his agents abroad (*m*). A patentee can sustain an action for an injunction to restrain a threatened infringement, even if no actual infringement has taken place (*n*).

Patents—Tenants in common.—In the case of the death of one of two tenants in common of a patent, the right of action for an infringement of the patent in the lifetime of the deceased tenant in common survives to the other, and the latter is, consequently, entitled to recover the whole of the damages (*o*).

Trade marks.—The assumption of a name by a stranger who has never before been called by that name is not the subject of a civil action; for by the English law there is no right of property in a person to the use of a particular name (*p*). Nor is there any right to the exclusive use of any name which has become affixed to a house or land (*q*). But no man has a right to sell his own goods as the goods of another (*r*); and, therefore, it is actionable for a trader to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person (*s*). Where the plaintiff

(*l*) *Daw* v. *Eley*, L. R., 3 Eq. 496; 36 L. J., Ch. 482.

(*m*) *Betts* v. *Wilmott*, L. R., 6 Ch. 239.

(*n*) *Frearson* v. *Loe*, 9 Ch. D. 48.

(*o*) *Smith* v. *The London & North Western Rail. Co.*, 2 El. & Bl. 69.

(*p*) Dodderidge, J., Poph. 142, 144. *Du Boulay* v. *Du Boulay*, L. R., 2 P. C. 430; 38 L. J., P. C. 35. See *Street* v. *Union Bank*, 30 Ch. D. 156.

(*q*) *Day* v. *Brownrigg*, 10 Ch. D. 294.

(*r*) *Croft* v. *Day*, 7 Beav. 84. *Metzler* v. *Wood*, 8 Ch. D. 606; 47 L. J., Ch. 625.

(*s*) *Lee* v. *Haley*, L. R., 5 Ch. 155; 39 L. J., Ch. 284. *Hendriks* v. *Montague*, 17 Ch. D. 638; 50 L. J., Ch. 456. *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748.

Trade marks are protected on the ground of property, and not exclusively on the ground of fraud; consequently, although the unauthorized use of a trade mark is unintentional, yet damages are recoverable therefor (*Oakes* v. *Tausmierre*, 4 Wood (U. S. C. C.) 547); and a court of equity will protect the owner in its exclusive use (*Hostetter* v. *Vowinkle*, 1 Dill. (U. S. C. C.) 329; *McLean* v. *Fleming*, 96 U. S. 245), upon the ground that its use by another is a fraud: *Del. and Hudson Canal Co.* v. *Clark*, 7 Blatch. (U. S. C. C.) 112; *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. (U. S. C. C.) 461.

The right to a trade mark is predicated upon the ground that the party owning it has a valuable interest in the goodwill of his trade, of which the trade mark is a valuable accessory: *McLean* v. *Fleming*, 96 U. S. 245.

A trade mark may consist of words or devices, or, in certain cases, a name, phrases, symbols, figures, letters, forms, or even words in common use, may be adopted and used by a manufacturer to designate the goods he manufactures or sells, and to distinguish them from those made or sold by others. The object of such use is, that his goods may be known in the market as his, and that he may thereby be enabled to reap the profits and advantages resulting from his skill and industry in their manufacture: *Taylor* v. *Carpenter*, 2 Sandf. Ct. (N. Y.) 603; Upton on Trade Marks, 9.

The rule is that when a manufacturer puts up his goods in a peculiar manner, so that they are known to purchasers chiefly by the appearance of the package, no person has a right to imitate

574 started omnibuses with particular words and devices marked upon them, an injunction was granted restraining the defendant from

such packages, so that unusual care is required to distinguish one from the other.

But letters or figures affixed to merchandise by a manufacturer, for the purpose of denoting its quality only, cannot be appropriated by him to his exclusive use as a trade mark. As the letters "A. C. A." used on ticking.

The reason is, that no one is liable to be deceived thereby, and an injunction will not be granted to restrain another manufacturer from using a label whose only resemblance to the complainant's label is that certain letters, which alone convey no meaning, are inserted in the centre of each, the dissimilarity of the labels being such that no one will be misled as to the true origin or ownership of the merchandise: *Amoskeag Mfg. Co.* v. *Trainor*, 101 U. S. 51. The grantee of the original proprietor of a trade mark forfeits his right to it by using it upon spurious articles, while adopting a new trade mark for the genuine article.

If several owners of a trade mark, whose rights are determined by territorial limits, for years disregard each other's rights by trespassing upon each other, and by misuse of the trade mark, they forfeit all their property therein, and can assign no exclusive valid claim therein to others: *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. (U. S. C. C.) 461.

The exclusive right to the use of the word "Durham" in labels on smoking tobacco belongs to the manufacturer of the article in the town of Durham, N. C.; and the right to the exclusive use of the word in connection with the picture of a Durham bull in such labels belongs to the person in that town who first appropriated it.

But a non-user for eight years forfeits the right to the use of a trade mark, and it cannot be resumed in prejudice of one who had used it exclusively during the period. And when, during the period of disuse, another person originates and devises an equivalent trade mark, without knowledge of the first, he may thereby acquire the right of exclusive use in the second trade mark. And where such second trade mark, during such period, acquires a public and valuable geographical and commercial signification, so that the use of the original as an arbitrary one would operate to deceive and defraud the public, such use may be enjoined by a court of equity. Mere non-user of a trade mark for a year does not constitute an abandonment, although it may entitle others to use the trade mark during that time: *Julian* v. *Hoosier Drill Co.*, 78 Ind. 408.

An assignment by one partner of all his interest in the firm to his co-partner carries with it the right to the exclusive use of the trade mark of the firm, unless expressly reserved: *Blackwell* v. *Debuell*, 3 Hughes (U. S. C. C.) 151. But the exclusive right to the use of a firm trade mark does not pass to any member of the firm by mere implication, though such member may use it, if he does so in a manner not to deceive the public: *Young* v. *Jones*, 8 Hughes (U. S. C. C.) 274. Thus, where two persons, associated in business for the manufacture and sale of a commodity, jointly adopted a trade mark for it, they are equally entitled to its use after the dissolution of their connection; and if one of the parties obtains letters of registration in his own name, he may be compelled to transfer an equal interest to his associate: *Taylor* v. *Bothin*, 5 Sawyer (U. S. C. C.) 584.

Where an article which is patented has acquired a certain name, when the patent expires a person manufacturing the article may use such name. Thus it has been held that there can be no trade mark in the name "Singer Sewing Machine;" while any one not connected with the Singer Manufacturing Co. has the right to construct such a Singer machine, yet he cannot be permitted to do any act the necessary effect of which will be to make people believe that the machine made and sold by him is manufactured by said company.

The rule is, that if a patented article has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because the name expresses only the kind and quality of the machine: *Singer Manufacturing Co.* v. *Larsen*, 8 Biss. (U. S. C. C.) 154; *Singer Manufacturing Co.* v. *Stanage*, 2 McCreary (U. S. C. C.) 512.

The word "Parabola," used as the name of needles, not being descriptive of any peculiar quality thereof, constitutes a valid trade mark: *Roberts* v. *Sheldon*, 8 Biss. (U. S. C. C.) 398. So does the term "Yankee," applied as the name or label upon soap: *Williams* v. *Adams*, 8 Biss. (U. S. C. C.) 452.

In *Smith* v. *Sixbury* (25 Hun. (N. Y.) 252), A. had for twenty-five years compounded, manufactured and sold a liquid medicine, which he called "Barker and Smith's Magnetic Balm." He had purchased the recipe from one who previously had manufactured and sold the medicine under the name of "Magnetic Balm." He had also purchased the interest of this person. It was held

starting opposition omnibuses having the same words and devices marked upon them, so as to make it appear that the defendant's

that he was entitled to protection in the use of the name.

In *Am. Grocer &c. Co.* v. *Grocer Pub. Co.* (25 Hun. (N. Y.) 398), the plaintiff had for many years published a paper called the "American Grocer." His editor left him and started for defendant a new paper called the "Grocer," similar in general appearance, and devoted to similar objects. The defendant located his office in the same block with plaintiff, and upon the removal of plaintiff defendant followed him. The plaintiff's paper was frequently called the "Grocer." It was held that the defendant should be enjoined from using the name.

The words "Insurance Oil" may be the subject of a trade mark, and the circumstance that it does not indicate the origin or ownership of the article does not necessarily render it defective: *Insurance Oil Tank Co.* v. *Scott*, 33 La An. 946.

The term "Cherry Pectoral" cannot be claimed as a trade mark for a medicine, where it appears that the first word described one of the ingredients, and the word "pectoral" the class of diseases for which the medicine is intended, the word having been so applied before the invention of the compound in question: *Ayer* v. *Rushton*, 7 Daly (N. Y.) 9. But the words "Conserves Alimentaires" with the coat of arms of the City of Paris, placed on packages, put up in Paris, of an article known as "Julienne," compounded of vegetables, and used for making Julienne soup, may constitute a trade mark: *Godillot* v. *Hazard*, 44 N. Y. Superior Ct. 427.

The right of a party to a trade mark in connection with the dry white oxide of zinc is not infringed by the sale of a paint composed of a white oxide of zinc ground in oil, and untruly represented as containing white oxide of zinc made by A., such trade mark never having been applied by A. to that article ground in oil: *La Société Anonyme* v. *Baxter*, 14 Blatchf. (U. S. C. C.) 261.

Where a person who claimed property in a trade mark had acquired it, if at all, by the use, in circulars of fraudulent, deceptive, and untrue language, as to the origin and qualities of the article in respect of which the trade mark was claimed, it was held that he had lost his right to claim the assistance of a court of equity to protect his trade mark: *Seabury* v. *Grosvenor*, 14 Blatchf. 262. The use on labels and bottles of the word "Apollinis" in connection with the representation of a bow and arrow, or anchor, was restrained, by preliminary injunction, on account of the similarity between them and the word "Apollinaris" and the representation of an anchor, as before used by the plaintiff, as being calculated and designed to induce the supposition, by users and dealers, that the waters of the defendant so marked were the waters of the plaintiff; but the plaintiff was ordered to give a bond to pay all damages to the defendant, if it should be finally determined that the plaintiff was not entitled to the injunction: *Apollinaris Brunnen* v. *Somborn*, 14 Blatchf. 380. If the alleged imitation of the plaintiff's trade mark has not deceived, and is not likely to deceive, ordinary purchasers, an injunction will not be granted: *Hurricane Lantern Co.* v. *Miller*, 56 How. (N. Y.) Pr. 234.

But if it is such a simulation as is likely to mislead purchasers its use will be restrained. Thus, the plaintiffs manufactured an article called "Sapolio," which had acquired a high reputation. The defendant, having ascertained by analysis the composition of the article, set about making one as nearly as possible like it, which he called "Saphia," and put up in wrappers closely resembling plaintiffs' (externally and internally) in colour and size, and partially in the inscription and directions for use. It was held, that as it appeared that the imitation was intended to deceive purchasers, the defendant should be restrained from using such wrappers: *Enoch Morgan's Sons' Co.* v. *Schwachofer*, 5 Abb. (N. Y.) N. Cas. 265.

If a trade mark is fraudulent, or calculated to deceive purchasers, it will not be upheld. Thus a court of equity will not enjoin the infringement of the plaintiffs' firm name as a trade mark, if it falsely implies that they are a corporation, as in the case below: "*Galaxy Publishing Company.*" *McNair* v. *Cleave*, 10 Phila. (Pa.) 155.

A trade mark for a stove polish, "The Rising Sun," with vignette of the sun, was held not to be infringed by the words "Rising Moon," with vignette of the moon: *Morse* v. *Worrell*, 10 Phila. (Pa.) 168.

The exclusive use of a tin pail with a bail or handle to it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, cannot be claimed as a trade mark, either under the statute or by virtue of the general law of trade marks: *Harrington* v. *Libby*, 14 Blatchf. (U. S. C. C.) 128.

In *Fairbanks* v. *Jacobus* (14 Blatchf. (U. S. C. C.) 128), it appeared that E. & T. Fairbanks & Co., manufacturers of scales, alleged that A. made scales, by

using, to make the iron castings thereof, the corresponding parts of a scale made by them, to form the moulds for those castings, and that the general shape, arrangement, color, and external appearance of such scales were imitated from the Fairbanks' scale so nearly that only an expert in scales could distinguish the difference between them. The words "Fairbanks' Patent" were cast on the scales made by both parties. All the Fairbanks & Co. patents had expired. Fairbanks & Co. applied for an injunction to restrain A. from using the words "Fairbanks' Patent" on his scales, and from making or selling an imitation of their scales. It was held that the application must be denied; that the words "Fairbanks' Patent" were not a trade mark; and that A. did not represent his scales to be of the make of Fairbanks & Co.

In *Freese* v. *Bachof* (14 Blatchford (U. S. C. C.) 432), the plaintiff's firm had long been accustomed to pack a compound, called "Hamburg tea," in long cylindrical packages with pink wrappers, and to have a crimson paper of directions, and yellow ones of warning, tied in with each package, and their firm name printed across a white label within a circle pasted across the ends of the string, and the same embossed with the words "Hamburg, Hopfensack, 6" on another white label pasted on the package, so that the package, by its form and colours, would be at once known by its general appearance, without taking time to read anything on it; and their wares had come to be well known as theirs by the appearance of the packages. A. openly used such style of package and firm name to put up Hamburg tea. He then discontinued the use of the firm name, but continued to use the exact form and style of package, substituting his own name merely for that of the firm on the labels. It was held that, with the proper parties before the court, A. ought to be restrained by injunction from such use of the plaintiff's symbols.

In an action to enjoin the defendants from using on their marks and labels, as druggists, the words "Established 1870," which had been conspicuously displayed for many years on the labels, bill-heads, &c. of a drug-house to whose business the plaintiffs had succeeded, it was held that the words were a species of trade mark, and should be protected accordingly: *Hazard* v. *Caswell*, 57 How. (N. Y.) Pr. 1.

In *Fleischmann* v. *Schuckmann* (62 How. Pr. (N. Y.) 92), the plaintiff had been engaged in New York city in the manufacture of an article known as "Vienna" bread, sold for many years with a label containing the words "Vienna Model Bakery." It was held that he was entitled to restrain the use by other parties of a label in imitation of his own, and particularly from applying the word "Vienna" to baked articles.

In *Lauferty* v. *Wheeler* (63 How. Pr. (N. Y.) 488), a manufacturer of oleomargarine, first using, as an integral part of a label, the words "Alderney Manufacturing Company," was held entitled to enjoin a subsequent manufacturer from using the word "Alderney."

In *Insurance Oil Tank Co.* v. *Scott* (33 La An. 946), the word "patented" was put upon the label of an unpatented article, and it was held that the trade mark being patented, and it not appearing that the word "patented" was used with intent to deceive the public, it would be presumed to have been used in reference to the trade mark, and not to the article.

A corporation calling itself "The Humphreys' Specific Homœopathic Medicine Company," for many years put up and sold remedies, called on the wrappers and labels "Homœopathic Specific," and numbered and entitled "No. 1, fever, congestion, inflammations," "No 2, worm fever or worm diseases," and so forth. Defendant put up specifics, which he entitled "Reeve's Improved Homœopathic Specifics," and similarly numbered and labelled. It was held that, although the term "homœopathic specific" could not alone be the subject of a trade mark, yet that, on the whole case, the corporation was entitled to an injunction against defendant's use of the term in connection with the numbers and descriptions: *Humphreys' Specific, &c. Medicine Co.* v. *Wenz*, 14 Fed. Rep. 250.

Before 1834, Collins & Co. made edge tools, using the firm name as their trade mark. In 1834 they assigned to the Collins Manufacturing Company the right to use such trade mark and to make their articles. In 1856, and afterwards, defendants manufactured shovels, which they stamped "Collins & Co." for the Australian market. The Collins Company had never made shovels, but their other articles, such as picks and hoes, had acquired a reputation in Australia, of which reputation defendants sought to avail themselves in using this label on their shovels. It was held that defendants should be enjoined from further use of the trade mark, and that they should be compelled to account. *Collins Co.* v. *Oliver Ames and Sons Corporation*, 20 Blatchf. (U. S. C. C.) 542.

While the mere name of an article manufactured, such as "Hostetter's Stomach Bitters," cannot be the subject of a trade mark, yet, where such name is used in connection with bottles of a certain size, colour, shape, and material, and a peculiar and original label, all together may constitute a valid

trade mark, the imitation of which may be enjoined: *Hostetter* v. *Adams*, 20 Blatchf. (U. S. C. C.) 326.

In *Hostetter* v. *Fries* (17 Fed. Rep. 620), the plaintiffs complained that defendants were selling to third persons an extract out of which it was claimed Hostetter's Stomach Bitters could be made, and that these third persons put up the compound made by them in the bottles which had been used for plaintiffs' bitters, which bottles had on them the name and label, which, with the bottles, constituted plaintiffs' trade mark. It was held that whatever remedy plaintiffs might have against such third parties, they had none against defendants.

If B. puts up, in packages shaped, labelled and designed in a peculiar manner, an article manufactured by himself, A. is liable for damages, and will be enjoined if he puts up similar goods in similar packages, so as to deceive the public into believing that they are buying goods of B.'s manufacture, and this whether B. has a trade mark or not: *Sawyer* v. *Horn*, 4 Hughes (U. S. C. C.), 239.

One cannot appropriate as a trade mark an ordinary and usual form of package and fashion of label, so as to exclude others from the use of a similar article; nor can the mere idea, represented by a figure on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, be the subject of a trade mark. *Enoch Morgan's Sons' Co.* v. *Troxell*, 89 N. Y. 292.

The words "silicon" and "electro-silicon" are properly the subject of a trade mark, these words not being, in a scientific sense, descriptive of the article thus designated, although silicon is one of its component parts; the article being a white powder sold and used for polishing metals: *Electro-silicon Co.* v. *Hazard*, 29 Hun. (N Y.) 369.

"Sliced animals," "sliced objects," and "sliced birds," as applied to puzzles or games, are properly the subject of a trade mark: *Selchow* v. *Baker*, 64 How. (N. Y.) Pr. 212.

The word "excelsior" may be the subject of a trade mark: *Sheppard* v. *Stuart*, 13 Phila. (Pa.) 117.

The word "snowflake," as applied to bread or crackers, is a mere descriptive phrase of appearance or quality, and will not answer for a trade mark: *Larrabee* v. *Lewis*, 67 Ga. 561.

In *Lorillard* v. *Wight* (15 Fed. Rep. 383), the plaintiffs first adopted, and used as a mark for their tobacco, tin tags variously coloured, with the name of the brand and their own name stamped on the tags and fastened to the plugs of tobacco. The public had come to know plaintiffs' tobacco by the tags. It was held that they had a right to the device as a trade mark, although their patent therefor had been declared void after surrender and re-issue, and that the use of tags closely imitating plaintiffs', and likely to mislead a purchaser, whether so intended or not, was an infringement, and should be enjoined.

In *Gray* v. *Taper Sleeve Pulley Works* (16 Fed. Rep. 436), the plaintiff purchased of W. the exclusive right to manufacture, within a specified territory, a patented device called the "Taper sleeve pulley." Plaintiff adopted as a trade mark the term "Taper Sleeve Pulley Works." It was held that this designation was properly selected as a trade name, and that defendant, who purchased the right to manufacture the same within certain other territory, had the right to assume and appropriate such trade name; that plaintiff was entitled to the exclusive use thereof.

Where frames for sewing machines, in the form of the letter G, have been so extensively manufactured and sold by the inventor, during the time they were protected by patents, that the machines containing this feature come to be known in the trade thereby, after the expiration of the patents the patentee cannot, by claiming such form or shape of frame as a trade mark, prevent others from using such frames in sewing machines manufactured and sold by them: *Wilcox & Gibbs' Sewing Machine Co.* v. *Gibbon's Frame*, 17 Fed. Rep. 623.

A trade mark composed of such devices as denote simply the quality of an article will be protected, especially if is once established: *Sohl* v. *Geisendorf*, 1 Wilson (Ind.) 60.

Words or phrases in common use, and which indicate the character, kind, quality, and composition of an article of manufacture, cannot be appropriated by the manufacturer, exclusively to his own use, as a trade mark; and this is so, although the form of the words or phrases adopted also indicate the origin and maker of the article, and were adopted by the manufacturer simply for that purpose. The combination of words must express only the latter, to authorize its protection as a trade mark. Thus, the plaintiffs prepared a medicine, the principal ingredients of which were iron, phosphorous and elixir of calisaya bark, to which they gave the name of "Ferro-Phosphorated Elixir of Calisaya Bark," and so labelled the bottles containing it. It was held that this phrase could not be protected as a trade mark: *Caswell* v. *Davies*, 58 N. Y. 223.

An exclusive right cannot be acquired to the use of the words "gold medal" as a trade mark upon the wrappers of a manufactured article. The words so used do not indicate ownership or origin, but quality, and that, in some competitive exhibition, a gold medal had been

awarded to the article for its excellence, and so they cannot be appropriated as a trade mark: *Taylor* v. *Gillies*, 59 N. Y. 331. The rule is, that a trade mark may consist of anything—marks, forms, symbols—which designate the true origin or ownership of the article, but cannot consist of anything merely denoting name or quality: *Godillot* v. *Hazard*, 49 How. (N. Y.) Pr. 5.

Generally, geographical names, as the name of a town or city, cannot be exclusively appropriated as the trade mark of any one. Thus, where a corporation adopted the trade mark "Glendon" on their iron, and the locality of their furnaces was afterwards made a borough by the name of "Glendon," it was held that a second company there located could lawfully use the same mark: *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467. But title to property in the name "Keystone Line," acquired by many years' certain exclusive possession thereof by shippers of merchandise, who did not own the vessels employed by them, will be protected in equity. The use of the name, while the shippers were agents for a steamship company, is a mere licence, and gives no right to its use after the agency is terminated: *Winsor* v. *Clyde*, 9 Phila. (Penn.) 513.

The rule that, in case of a wrongful imitation of a trade mark, a variation should be regarded as immaterial which requires close inspection to detect, was applied where a trade mark, consisting of a lithographed female bust and the words "Laird's Bloom of Youth or Liquid Pearl, prepared by George W. Laird, No. 74, Fulton Street, New York, was counterfeited by a like bust, and the same words, except "by Joseph Laird, No. 384, Broadway, N. Y.," but an injunction was refused, the complainant being shown to be deceiving the public by false representations that his preparation was "free from all mineral and poisonous substances." Equity will not aid the monopoly of a fraud. *Laird* v. *Wilder*, 9 Bush. (Ky.) 181.

In *Liegert* v. *Abbott* (61 Md. 276), the plaintiffs manufactured and sold a cordial under the name of "Angostura Bitters," claiming that name as a trade mark, with labels stating that it was prepared by Dr. S., formerly at Angostura, but now at Port of Spain, and that the bottles bore the plaintiff's signature. In fact, Dr. S. died before this suit, never lived at Port of Spain, and the bottles bore only the signature of the inventor. The plaintiff sought to enjoin the defendants from manufacturing and selling a cordial under the name of "Angostura Aromatic Bitters." It was held that, in consequence of these misrepresentations, he could not maintain this suit.

The use of the trade mark "Trommer Extract of Malt Co.," used by one Gessner, who made his extract in an entirely different manner from Trommer, whose extract was justly famous, was held to be fraudulent, and therefore not to be protected: *Buckland* v. *Rice*, 40 Ohio St. 526.

A business sign with a row of beer barrels painted on it, with the letters "P. B." on the heads, the words "Depôt of the Celebrated" above, and the words "Philadelphia Beer" below, cannot be protected as a trade mark *per se*: *Eggers* v. *Hink*, 63 Cal. 445.

Neither a letter, nor a horse-shoe, nor any such simple device, can be claimed as a label: *Lorillard* v. *Drummond Tobacco Co.*, 14 Fed. Rep. 111.

If the person using the name has not no exclusive right to its use, it will not be protected. Thus, in *Marshall* v. *Pinkham* (52 Wis. 572), M., having a recipe (not discovered or invented by himself, or protected by a patent) for a liniment used for the cure of rheumatism and other diseases, communicated it to the various members of his numerous family, and permitted each of them, for his or her own benefit, to manufacture the article and sell it with a certain label attached (furnished by M.) containing the words "Old Dr. Marshall's Celebrated Liniment," and certain other words descriptive of the liniment, and a certain vignette, with the address of the particular member of the family manufacturing the article at the bottom of such label. Each member of the family engaged in such manufacture appeared to have had, by their mutual agreement, some particular route or routes to which his sales were confined. After M.'s death, his widow continued for some years to manufacture the liniment, and to sell it (with said label attached) on the routes last occupied by M., and she then sold the material and paraphernalia of her business to plaintiff, one of M.'s sons. It was held that plaintiff had no exclusive right to manufacture said liniment, or to the use of the label or the name "Marshall" as descriptive of the article sold.

The term "Worcestershire Sauce" has become generic as applied to a certain kind of table sauce, and cannot be exclusively appropriated by the complainants simply because they reside in Worcestershire, England: *Lea* v. *Deakin*, 11 Biss. (U. S. C. C.) 23. One will be protected in using an arbitrary combination of figures—as "830" on hosiery boxes—adopted by him to distinguish his wares from those of other parties: *Shaw Stocking Co.* v. *Mack*, 21 Blatchf. (U. S. C. C.) 1.

The words "sliced animals," "sliced birds" and "sliced objects," may be appropriated as a trade mark when used to designate dissected puzzle pictures for

children: *Selchow* v. *Baker*, 93 N. Y. 59.

But the word "Royal" is not a valid trade mark for a particular grade of goods: *Royal Baking Powder Co.* v. *Sherrell*, 93 N. Y. 331. Nor is the word "Samaritan" on medicines: *Desmond's Appeal*, 103 Penn. St. 126.

A trade mark, to be valid, must indicate the ownership or origin of the article on which it is used. The mere device of a drum, without more, cannot be the subject of a trade mark: *White* v. *Schlect*, 14 Phila. (Penn.) 88.

Where there is such a similarity in trade marks that a difference would not be noticed, when seen at different times and places, even though if the imitation and original were placed side by side it would not mislead, it is an infringement. *Sohl* v. *Giesendorf*, 1 Wilson (Ind.) 60.

Where for seventeen years after the death of the senior member of a soap manufacturing firm, the firm had owned and enjoyed the exclusive use of their original trade mark, it was held that on the dissolution of the firm, and sale by his executors of the manufactory to *L.*, they could not maintain a bill in equity to compel a member to join in an agreement to transfer to L. the right to use the trade mark: *Sohier* v. *Johnson*, 111 Mass. 238. A person charged with an infringement of a trade mark, and against whom an action is threatened and about to be commenced, cannot maintain an action to restrain the commencement of such threatened action; and the fact that an injunction against him would be a serious injury to his business furnishes no justification therefor.

It is no ground for equitable interference that the decision may result in determining the law in a way which will or may have the effect of preventing suits between other parties: *Wolfe* v. *Burke*, 56 N. Y. 115.

In *Electro-Silicon Co.* v. *Trask*, 59 How. P. (N. Y.) 189, a company that had coined the compound word "Electro-Silicon" applied it to a polishing powder prepared by them from an infusorial deposit, put up the powder in appropriate packages, and acquired a large sale therefor, was held to be entitled to restrain an imitator from designating a powder to be used for the same purpose, and put up in like packages, "Electric-Silicon:" *Electro-Silicon Co.* v. *Trask*, 59 How. (N. Y.) Pr. 189. And the same rule was adopted as to the use of the words "Nevada Silicon Co." in place of "Electro-Silicon Co.:" *Electro-Silicon Co.* v. *Levy*, 59 How. (N. Y.) Pr. 469.

A person may use his own name as a trade mark to designate an article which he produces, although another person of the same name has previously produced and sold the like article with the same designation; but where the later use of the name is for the purpose of leading the public to believe that the articles so designated are those of the prior user of the title, such use will be restrained. But where the plaintiff assumed the name of Frank Leslie, and published various newspapers under titles of which the words "Frank Leslie's" formed a part, and his son, in obedience to his father's directions, took the same name, under which he was christened and married, and by which he was generally known, but afterwards, in obedience to the father's wishes, under threats of disinheritance, and being further influenced by being informed that he was prohibited from using the name of Frank by an order of court, assumed the name of Henry Leslie, but he subsequently resumed the name of Frank, and in connection with others published a serial, entitled "Frank Leslie Junior's Sporting and Dramatic Times," it was held that this was not such a use of the words "Frank Leslie" as would entitle the plaintiff to an injunction: *England* v. *N. Y. Publishing Co.*, 8 Daly (N. Y. C. P.) 375.

In an action for infringement of a trade mark upon a label, the fact that shortly before service of summons the defendant had stopped using the labels, does not preclude the plaintiff from a right to a continued injunction, even though it is not shown that any one is likely to be deceived thereby: *India Rubber Co.* v. *Rubber Comb and Jewellery Co.*, 45 N. Y. Super. Ct. 258.

To entitle a complainant to relief against a fraudulent or colourable imitation of a certain trade mark, he must clearly show a property right in himself, and also that the resemblance between the original and the imitation is such as would mislead persons purchasing with ordinary caution: *Robertson* v. *Berry*, 50 Md. 591.

A sign, "Great I. X. L. Auction Co.," was held not to infringe on a sign and recorded trade mark, "I. X. L. General Merchandise Auction Store:" *Lichtenstein* v. *Mellis*, 8 Or. 464.

One may appropriate an arbitrary number as a valid trade mark, although not using it in connection with any word signifying ownership. Thus the figures "35," designating a kind of carte-de-visite mount, were held a valid trade mark: *Collins* v. *Reynolds Card Manuf. Co.*, 7 Abb. (N. Y.) N. Cas. 17. So, also, as to the numbers "2101" and "32," selected arbitrarily to distinguish one pattern of goods from another: *India Rubber Co.* v. *Rubber Comb and Jewellery Co.*, 45 N. Y. Super. Ct. 258. So a property right may be acquired in devices, emblems, and title pages of an almanack by adoption and use: *Robertson* v. *Berry*, 50 Md. 591. The proprietor of a trade mark, consist-

ing chiefly of the words, "The India Rubber Comb Company," was held to be entitled to protection against an imitation consisting chiefly of the words, "The India Rubber Comb and Jewellery Co.," although this was the proper corporate name of the imitating party, there being strong circumstantial evidence of intention to imitate, and to lead the ordinary reader's attention away from the differences in the vignettes on the labels.

A person cannot be charged with the violation of a trade mark when he simply uses it upon certain portions of the original article to which it was applied by the owner of the trade mark, and merely to restore the article. Thus, in an action to enjoin the defendant from using the plaintiff's trade marks, it appeared that the plaintiff, a manufacturer of stoves and ranges not patented, placed upon each of these stoves and ranges a name and number as a trade mark, and also placed upon such of their separate parts respectively as were liable to be worn out rapidly the initial letter and the number of the stove or range to which it belonged; that each of these parts was well known, had acquired a high reputation, and was sold under the name of the letter and number placed upon it; that the defendant procured some of these parts, made patterns from them, and cast from the patterns parts of stoves and ranges inferior in quality to the plaintiff's, but having all their peculiarities of ornamentation, lettering, and numbering, and advertised these parts for sale as manufactured by himself, describing the parts by the names used to designate them by the plaintiff. It was held that the defendant had a right to manufacture and sell parts of stoves suitable to replace worn out parts of the stoves made by plaintiffs, and the bill could not be maintained: *Magee Furnace Co.* v. *Le Barron*, 127 Mass. 115.

So where G., having a patent for an improvement in stoves, acquiesced, during the existence of the patent, in the manufacture and sale by M. of stoves containing said improvement, with the name "Charter Oak" upon them, and after the patent had expired, G., claiming the name "Charter Oak" as a trade mark, sought to restrain the use of it by M., it was held that M. should not be restrained so long as he did not represent the stoves, bearing said name, as made by G.: *Filley* v. *Child*, 16 Blatchf. (U. S. C. Ct.) 376.

The words "Independent National System of Penmanship," in letters of the same size and form and occupying the same position upon copy books as the trade mark "Payson, Dunton, & Scribner's National System of Penmanship," was held to be an infringement upon the latter, and their use to be properly restrained by injunction, even though persons buying to resell might not be misled by the resemblance: *Potter* v. *McPherson*, 21 Hun. (N. Y.) 559. So the appropriation and use for many years of the word "Royal" as part of a trade mark in connection with flavouring extracts, was held to entitle one to protection in its exclusive use therefor: *Royal Baking Powder Co.* v. *Sherrell*, 59 How. (N. Y.) Pr. 17.

It is no defence to an action to enjoin the use of a trade mark that the article to which it is applied is equal or even superior in quality to that to which it belongs: *Taylor* v. *Carpenter*, 10 Law Rep. 35. It is the property interest of the owner of the trade mark which the court regards, and if such interest is established it will be protected, upon the ground that its use by the defendant not only damnifies the plaintiff but also operates as a fraud upon the public.

One trade mark may infringe another, although the resemblance is not such as would deceive persons who carefully compared the two. Thus, in *Liggett and Myer Tobacco Co.* v. *Hynes* (20 Fed. Rep. 883), the defendant put up his plug tobacco in plugs of the same shape and size as the plaintiffs, but put a "star" thereon, it was held an infringement of the plaintiffs' trade mark. So, where the plaintiff had adopted the name "Lone Jack" for his smoking tobacco, and the defendant put on to the market cigarettes under the name of "Lone Jack Cigarettes." It was held an infringement, although the defendant had surrounded the name with a device different from that adopted by plaintiff: *Carroll* v. *Ertheiller*, 14 Phila. (Pa.) 424.

The rule is, that a fraudulent, or even accidental, copy of plaintiff's trade mark, with merely colourable and evasive differences, calculated to impose upon the public, will be enjoined. *Dreydoppel* v. *Young*, 14 Phila. (Penn.) 226.

In *Williams* v. *Brooks* (50 Conn. 278), the plaintiffs, partners under the name of "D. F. Taylor & Co.," had long manufactured and sold hair pins, known and readily sold as "Taylor's hair pins," put up in pink and yellow packages, with a peculiar device well known to the trade. The defendants also manufactured and sold hair pins, and had procured from L. B. Taylor the right to mark their packages "L. B. Taylor & Co.," to which they added, "Cheshire, Conn.," using a device, labels, and wrappers so nearly resembling the plaintiff's in size and colour as to be likely to deceive careless and unwary purchasers. The defendants acted in good faith, and with no design to infringe the plaintiffs' rights. Held, that the defendants should be enjoined.

omnibuses belonged to, and were under the management of, the plaintiff (*t*).

Where manufacturers have introduced a rare or superior article, and have given it a new name, by which it is known in the market, the court will restrain another manufacturer from bringing out a similar article, and calling it by the same name (*u*). The original inventor of a new manufacture, and persons claiming through him, are alone entitled to designate such manufacture as "the original;" and, after the manufacture has obtained a reputation, an injunction will be granted to restrain another manufacturer from applying the designation of "original" to his goods (*x*).

The 20th section of the Companies Act, 1862, provides that no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in certain cases. But the mere fact that a company has obtained registration under a particular name does not enable it to carry on business under that name, if it is proved that that name is calculated to deceive; for the principles applicable to individuals trading under identical or similar names apply equally to companies (*y*).

Where the thing done by the defendant has a tendency to deceive, and to induce persons to buy his own goods as the goods of the plaintiff, it is not necessary to prove damage (*z*).

Whenever a person has been injured in his trade or business, or has sustained some special or peculiar injury from a fraud committed by another, he is entitled to an injunction to prevent the continuance of the injury as well as to compensation in damages. But the court will not lend its assistance for the purpose of preventing mere falsehood, not interfering with the rights of another. It will not, therefore, restrain a tradesman from putting a false statement upon the goods he sells, such as a representation that they have obtained a prize-medal, when no such medal has ever been obtained (*a*).

Fraud on the public affords no ground for a plaintiff coming

575 into court for an injunction where he has himself no interest in the subject-matter by which the fraud is committed. In these cases, the suit must be at the instance of the Attorney-General (*b*).

(*t*) *Knott* v. *Morgan*, 2 Keen, 219.
(*u*) *Braham* v. *Bustard*, 1 H. & M. 447. *Massam* v. *Thorley's Cattle Food Co.*, *supra*.
(*x*) *Cocks* v. *Chandler*, L. R., 11 Eq. 446; 40 L. J., Ch. 575.
(*y*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 9 Ch. D. 560; 47 L. J., Ch. 828.
(*z*) *Braham* v. *Beachim*, 7 Ch. D. 848; 47 L. J., Ch. 348. *Blofield* v. *Payne*, 4 B. & Ad. 410.
(*a*) *Batty* v. *Hill*, 1 H. & M. 264.
(*b*) *Hall* v. *Barrows*, 32 L. J., Ch. 551; 33 L. J., Ch. 204.

The principle that a man has no right to sell his goods as the goods of another man has been held to preclude the use of any trade mark under which the goods of another trader have become known and acquired a reputation in the market (*c*). But if a person invents a process and invents a new name for it, and the process comes into general use, known by that name, the inventor cannot afterwards claim a monopoly in the name (*d*). The history of the law of trade marks shows the gradual rise of a new and peculiar species of property into existence and importance. The common law recognized no right of property in a trade mark; and, therefore, in an action for damages for wrongfully using a trade mark, fraud was held to be of the gist of the action, and the plaintiff failed, unless he could show that the defendant used the trade mark with intent to mislead the public. In such an action the plaintiff did not claim any abstract right to the exclusive use of the mark in question. He merely said that, having adopted a particular trade mark to denote that the goods so marked were made by him, and the mark having become known and understood in the trade, the public were led to believe that goods so marked were of his manufacture, and that the defendant marked his goods with a mark resembling the plaintiff's mark with a view to deceive the public and induce them to purchase the same as and for the plaintiff's goods, and by reason thereof the plaintiff sustained damage (*e*). In courts of equity, on the other hand, it was held, as early as the case of *Millington* v. *Fox* (*f*), that the intent was immaterial, and that, if the plaintiff could show that he had been in the habit of using a particular mark for articles which he manufactured, and that the public had in fact been misled by the use of it by the defendant, he was entitled to an injunction (*g*).

Where a trade mark has come to be in such frequent use that nobody can be deceived, or induced by it to believe he is buying the goods of the original trader who adopted the trade mark, it has become a thing *publici juris;* but mere length of adverse user will not have this effect (although it may be strong evidence);

576 for the user may be shown to be fraudulent and calculated to deceive (*h*).

(*c*) *Perry* v. *Truefitt*, 6 Beav. 63. *Dixon* v. *Fawcus*, 3 El. & El. 537; 30 L. J., Q. B. 137. *Dent* v. *Turpin*, 2 J. & H. 139; 30 L. J., Ch. 495.

(*d*) *Leonard* v. *Wells*, 26 Ch. D. 288; 53 L. J., Ch. 603.

(*e*) *Rodgers* v. *Nowill*, 5 C. B. 127. *Crawshay* v. *Thompson*, 4 M. & G. 387; 5 Sc. N. R. 562. *Morison* v. *Salmon*, 2 M. & G. 385; 2 Sc. N. R. 452.

(*f*) 3 My. & Cr. 338. *Cartier* v. *Carlisle*, 31 Beav. 292. *Welch* v. *Knott*, 4 K. & J. 747.

(*g*) *Ford* v. *Foster*, L. R., 7 Ch. 611; 41 L. J., Ch. 682. *Hirst* v. *Denham*, L. R., 14 Eq. 542; 41 L. J., Ch. 752.

(*h*) *Ford* v. *Foster*, *supra*. *In re Heaton's Trade Mark*, 27 Ch. D. 570. *Lie-*

Trade marks—Registration.—The Patents, Designs, and Trade Marks Act, 1883 (*i*), consolidates and amends the law relating to trade marks.

By sect. 62 of that Act the controller may, on application of the proprietor, register a trade mark when applied for in proper form, or he may refuse to do so, subject to appeal to the Board of Trade, who may refer the appeal to the court. Where registration is not completed within twelve months from the date of application, the application is deemed to be abandoned (*k*).

Trade marks—What can be registered.—A trade mark is defined as consisting of (1) a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner (*l*); (2) a written signature, or copy of a written signature, of an individual or firm; or (3) a distinctive device, mark, brand, heading, label or ticket, or fancy word (*m*), or words not in common use (*n*); and there may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures (*o*). Any special and distinctive word or words, letter, figure, or combination of figures or letters, or of figures and letters used as a trade mark before the 13th of August, 1875, may also be registered as a trade mark (*p*). An English adjective expressing simply a well-known quality of the article sold, as "nourishing" prefixed to "stout," could not have been used as a trade mark before the passing of the Trade Marks Registration Act, 1875 (*q*). A "special and distinctive word" under sect. 10 of the Act of 1875 meant that the goods so marked were goods made or sold by the owner of the mark, and the right to register is lost if

big's Extract of Meat Co. v. *Hanbury*, 17 L. T., N. S. 298. See *In re Anderson's Trade Mark*, 26 Ch. D. 409; 53 L. J., Ch. 664. As to when a trade mark is "common to the trade," see *In re Wragg's Trade Mark*, 29 Ch. D. 551; 54 L. J., Ch. 391.

(*i*) 46 & 47 Vict. c. 57.

(*k*) Sect. 63. Where a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars, yet differ in certain other respects, seeks to register such trade marks, they may be registered as a series in one registration, and are assignable and transmissible as a whole, but for all other purposes are deemed separate. (Sect. 66.) Sect. 67 provides that trade marks may be registered in any colour, and sect. 68 provides for advertisement of the application. The Act of Congress providing for the registration of trade marks has been declared to be unconstitutional by the Supreme Court of the United States: *Amoskeag Manufacturing Co.* v. *Trainor*, 101 U. S. 51.

(*l*) The name in common letters is not sufficient. *In re Price's Patent Candle Co.*, 27 Ch. D. 681; 54 L. J., Ch. 210.

(*m*) The word "Alpine," though a common word, is a "fancy word" as applied to woollen or cotton goods. *In re Trade Mark "Alpine,"* 29 Ch. D. 877; 54 L. J., Ch. 727. And so is "Electric," applied to velveteen. *In re Leaf's Trade Mark*, 33 Ch. D. 477.

(*n*) "National sperm" are common words. *In re Price's Patent Candle Co.*, *supra*.

(*o*) A pictorial representation of an article is not a distinctive device. *James* v. *Parry*, 31 Ch. D. 340; 55 L. J., Ch. 214.

(*p*) 46 & 47 Vict. c. 57, s. 64 (3), and see *In re Palmer's Trade Mark*, 24 Ch. D. 504; 52 L. J., Ch. 224.

(*q*) *Raggett* v. *Findlater*, L. R., 17 Eq. 29; 43 L. J., Ch. 64.

577 the owner uses words to induce people to believe that the goods are of a foreign brand (*r*).

A proper name applied to an article of manufacture may be a mark or sign indicating the manufacturer, or it may describe a particular structure or formation, without reference to the manufacturer or the quality of the manufacture, as, for instance, a "Brougham" or a "Hansom" cab. In the former case the proper name is a trade mark; in the latter case it is not (*s*). Even where the article manufactured is quite new, and has been protected by a patent, yet, when the patent has expired, any one may not only make the article, but may use the name which has been used to describe it, where that name has only been used for the purpose of describing the article (*t*).

A trade mark is ordinarily used to denote that the articles so marked are manufactured by a particular person, or at a particular place (*u*), or are of a particular quality (*x*).

The publisher of a book or the proprietor of a periodical publication, such as a magazine or a newspaper, has a right to prevent any other person from adopting the same name for any other similar publication (*y*); and this right is a chattel interest capable of assignment (*z*).

A word or distinctive combination of letters, not being the name of an individual or firm, cannot alone be registered as a trade mark, unless it has been used as such before the 13th of August, 1875 (*a*); and it would seem that a single letter cannot be registered, whether it has been used before the 13th of August, 1875, or not (*b*).

A trade mark must be registered as belonging to particular goods or classes of goods (*c*), and, when registered, can be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and will be determinable with such goodwill (*d*); but, subject to these

(*r*) *In re Woods' Trade Mark*, 32 Ch. D. 247. As to the word "distinctive" in the new Act, see *In re Hudson's Trade Mark*, 32 Ch. D. 311.

(*s*) *Singer Machine Manufacturers* v. *Wilson*, L. R., 3 App. Cas. 376; 47 L. J., Ch. 481.

(*t*) *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834; 47 L. J., Ch. 430.

(*u*) *Raddle* v. *Norman*, L. R., 14 Eq. 348; 41 L. J., Ch. 525. *M'Andrew* v. *Bassett*, 4 De G., J. & S. 380; 33 L. J., Ch. 561.

(*x*) *M'Andrew* v. *Bassett*, *supra*. *Ford* v. *Foster*, L. R., 7 Ch. 611; 41 L. J., Ch. 682. *Braham* v. *Bustard*, 1 H. & M. 447.

(*y*) *Maxwell* v. *Hogg*, L. R., 2 Ch. 307; 36 L. J., Ch. 433. *Mack* v. *Petter*, L. R., 14 Eq. 431; 41 L. J., Ch. 781. *Kelly* v. *Hutton*, L. R., 3 Ch. 703; 37 L. J., Ch. 917. *Weldon* v. *Dicks*, 10 Ch. D. 247; 48 L. J., Ch. 201.

(*z*) *Tugman* v. *Tripp*, 2 Bos. & P. N. R. 67. *Ex parte Foss*, 2 De G. & J. 230.

(*a*) *Ex parte Stephens*, 3 Ch. D. 659; 46 L. J., Ch. 46.

(*b*) *In re Mitchell's Trade Mark*, 7 Ch. D. 36.

(*c*) Sect. 65.

(*d*) Sect. 70. Upon sections similar to these in the old Act of 1875, see *Edwards* v. *Dennis*, 30 Ch. D. 454; 55 L. J., Ch. 125.

578 provisions, registration of a trade mark is to be deemed to be equivalent to public user of such mark (*e*). Those distinctive things which are comprised in the first part of sect. 10 of the Act of 1875 are to be considered as trade marks even before they are registered, yet not so as to give any one the right to complain of the user of them until they have been registered, the registration being equivalent to public use of such marks (*f*).

Trade marks—What may not be registered.—The controller is not, except where the court has otherwise decided, to register in respect of the same goods or description of goods a trade mark identical with one which is already registered with respect to such goods or description of goods; nor is he to register with respect to the same goods or description of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive (*g*). It is not lawful to register as part of or in combination with a trade mark any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of equity, or any scandalous designs (*h*). If the trade mark itself contains a material misrepresentation as to the character of the goods to which it is applied (*i*), or if the trade itself is a fraud (*k*), that will disentitle a complainant to an injunction, although the misrepresentation is so obvious that no purchaser would be deceived (*i*). The use of the word "patent" after the patent has expired, in such a way as to suggest that the article is protected by an existing patent, will vitiate a trade mark and deprive it of protection (*l*). But the mere statement on the trade mark that the article is "patent" is not such a misrepresentation, although no patent for it has been taken out, if the goods have, from many years' usage, acquired that designation in the trade generally (*m*). A collateral misrepresentation, not existing in the trade mark or label itself, would not have disentitled the person who was guilty of it to relief in equity (*n*).

Trade marks—Effect of registration.—Registration of a trade mark is to be deemed equivalent to public use of the trade mark (*o*).

(*e*) Sect. 75.

(*f*) *In re Hudson's Trade Marks*, 32 Ch. D. 311.

(*g*) Sect. 72. *In re Price's Patent Candle Co.*, 27 Ch. D. 681; 54 L. J., Ch. 210.

(*h*) Sect. 73.

(*i*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 543; 35 L. J., Ch. 53.

(*k*) *Perry* v. *Truefitt*, 6 Beav. 66. *Pidding* v. *How*, 8 Sim. 477.

(*l*) *Cheavin* v. *Walker*, 5 Ch. D. 850; 46 L. J., Ch. 686.

(*m*) *Marshall* v. *Ross*, L. R., 8 Eq. 651; 39 L. J., Ch. 225. *Sykes* v. *Sykes*, 3 B. & C. 541. *Ford* v. *Foster*, L. R., 7 Ch. 611; 41 L. J., Ch. 682.

(*n*) *Ford* v. *Foster*, *supra*. *Siegert* v. *Findlater*, 7 Ch. D. 801; 47 L. J., Ch. 233.

(*o*) Sect. 75.

579 The registration of a person as proprietor of a trade mark will be *primâ facie* evidence, and, after the expiration of five years from the date of such registration, will be conclusive evidence, of his right to the exclusive use of such trade mark, subject to the provisions of the Act (*p*).

Trade marks—Opposition to registration.—By sect. 69 provision is made for opposition to registration and the giving of costs as security to prosecute such opposition, and when such security is given the case is deemed to stand for the determination of the court.

Trade marks—Rectification of register.—By sect. 90, the court, on the application of any person aggrieved (*q*), may make an order for expunging or varying an entry, or may refuse the application, and may make such order as it thinks fit as to costs, and may decide any question for rectification of the register, or direct an issue of fact to be tried, and award damages (*r*). The proprietor of a trade mark may apply to the court to add or alter such mark in any non-essential particular (*s*).

Where each of several persons claims to be registered as proprietor of the same trade mark, the controller may refuse to comply with the claims of any such persons until their rights have been determined by the court; and the controller may himself submit, or require the claimants to submit, their rights to the court (*t*).

Trade marks—Assignment.—By sect. 70, a trade mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill. Notifications of assignments and of transmissions of trade marks are to be entered in the register of trade marks (*u*).

Where a trade mark has been registered, an assignee of the registered proprietor can bring an action to prevent the use of the trade mark without having registered the assignment (*x*).

Trade marks—Infringement.—The use of a mark so similar as to lead or be likely to lead purchasers to buy the goods marked therewith, under the impression that they are the goods of the original manufacturer whose mark they bear, is an infringement of

(*p*) Sect. 76. This section must be read subject to sect. 90 (see above). *Lloyd* v. *Bottomley*, 27 Ch. D. 646; 54 L. J., Ch. 66.

(*q*) See *In re Rivière's Trade Mark*, 26 Ch. D. 48; 53 L. J., Ch. 578.

(*r*) The controller may correct clerical errors. Sect. 91.

(*s*) Sect. 92.

(*t*) Sect. 71.

(*u*) Sect. 78. *In re Wellcome's Trade Mark*, 32 Ch. D. 213; 55 L. J., Ch. 542.

(*x*) *Ihlee* v. *Henshaw*, 31 Ch. D. 323; 55 L. J., Ch. 273.

580 that mark (*y*), although the marks are so far different that any one seeing them side by side would not be misled (*z*).

A trader has a right to make and sell machines similar in form and construction to those made and sold by a rival trader, and he has a right to refer by advertisement to his rivals' machines and name, provided he does so in a way to prevent any reasonable possibility of deception (*a*). If one trader appropriates a material and substantial part of the trade mark of another trader, he must avoid the reasonable probability of error or deception, and the *onus* is on him to show that purchasers will not be deceived (*b*). Where a trade mark of a firm selling condensed milk consisted partly of a figure of a dairy-maid, but the word "Dairy-maid" was not used on the mark, nevertheless people commonly called it the "Dairy-maid" brand, it was held an infringement to sell condensed milk under a trade mark using the word "Dairy-maid," but not the figure (*c*).

Whether a new mark is so like another as to be calculated to deceive, is a question of comparison of the two when both are fairly used, and the size, material, effect of wear and tear, and all other circumstances are considered; if, then, one is likely to be mistaken for the other, it is calculated to deceive (*d*).

Trade-marks—Action—Damages.—In the case of a trade mark, the article sold is open to the whole world to manufacture; and the only right the plaintiff has is that goods shall not be sold under his mark. It does not follow, therefore, that the plaintiff can claim damages for every article manufactured by the defendant, although sold under that mark (*e*).

Trade marks—Injunction.—An injunction may be granted for the infringement of a trade mark in this country, whatever may be the country of the manufacturer who has been defrauded (*f*).

Trade marks—Account of profits.—Where the trade mark has been used with the knowledge that it belongs to another manufacturer, the court will, in addition to an injunction against the future use of it, decree an account of profits, and give compensation in respect of the past use after knowledge of the prior right (*g*).

(*y*) *Cope* v. *Evans*, L. R., 18 Eq. 138.

(*z*) *Seixo* v. *Provezende*, L. R., 1 Ch. 192. *Wotherspoon* v. *Currie*, L. R., 5 H. L. 508; 42 L. J., Ch. 130.

(*a*) *Singer Co.* v. *Loog*, 8 App. Cas. 15; 52 L. J., Ch. 481.

(*b*) *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434. *In re Worthington & Co.'s Trade Mark*, 14 Ch. D. 8; 49 L. J., Ch. 646.

(*c*) *Anglo-Swiss Co.* v. *Metcalfe*, 31 Ch. D. 454; 55 L. J., Ch. 463.

(*d*) *In re Lyndon's Trade Mark*, 32 Ch. D. 109; 55 L. J., Ch. 409.

(*e*) *Davenport* v. *Rylands*, L. R., 1 Eq. 302; 35 L. J., Ch. 204.

(*f*) *Holloway* v. *Holloway*, 13 Beav. 213. *Franks* v. *Weaver*, 10 Beav. 303. *Collins Co.* v. *Brown*, 3 Kay & J. 428. *Leather Cloth Co.* v. *American Cloth Co.*, 1 H. & M. 271; 4 De G., J. & S. 137; 11 H. L. C. 523; 35 L. J., Ch. 53.

(*g*) *Edelsten* v. *Edelsten*, 1 De G., J. & S. 185. *Leather Cloth Co.* v. *American Cloth Co.*, *supra*.

581 *Trade marks — Removal of spurious mark.*—Where goods marked with a forged trade mark were deposited in the hands of a bailee, who was ignorant of the forgery, it was held that the person whose right was infringed was entitled to have the spurious imitation of his mark removed from the goods. But it would seem that he is not entitled to a lien for his costs on the goods; and he is certainly not entitled to such a lien in priority to the bailee's lien for his charges (*h*).

Title to fees—Offices.—Where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved; and where a payment, originally voluntary, has been made from before the time of legal memory, the title to it as a customary payment is established. But, where a fixed money payment is claimed, its existence from the time of legal memory is disproved, if, looking at the difference in the value of money, the sum claimed could not in fact have been paid in the reign of Richard I. (*i*). Where a reasonable fee is claimed, the amount may vary (*k*).

(*h*) *Moet* v. *Pickering*, 8 Ch. D. 372; 47 L. J., Ch. 527, questioning *Upmann* v. *Elkan*, L. R., 12 Eq. 140; 7 Ch. 130; 41 L. J., Ch. 246.

(*i*) *Bryant* v. *Foot*, L. R., 3 Q. B. 497; 37 L. J., Q. B. 217.

(*k*) *Shephard* v. *Payne*, 12 C. B., N. S. 414; 31 L. J., C. P. 297.

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CHAPTER IX.

INJURIES TO RIGHTS ARISING OUT OF THE DOMESTIC RELATIONS.

SECTION I.

INJURIES TO THE RIGHTS OF A MASTER.

Injuries to the rights of a master—Personal injuries to the servant.—The master is entitled to maintain an action for damages for a personal injury to his servant, whereby he has been deprived of his services, and may recover the expenses incurred in curing the servant's personal injuries and recovering the benefit of his services. If an assault is committed upon a servant, and the master has lost the benefit of his service by reason of the assault, an action for damages is maintainable both by the servant and the master; but the master cannot have an action for the beating, unless the battery is so great that, by reason thereof, he loses the services of his servant; but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of the loss of service (*a*).

The service.—An actual service is sufficient; and it is unnecessary to prove any legal contract to serve (*b*).

Personal injuries arising from breach of contract.—If the act complained of is in effect a breach of contract, *e. g.*, the neglect of a railway company to carry a servant, who is a passenger on their railway safely, the master of the servant is not entitled to sue the railway company, for the contract is not with him (*c*).

Personal injuries causing death.—A master cannot maintain an action for injuries which cause the immediate death of his servant. Where the defendant's servant negligently drove over the plaintiff's

(*a*) *Robert Mary's case*, 9 Co. 205; *Eden* v. *Lexington R. R. Co.*, 14 B. Mon. (Va.) 204; *Hyatt* v. *Adams*, 16 Mich. 493. See Wood's Master and Servant, Chap. IX., on "Injuries to Servants."

(*b*) Fitz. N. B. 919. *Barber* v. *Dennis*, 6 Mod. 69; 1 Salk. 68.

(*c*) *Alton* v. *Midland Rail. Co.*, 19 C. B., N. S. 213; 34 L. J., C. P. 292. *Marshall* v. *Y. & N. Rail. Co.*, 11 C. B. 655. *Austin* v. *G. W. Rail. Co.*, L. R., 2 Q. B. 442; 36 L. J., Q. B. 201.

583 servant, and killed him, it was held that the plaintiff could not maintain an action (*d*).

Personal injuries to a child.—A parent has a right of action for an injury done to his child by the wrongful act of another, if the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant (*e*). But, where the plaintiff brought an action against the defendant for carelessly driving over and injuring the plaintiff's child, whereby the plaintiff was deprived of the service of the child, and was obliged to expend a large sum of money in doctors and nurses, and it appeared that the child was only two years and a-half old, and incapable of performing any act of service, it was held that the action was not maintainable (*f*).

Personal injury to servant—Damages.—Where the master has brought an action for damages for a personal injury to his servant, "courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages" (*g*). The master may claim, and will be entitled to recover, damages, not only for the loss of the services of his servant up to the time of the commencement of the action, but, if the servant continues disabled, up to the time when it appears by the evidence that the disability may be expected to cease (*h*). The servant himself, also, is entitled to an action for the damage he has sustained by the tortious act, for loss of wages, bodily pain, and the expenses he has incurred in procuring medical advice and medicine, food and lodging, which would otherwise have been provided for him by his master. The servant himself who sustains bodily pain and anguish, is the only person entitled to damages in respect thereof (*i*).

Enticing away and harbouring of servants.—Every person who knowingly and designedly interrupts the relation subsisting between master and servant, by procuring the servant to depart from the master's service, or by harbouring him and keeping him as servant, after he has quitted his place, and during the stipulated period of service, whereby the master is injured, commits a wrongful act, for which he is responsible in damages (*k*); and, if a servant or apprentice quits his master or employer without just cause, before his term of service expires, and another retains and employs him against the will of the master, and with notice of his

(*d*) *Osborn* v. *Gillett*, L. R., 8 Ex. 88; 42 L. J., Ex. 53, *dissentiente*, Bramwell, B. See Wood's Master and Servant, p. 443.

(*e*) *Hall* v. *Hollander*, 4 B. & C. 662.

(*f*) *Grinnell* v. *Wells*, 7 M. & G. 1041; 8 Sc. N. R. 741.

(*g*) Abbott, C. J., *Hall* v. *Hollander*, 4 B. & C. 663.

(*h*) *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 301. *Ante*, p. 80.

(*i*) *Gladwell* v. *Steggall*, 5 Bing. N. C. 736.

(*k*) *Lumley* v. *Gye*, 2 El. & Bl. 224; 22 L. J., Q. B. 463. See Wood's Master and Servant, Chap. X.

584 having deserted the service of the latter, an action for damages is maintainable against him, as the very act of giving the servant employment is affording him the means of keeping out of his former service (*l*).

Enticing away servant—The service.—A taskworkman, who contracts with another by the job or piece, is the servant of that other until the work is finished; and no other person can, whilst such work is going on, and is unfinished, lawfully employ the servant, if, by so doing, he causes him to leave his work unfinished, and has knowledge of the fact. Thus, where a journeyman shoemaker, living and working in his house, was employed by a shoe manufacturer to make a certain number of shoes at so much per pair, to be completed by a given time, and the defendant took the man into his service, and thereby caused him to leave a number of shoes unfinished, and neglected to discharge him after having received notice from the plaintiff of the subsisting engagement between such workman and himself, he was held responsible in damages to the plaintiff for the injury (*m*).

Where the action is brought in respect of the enticing away of a child, it is not necessary to allege or prove any contract of service beyond what the law will imply from the relationship of parent and child, where the child is living under the parent's roof (*n*).

Enticing away servant—The damages.—If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuasion of the defendant, damages far beyond the value of the subject-matter of the contract may be recoverable from the wrong-doer (*o*). The measure of damages is not to be confined to the loss of the services of the servants who were actually enticed away; but the jury are justified in giving ample compensation for all the damage resulting from the wrongful act (*p*). If the defendant has derived any benefit from the services of the servant or apprentice, the master is entitled to recover the value of it (*q*).

Seduction of female servants.—To entitle a person to maintain an action for the seduction of a girl, it must be proved that the relationship of master and servant existed between the plaintiff and the person seduced at the time of the seduction. The action may be brought by any person with whom the seduced girl was residing at the time she was seduced, either in the character of a daughter and servant, or as a ward and servant, or as a servant

(*l*) *Blake* v. *Layton*, 6 T. R. 221. *Fawcet* v. *Beavres*, 2 Lev. 63. *Adams* v. *Bafeald*, 1 Leon. 240. *Hamilton* v. *Vere*, 1 Lev. 299; 2 Saund. 169.

(*m*) *Hart* v. *Aldridge*, Cowp. 54. Bac. Ab. MASTER AND SERVANT (O).

(*n*) *Evans* v. *Walton*, L. R., 2 C. P. 815; 36 L. J., C. P. 307.

(*o*) Crompton, J., *Lumley* v. *Gye*, 2 El. & Bl. 230; 22 L. J., Q. B. 463.

(*p*) *Guntor* v. *Astor*, 4 Moore, 15.

(*q*) *Foster* v. *Stewart*, 3 M. & S. 201.

585 only. Thus, in the case of an orphan living with a relative or a friend or benefactor, and rendering such domestic attendance and obedience as is usually rendered by a daughter to her father, the relative or benefactor is the proper person to sue for the wrong done (*r*); and standing *locò parentis*, and being thus entitled to sue, he is permitted to recover damages beyond the mere loss of service, as when the action is brought by the actual parent (*s*).

The law gives no remedy to a parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity (*t*); but, if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.

Seduction — The service.—The foundation, therefore, of the action by a father to recover damages against a wrong-doer for the seduction of his daughter has been uniformly placed, from the earliest time, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of the service of the daughter, in which service the father is supposed to have a legal right or interest. It has, consequently, always been held, that the loss of service must be proved, or the plaintiff must fail. It is not enough for the father to show that his daughter was a poor person maintaining herself by her labour, that the defendant seduced her and got her with child, and that she became unable to maintain herself, and that the father was forced to maintain her at his own expense, and to pay for doctors and nurses to attend upon her, &c. (*u*); or that the father had apprenticed her to the defendant, and paid him a large sum of money to instruct her in a trade, but that the defendant seduced her and got her with child, and rendered her unable to learn the trade (*x*). However slight the act of service may be, it must be a real, genuine service, such as the parent may command. Milking the cows, nursing the children, making tea, or doing any household work at the command of the parent is, however, quite sufficient to constitute the relationship of master and servant, when the girl is residing with her father and mother (*y*).

(*r*) Holt, 453, note.
(*s*) *Irwin* v. *Dearman*, 11 East, 24. *Edmonson* v. *Machell*, 2 T. R. 4. See Wood's Master and Servant, Chap. XI.
(*t*) *Saterthwaite* v. *Dwerst*, 4 Doug. 315; 5 East, 47, n.
(*u*) *Grinnell* v. *Wells*, 7 M. & G. 1033; 8 Sc. N. R. 741; 14 L. J., C. P. 19.
(*x*) *Harris* v. *Butler*, 2 M. & W. 539.
(*y*) *Bennett* v. *Allcott*, 2 T. R. 168. *Jones* v. *Brown*, 1 Esp. 217. *Fores* v. *Wilson*, 1 Peake, 77. Coleridge, J., *Torrence* v. *Gibbins*, 5 Q. B. 300. *Evans* v. *Walton*, L. R., 2 C. P. 815; 36 L. J., C. P. 307. *Ante*, p. 584.

586 Indeed, it would seem that, where the daughter is living with her father, forming part of his family, and liable to his control and command, proof of any act of service is unnecessary, the right to the service being sufficient (*z*).

As the loss of service is the foundation of the action, it follows that the relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction; for otherwise the defendant's act does not infringe upon the plaintiff's rights, or deprive him of anything then belonging to him. If, therefore, the daughter, at the time she was seduced, was at the head of an establishment of her own, and her father was living with her as a visitor in her own house, she cannot be treated as being in the subordinate position of a servant, and the father cannot maintain an action for loss of service (*a*). If the daughter, at the time she was seduced, did not reside with the father, but was living away from home in the service of another person, the father has no ground of action for the seduction (*b*), even though he received part of her wages (*c*) (unless the person with whom she is living inveigled her away from home into a pretended service, for the purpose of seducing her), and although it is proved that the absence was only temporary, and that she intended to return and live with her father after the term of service had expired (*d*). But, if she is away only on a temporary visit, and still forms part of her father's family, and makes herself serviceable to him when she is at home, such temporary absence constitutes no impediment to an action by the father for damages (*e*); and, if she is seduced while on her way home from her master's to her father's house, having been dismissed by her master, there is sufficient constructive service (*f*). Where a girl was bound to serve the defendant for eleven hours during the day as a servant in husbandry, but slept at her father's, and after her day's work performed services for him, it was held that there was a sufficient service to the father (*g*). Whenever the girl is away in actual service, the mere fact of her mistress being in the habit, from time to time, of allowing her to go home and assist her widowed mother in needlework, has been held to be insufficient to enable the mother to maintain an action for damages (*h*), although the seduction actually is effected while she is on such a temporary visit, and during such visit she assists

(*z*) *Maunder* v. *Venn*, Moody & M. 323.

(*a*) *Manley* v. *Field*, 7 C. B., N. S. 96; 29 L. J., C. P. 79.

(*b*) *Dean* v. *Peel*, 5 East, 47. *Grinnell* v. *Wells*, 7 M. & G. 1042; 8 Sc. N. R. 741.

(*c*) *Carr* v. *Clarke*, 2 Chit. Rep. 261.

(*d*) *Blaymire* v. *Haley*, 6 M. & W. 55. *Harris* v. *Butler*, 2 *ib.* 539.

(*e*) *Griffiths* v. *Teetgen*, 15 C. B. 344.

(*f*) *Terry* v. *Hutchinson*, L. R., 3 Q. B. 599; 37 L. J., Q. B. 257.

(*g*) *Rist* v. *Faux*, 4 B. & S. 409; 32 L. J., Q. B. 386.

(*h*) *Thompson* v. *Ross*, 5 H. & N. 16; 29 L. J., Ex. 1.

587 in the housework (*i*). If the relation of master and servant is contracted after the seduction, the loss of service cannot then be made the foundation of an action. The state of the case then is, that the master has taken into his service a servant whose services are less valuable to him by reason of antecedent occurrences; and there is no consequential injury of which he has any right to complain as against the seducer (*k*).

Seduction—The service—Pretended hiring.—If a person hires a girl as a servant, and withdraws her from her father's service, for the very purpose of getting possession of her person and seducing her, this fraudulently-concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, and does not throw any impediment in the way of an action by the latter for the seduction. Thus, where the plaintiff's daughter, who was residing with the plaintiff, and rendering him service in domestic matters, advertised for a situation as lady's maid, and the defendant, seeing the advertisement, proposed to engage her in that capacity for his sister, but afterwards hired her at weekly wages to take care of an empty house, where he seduced her and got her with child, it was held by Abbott, C. J., to be a question for the jury whether the daughter was withdrawn from her father's house by the defendant under a *bonâ fide* contract for her services, or the whole matter was a mere pretence and contrivance on the part of the defendant to get possession of her person. "If she was the servant of the defendant," observes his lordship, "the action certainly cannot be maintained; but had she ceased to be the servant of her father, the plaintiff? If the jury are of opinion that the defendant practised a fraud and contrivance to procure her to leave her father's house, without any real intention to hire her as a servant, I am of opinion that the action is maintainable." And afterwards, in summing up to the jury, his lordship said, "During the time that she was in her father's house she was his servant; was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house at the rate of 7*s.* per week; but, if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them" (*l*).

Seduction—The service—Married daughters.—Where a married woman, separated from her husband, returned to her father's house

(*i*) *Hedges* v. *Tagg*, L. R., 7 Ex. 283; 41 L. J., Ex. 169.

(*k*) *Davies* v. *Williams*, 10 Q. B. 728; 16 L. J., Q. B. 369.

(*l*) *Speight* v. *Oliviera*, 2 Stark. 495.

588 and lived with him, performing various acts of service, it was contended that a married woman was not capable of making any contract of service; but the court held that, as against a wrong-doer, it was sufficient to prove that the relationship of master and servant *de facto* existed at the time of the seduction, and that, in the absence of any interference on the part of the husband, it was not competent to the defendant to set up the husband's right to the services of his wife as an answer to the action (*m*).

Seduction—The paternity.—If the defendant, though he seduced the girl, was not the father of the child of which she was subsequently delivered, and did not, consequently, cause the pregnancy and illness, and the consequent loss of service, there is no cause of action against him (*n*).

Seduction caused by the plaintiff's own misconduct.—It is expected of every parent that he should be jealous of, and watchful over, the honour of his daughter, and protect her, as far as possible, from the advances and solicitations of notorious libertines. If, therefore, he introduces her to profligate acquaintances, encourages improper intimacies, and invites the injury of which he complains, he has no ground of action for damages. Where the defendant proposed to marry the daughter of the plaintiff, and was received and entertained as her suitor at the plaintiff's house, and the plaintiff then ascertained that the defendant was a married man and a great libertine, notwithstanding which he allowed him to continue his addresses to the daughter, on the strength of certain assurances which he gave to the effect that his wife was afflicted with a mortal disease, and could not live long, and then he would marry the daughter, and the defendant ultimately seduced her, it was held that, as the plaintiff had by his own misconduct contributed to the injury of which he complained, he had no ground of action for redress (*o*).

Seduction—Damages.—In estimating the damages to be given to a father for the loss of service of his daughter from seduction, the jury are not confined to the consideration of the mere loss of service, but may give damages for the distress of mind which the parent has sustained in being deprived of the society and comfort of his child, and by the dishonour which he receives (*p*). The jury also must take into consideration the situation in life but not the means (*q*) of the parties, and say what they think, under all the circumstances, is a reasonable compensation to be given to the

(*m*) *Harper* v. *Luffkin*, 7 B. & C. 387.
(*n*) *Eager* v. *Grimwood*, 1 Exch. 61; 16 L. J., Ex. 236.
(*o*) *Reddie* v. *Scoolt*, 1 Peake, 316.
(*p*) *Irwin* v. *Dearman*, 11 East, 23.
(*q*) *Hodsoll* v. *Taylor*, L. R., 9 Q. B. 79; 43 L. J., Q. B. 14.

589 parent (*r*). "In point of form," observes Lord Eldon, "the action only purports to give a recompense for loss of service; but 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" (*s*).

Seduction—Aggravation of Damages.—Evidence is inadmissible to show that the defendant accomplished the seduction through the medium of a promise of marriage, for the purpose of enhancing the damages, as the breach of promise constitutes a distinct cause of action, in respect of which damages are recoverable by the daughter. "But you may ask," observes Lord Ellenborough, "whether the defendant paid his addresses to her in an honourable way" (*t*). "The jury do right," observes Wilmot, C. J., "in a case where it is proved that the seducer made his advances under the guise of matrimony, in giving liberal damages; and, if the party seduced brings another action against the defendant for the 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 had civilly received the defendant, and permitted him to pay his addresses to his daughter" (*u*). If, in the course of the trial, a promise of marriage is inadvertently proved, the jury must be told to exclude the injury resulting to the seduced girl from the breach of promise of marriage from their consideration, and leave it quite out of the question, in determining the amount of the damages to be recovered by the father and master for the loss of service (*u*).

Seduction—Mitigation of damages.—The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Primâ facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents; but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages; and, if evidence is given to impeach the character of the girl, it may be met and rebutted by evidence on the part of the plaintiff of her previous good character. The defendant may

(*r*) *Andrews* v. *Askey*, 8 C. & P. 9. *Southernwood* v. *Ramsden*, cited *ib.* 9.
(*s*) *Bedford* v. *M'Kowl*, 3 Esp. 120. See per Lord Ellenborough, C. J., in *Irwin* v. *Dearman*, 11 East, 23.
(*t*) *Dodd* v. *Norris*, 3 Campb. 520. *Elliott* v. *Nicklin*, 5 Pr. 641.
(*u*) *Tullidge* v. *Wade*, 3 Wils. 18.

590 call witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses prior to the period of the seduction, for the purpose of reducing the damages (*x*). It may be shown that the seduced girl, prior to the seduction, was in the habit of keeping loose company or of giving utterance to loose language and immodest remarks; she may be asked, for instance, whether she had not admitted that some person other than the defendant was the father of her child; but, before witnesses can be called to prove the nature of the language or of the remarks, she must be pointedly and expressly asked in her cross-examination, whether she ever used the particular language or the precise remarks intended to be given in evidence against her (*y*). Where the whole of the cross-examination in an action for seduction went to show that the person seduced had conducted herself immodestly and kept improper company, witnesses were allowed to be called to prove her general good character and modest deportment, and the general respectability of the family (*z*). But, where the daughter was cross-examined to show that she had submitted herself to the defendant's embraces under circumstances of extreme indelicacy, and had been guilty of great levity of conduct, Lord Ellenborough refused to allow witnesses to be called to the general character of the daughter, saying she had had ample opportunity of setting her conduct right in the course of her re-examination (*a*); and, where evidence was given on the part of the defendant to prove that the girl, previous to her acquaintance with him, had had a child by another man, Lord Ellenborough restricted the evidence tendered by the plaintiff in reply thereto to disproving the specific breach of chastity alleged by the defendant, and would not allow him to give general evidence of his daughter's good character for chastity and respectability (*b*).

SECTION II.

INJURIES TO THE RIGHTS OF A HUSBAND.

Injuries to marital rights—Personal injuries to the wife—Discharge by conviction before justices.—Where *A* assaulted *B*'s wife, and for such assault was fined by justices under the 24 & 25 Vict.

(*x*) *Verry* v. *Watkins*, 7 C. & P. 308.
(*y*) *Carpenter* v. *Wall*, 11 Ad. & E. 803.
(*z*) *Bate* v. *Hill*, 1 C. & P. 100.
(*a*) *Dodd* v. *Norris*, 3 Campb. 518.
(*b*) *Bamfield* v. *Massey*, 1 Campb. 604.

591 c. 100, and paid the fine, it was held that an action by the husband in respect of the consequential damage to himself by reason of the assault on his wife was barred under the 45th section of the Act (*c*).

Of the enticing away and harbouring of married women.—Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or turned his wife out of doors, or by some insult or ill-treatment, compelled her to leave him. Where the defendant persuaded and procured a wife to separate from her husband and live apart from him, it was held that he was responsible in damages to the husband, that every moment a wife continues absent from her husband is a new tort, and that every one who persuades her to do so does a new injury (*d*). But, where a married woman came to the defendant's house and represented herself to have been very ill-used by her husband, who, she said, had turned her out of doors, and upon this representation the defendant received her into his house, and suffered her to continue there after he had received notice from the husband not to harbour her, Lord Kenyon held that an action could not be maintained against him, as he appeared to have acted solely from principles of humanity (*e*), and that, if a husband ill-treats his wife, so that she is forced to leave his house through fear of bodily injury, any person may safely receive and protect her (*f*).

Enticing wife away—Damages.—Where the plaintiff alleged that his wife left him and lived apart from him, during which time a considerable fortune was left to her separate use, and that, she being willing to return to the plaintiff, the defendant unlawfully persuaded her to continue to live away from the plaintiff, whereby he lost the assistance of his wife in his domestic affairs and the advantage of her fortune, 3,000*l.* damages were recovered for the wrong done (*g*).

Adultery.—By the 20 & 21 Vict. c. 85, s. 59, the action for criminal conversation is abolished; but by sect. 33 it is enacted, that any husband may, either in a petition for dissolution of marriage or for judicial separation, or by petition only, claim damages from

(*c*) *Masper* v. *Brown*, 1 C. P. D. 97; 45 L. J., C. P. 203. Although since the Married Women's Property Act, 1882, it would appear that a husband cannot sue for wrongs committed against his wife (see *ante*, p. 62), it seems that he can still sue for consequential damage to himself arising out of personal injuries to her.

(*d*) *Winsmore* v. *Greenbank*, Willes, 577.

(*e*) *Philp* v. *Squire*, 1 Peake, 115.

(*f*) *Berthon* v. *Cartwright*, 2 Esp. 480.

(*g*) *Winsmore* v. *Greenbank*, Willes, 580.

592 any person on the ground of his having committed adultery with the wife of such petitioner; and such claim is to be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations, as actions for criminal conversation were formerly tried and decided in courts of common law (*h*); and the damages to be recovered are in all cases to be ascertained by the verdict of a jury, although the respondents or either of them may not appear.

In order to establish a *primâ facie* case for damages from a defendant who is charged with having committed adultery with the claimant's wife, it is necessary to prove a legal marriage between the claimant and the woman alleged to be his wife. It is not enough to show that he and his alleged wife intended to celebrate, and did in their belief celebrate, a lawful and formal marriage, and did afterwards cohabit as man and wife upon the faith of this *bonâ fide* belief; for the burthen is on him to prove a clear legal marriage, whereby the relation of husband and wife is really created. A mere proof of the ceremony which the parties suppose to be sufficient to constitute that relation is not enough; it must be shown to be sufficient according to law for that purpose (*i*).

A voluntary separation was no bar formerly to the husband's claim for damages in an action of crim. con. (*k*); but it may be now under the Divorce Act, if it amounts to such misconduct as will induce the court, in the exercise of its discretion, under s. 31, to dismiss the petition (*l*). If the claimant connived at the adul-

(*h*) See *Seddon* v. *Seddon*, 30 L. J., P. & M. 12.

(*i*) *Catherwood* v. *Caslon*, 13 M. & W. 265; 13 L. J., Ex. 334. *Morris* v. *Miller*, 1 W. Bl. 632; 4 Burr. 2057. Marriages may be proved by a copy or extract from the register, purporting to be signed and certified as a true copy or extract by the parish officer, whether incumbent, rector, vicar or curate, who has the custody of the register (14 & 15 Vict. c. 99, s. 14. *In re Hall's Estate*, 2 De G., M. & G. 748; 22 L. J., Ch. 177); and the identity of the petitioner and his wife with the parties named in the register, as having been married at the time and place therein mentioned, may be proved by any person who was present at the ceremony, or by any evidence sufficient to satisfy a jury of their identity (*Birt* v. *Barlow*, 1 Doug. 174. *Hubbard* v. *Lees*, L. R., 1 Ex. 255; 35 L. J., Ex. 169). The fact of the marriage may also be proved by the testimony of an eye witness of the ceremony, without the production of any examined or certified extract from the register (*St. Devereux* v. *Much Dew Church*, 1 W. Bl. 367. *Reg.* v. *Mainwaring*, Dears. & B. C. C. 132; 26 L. J., M. C. 11. *Sichel* v. *Lambert*, 15 C. B., N. S. 781; 33 L. J., C. P. 137); and, in a suit for dissolution of marriage, where the evidence was that the parties left a certain place in order to be married, that they returned and stated that they had been married, and that they subsequently lived together as man and wife for many years, it was held sufficient (*Patrickson* v. *Patrickson*, L. R., 1 P. & D. 86; 35 L. J., P. & M. 48), the presumption in favour of marriage in such and similar cases being very strong (*Gompertz* v. *Kensit*, L. R., 13 Eq. 369; 41 L. J., Ch. 382). As to the proof of a foreign marriage, see *Finlay* v. *Finlay*, 31 L. J., P. & M. 149. *Abbott* v. *Godoy*, 29 L. J., P. & M. 57. A marriage in India may be established by an authenticated copy of the register of marriages kept in India by public authority and transmitted to this country. (*Ratcliffe* v. *Ratcliffe*, 1 S. & T. 467; 29 L. J., P. & M. 202. See, also, Add. on Contracts, 8th ed., pp. 849 *et seq.*)

(*k*) *Chamb. rs* v. *Caulfield*, 6 East, 256.

(*l*) *Seddon* v. *Seddon*, 30 L. J., P. & M. 12.

593 terous intercourse (*m*), or if he suffered or encouraged his wife to live in a state of prostitution, he could not, before the passing of the Divorce Act, come into a court of justice to ask for damages. His having suffered such connexion with other men, was equally a bar to the action as if he had permitted the defendant to be connected with her (*n*). But the infidelity of the husband was held to constitute no bar to his claim for damages from the adulterer, although it might be given in evidence in mitigation of damages (*o*). All these circumstances, however, may now be pleaded as a defence to the petition for the dissolution of the marriage (*p*).

Damages recoverable in cases of adultery.—The injury suffered by the husband from the seduction of his wife depends upon the circumstances and situation in life of the husband at the time of the seduction, upon the mode in which he fulfilled his marital duties, the terms upon which the husband and wife were living together (*q*), and upon the general character of the wife at the time she was led astray. These are circumstances for the proper and sole cognizance of the jury; and the court will not interfere with their estimate of damages, unless it is manifestly and palpably outrageous (*r*). Where the plaintiff's wife had not been criminally connected with the defendant alone, Lord Ellenborough directed the jury to award damages proportioned to so much of the plaintiff's loss of comfort, &c., as they might suppose to have been occasioned by the defendant's misconduct, and not to give damages for the whole of the injury that the plaintiff had sustained (*s*). So, proof of adulterous intercourse between the wife and other men prior to the commission of the adultery with the defendant, may be given in evidence in reduction of damages, for the purpose of showing that the claimant has lost a wife who was worth nothing (*t*).

(*m*) *Cibber* v. *Sloper*, cited 4 T. R. 655.

(*n*) Per Ld. Kenyon, *Hodges* v. *Windham*, 1 Peake, 54.

(*o*) *Bromley* v. *Wallace*, 4 Esp. 237.

(*p*) *Plumer* v. *Plumer*, 1 S. & T. 147; 29 L. J., P. & M. 63.

(*q*) When the husband and wife are separated from each other, the wife's letters to her husband are admissible in evidence for the purpose of showing the state of her affections at the time of the writing of the letters; but, to remove all grounds for any suspicion of collusion between the husband and wife it should be proved that the letters were written at the time they bear date, and before there was any knowledge or suspicion of the adulterous intercourse. (*Trelawney* v. *Coleman*, 1 B. & A. 90; 2 Stark. 191. *Edwards* v. *Crock*, 4 Esp. 38.) Such letters are not to be rejected merely because they contain statements of specific facts calculated to influence the minds of the jury, and which are not strictly evidence. But the jury must be cautioned not to allow themselves to be influenced by the particular facts alluded to (*Willis* v. *Bernard*, 8 Bing. 376; 1 M. & Sc. 584).

(*r*) *Wilford* v. *Berkeley*, 1 Burr. 609. *Duberley* v. *Gunning*, 4 T. R. 657.

(*s*) *Gregson* v. *Theaker*, 1 Campb. 415, n.

(*t*) Alderson, B., *Winter* v. *Henn*, 4 C. & P. 498. *Forster* v. *Forster*, 33 L. J., P. & M. 150, n.

594 Circumstances not amounting to a defence under the 31st section may be admissible in mitigation of damages; for, previous to the passing of the Divorce Act, it might be shown in mitigation of damages that the husband neglected his wife, or treated her with coldness, and as a person whom he did not esteem or regard; also that the marriage was kept secret, and that the wife was allowed to live with her mother, and pass as a single woman, and that she was not known by the defendant to be married at the time of the commission of the adultery (*u*).

Evidence of the defendant's circumstances or property has been held to be inadmissible for the purpose of enhancing the damages, it being considered that the jury ought to give compensation for the injury sustained without reference to the wealth of the defendant (*x*). But, if the co-respondent has used his wealth for the purpose of seducing the respondent, the jury may, it seems, take it into consideration in assessing the damages (*y*). Evidence of the humble condition in life and poverty of the defendant, has been received in mitigation of damages, for the purpose of showing that the allurements and temptations to the commission of the adultery, did not emanate from the defendant. Letters, also, written by the claimant's wife before the commission of the adultery, soliciting the defendant's addresses, and enticing him into the adulterous connexion, are admissible in evidence in mitigation of damages, but not proofs of misconduct subsequent to the commission of the adultery (*z*).

Adultery—Application of the damages recovered.—After verdict, or decree, the Court for Divorce and Matrimonial Causes is to direct in what manner the damages are to be applied (*a*), and is empowered to settle the whole, or any part thereof, for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife (*b*).

(*u*) *Calcraft* v. *Earl of Harborough*, 4 C. & P. 501.

(*x*) Alderson, B., *James* v. *Biddington*, 6 C. & P. 590.

(*y*) *Cowing* v. *Cowing*, 33 L. J., P. & M. 149.

(*z*) *Elsam* v. *Faucett*, 2 Esp. 563.

(*a*) See *Patterson* v. *Patterson*, L. R., 2 P. & D. 189.

(*b*) *Bent* v. *Bent*, 30 L. J., P. & M. 175. *Bellingay* v. *Bellingay*, L. R., 1 P. & D. 168. Whenever, in any petition presented by a husband, the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, the court may order the adulterer to pay the whole or any part of the costs of the proceeding (20 & 21 Vict. c. 85, ss. 33, 34); or, if no sufficient justification has been proved for making him a co-respondent (*Whitmore* v. *Whitmore*, L. R., 1 P. & D. 25; 35 L. J., M. C. 52; and see *Conradi* v. *Conradi*, L. R., 1 P. & D. 163; 35 L. J., M. C. 49), or the husband has connived at the adultery (*Adams* v. *Adams*, L. R., 1 P. & D. 333; 36 L. J., P. & M. 62), may order the husband to bear his own costs. But, where the Court of Appeal has exercised its discretion with regard to costs, the Judge Ordinary will not interfere (*L*—— v. *H*——, L. R., 1 P. & D. 293; 36 L. J., P. & M. 76). Under certain circumstances the wife will have to bear her own costs (*Heal* v. *Heal*, L. R., 1 P. & D. 300; 36 L. J., P. & M. 62), as well as those of her husband (*Miller* v. *Miller*, L. R., 2 P. & D. 13; 39 L. J., P. & M. 4. *Milne* v. *Milne*, L. R., 2 P. & D. 202; 40 L. J., P. & M. 13. See *Wait*

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SECTION III.

INJURIES TO PARENTAL RIGHTS.

Injuries to parental rights—Of the right of fathers to the custody of their infant children.—Every father has a right by the common law (*c*) to the custody of his legitimate infant children to the exclusion of the mother (*d*), while they are within the age of nurture, or until they reach the age of discretion, viz., fourteen in the case of boys, and sixteen in the case of girls (*e*). If the father has been deprived of the custody of his children, it will be restored to him by the court, so long as he has not by immorality and misconduct disqualified himself from being the legal guardian of his children, and forfeited his claim to the assistance of the court (*f*). A contract by the father for the abandonment of these rights, and for the maintenance and education of the child by a relation, or any other person, does not prevent him from claiming the custody of the child, and requiring the child to be delivered up to him (*g*). An agreement made before marriage between a husband and wife of different religious persuasions with regard to the religious education of the issue of the marriage is not binding as a legal contract, and cannot be enforced. The father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him, not for his own benefit, but for that of his

v. *Wait*, L. R., 2 P. & D. 228; 40 L. J., P. & M. 30). The payment of costs may be enforced by writ of sequestration. *Dent* v. *Dent*, L. R., 1 P. & D. 366; 36 L. J., P. & M. 61. *Miller* v. *Miller*, L. R., 2 P. & D. 54; 39 L. J., P. & M. 38.

(*c*) The Courts of Common Law professed themselves incompetent to control the right of the father to the custody of his infant children, and decided that they had no power to interfere to take an infant child from the custody of its father, except for the purpose of preventing improper and unjustifiable restraint of the person of the child, and protecting it from personal ill-usage and gross cruelty (*R.* v. *De Manneville*, 5 East, 221); and they accordingly refused to interfere to take a child out of the custody of the father, although his cruelty to the mother had rendered it impossible for her to live with him, and his conduct was grossly immoral (*Ex parte Skinner*, 9 Moore, 278. *R.* v. *Greenhill*, 4 Ad. & El. 624; 6 N. & M. 255). The Court of Chancery, on the other hand, representing the sovereign as *parens patriæ*, has always exercised a general control over the maintenance and education of all the Queen's subjects within its jurisdiction, and has from time to time interfered with the father's right to the custody of his infant children, where the conduct of the father and a due regard for the interests of the children have rendered such interference necessary. By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 10, it is enacted that in questions relating to the custody and education of infants the rules of equity shall prevail. See per Brett, M. R., *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 323; 53 L. J., Ch. 10.

(*d*) *Cartlidge* v. *Cartlidge*, 2 S. & T. 567; 31 L. J., P. & M. 85.

(*e*) Com. Dig. Guardian (D), *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J., Ch. 10.

(*f*) Cresswell, J., *In re Hakewill*, 12 C. B. 232. *Ex parte M'Clellan*, 13 C. B. 680; 1 Dowl. P. C. 81.

(*g*) *Reg.* v. *Smith*, 1 B. C. C. 132; 22 L. J., Q. B. 116. *Vansittart* v. *Vansittart*, 4 Kay & J. 62; 2 De G. & J. 249; 27 L. J., Ch. 289.

596 children (*h*). So, where the father had covenanted in a separation deed, that his infant daughter should remain in her mother's custody during eleven months in the year, and the mother refused to allow the child to receive any religious instruction, and published an obscene book, the court removed the child from the custody of the mother (*i*). But, where the father is capriciously interfering with an arrangement which has been acted upon, and which is clearly for the benefit of the children, the court will interfere (*k*); and, when a parent has committed the care of an infant child to a relation who has brought it up, and had the guardianship and control of it for a lengthened period, the court will not compel the restoration of the child to the parent, if the effect of the proceeding would be productive of serious injury to the position and prospects of the child (*l*). So, where a father, having grossly misconducted himself, has covenanted not to exercise his paternal rights, the court will recognize and enforce the covenant (*m*).

By the 36 Vict. c. 12, s. 2, it is enacted that no agreement contained in any separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that the father of such infant shall give up the custody or control thereof to the mother; provided always, that no court shall enforce any such agreement, if the court shall be of opinion that it will not be for the benefit of the infant to give effect thereto.

Although a father is entitled to have the custody of his children up to their attaining the age of twenty-one years, the court will not interfere on *habeas corpus*, to withdraw a female child from the custody of persons with whom she may be, and hand her over to the custody of the father, if the child has attained the age of sixteen years. Up to that age, a female child is not entitled to withdraw herself from the father's protection, when there is nothing to show that he will not exercise proper parental care and protection over her (*n*); but, at that age, a girl has then a discretion as to where, or with whom, she will live (*o*). But between the age of discretion and twenty-one, there is a natural paternal jurisdiction which the law will recognize. So, where the child was a ward of court, although over sixteen years of age, and the father had refused to allow her to reside with her mother, the court declined to inter-

(*h*) *In re Agar-Ellis*, 10 Ch. D. 49; 48 L. J., Ch. 1. See *In re Clarke*, 21 Ch. D. 817; 51 L. J., Ch. 792.

(*i*) *In re Besant*, 11 Ch. D. 508; 48 L. J., Ch. 497.

(*k*) *Andrews* v. *Salt*, L. R., 8 Ch. 622, 636.

(*l*) *Lyons* v. *Blenkin*, Jac. 245. *In re Preston*, 5 D. & L. 233; 17 L. J., Q. B. 221. *In re Fynn*, 2 De G. & S. 457. *Anon.*, 2 Sim. N. S. 54.

(*m*) *Swift* v. *Swift*, 4 De G. J. & S. 710; 34 L. J., Ch. 394. *Hamilton* v. *Hector*, L. R., 13 Eq. 511; 6 Ch. 701; 40 L. J., Ch. 692.

(*n*) *Reg.* v. *Howes*, 30 L. J., M. C. 47. *Reg.* v. *Timmins*, *ib.* 45.

(*o*) *Ryder* v. *Ryder*, 2 S. & T. 225; 30 L. J., P. & M. 44.

597 fere with his decision (*p*). By 12 Car. 2, c. 24, s. 8, the father may dispose of the custody and tuition of children during such time as they are under twenty-one years of age to any person (not being a popish recusant) who shall maintain an action of ravishment of ward, or trespass, against any person wrongfully taking away or detaining such child, and may recover damages for the benefit of the child.

Guardianship for nurture continues until the child has attained the age of fourteen years; and a guardian for nurture has *primâ facie* a right to the custody of the child during that period; for every guardian for nurture has by law a right to the custody of the child (*q*).

Controlling power of the court over the father's right to the custody of his infant children.—The court will restrain the father from acquiring possession of the person of his infant children, when he has deserted their mother, and has by immoral conduct proved himself to be unfit to have the guardianship of them, and the interference of the court is necessary to protect the child from temporal ruin or spiritual peril (*r*). When the conduct of the father has been such as to render it impossible that the wife can live with him, and the court has therefore the duty cast upon it of deciding whether the children shall be brought up by one parent or the other, it will adopt that custody which seems best for the interests of the children. Now, however, the mother may provisionally nominate a guardian to act after her death jointly with the father, and if the court is satisfied that the father is unfit to be sole guardian it may confirm the appointment (*s*).

The grounds upon which the court has deprived a father, who has deserted, or driven away his wife, of the custody of his children, and placed them under the care of the mother, or a guardian appointed by the court, are, notorious impiety and irreligion; profligacy and adultery (*t*); teaching the children to swear, and introducing them to low company and immoral companions (*u*); such gross and habitual intemperance, associated with the constant and habitual use of such improper and outrageous language as could not but be seriously prejudicial to the moral safety and welfare of the child (*x*); the public avowal by the father of his being an atheist, and the publication by him of books deriding the truth

(*p*) *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J., Ch. 10.

(*q*) Com. Dig. Guardian (D).

(*r*) *Thomas* v. *Roberts*, 3 De G. & S. 781; 19 L. J., Ch. 506. *Creuze* v. *Hunter*, 2 Cox, 242. *Re Ethel Brown*, 13 Q. B. D. 614.

(*s*) The Guardianship of Infants' Act, 1886, 49 & 50 Vict. c. 27, s. 3, sub-s. 2. See *post*, p. 599.

(*t*) *Shelley* v. *Westbrooke*, Jac. 266. *Warde* v. *Warde*, 2 Phill. 791.

(*u*) *Wellesley* v. *Wellesley*, 2 Bligh, N. S. 124.

(*x*) *In re Goldsworthy*, 2 Q. B. D. 75; 46 L. J., Q. B. 187.

598 of the Christian revelation and denying the existence of God (*y*). There are no bounds to the interference of the court with the rights of the father to the custody of his children, whenever his misconduct has brought about a separation between himself and the mother of those children, and his natural rights to the custody of them clash with their true interests; but it is a jurisdiction which the court is extremely reluctant to exercise (*z*), and it will not be exercised upon the mere consideration of what may be manifestly for the benefit of the children.

Before the jurisdiction can be called into action, the court must be satisfied, not only that it has the means of acting safely and efficiently, but that the father has so conducted himself as to render it essential to the safety of the children, or to their welfare in some very serious respect, that his acknowledged rights should be superseded or interfered with (*a*). The mere fact of the father's having committed adultery, or of his keeping up an adulterous intercourse and being separated from his wife, has been held not to be sufficient of itself to warrant the interference of the court with his natural right to the custody of his children (*b*). But it is now competent to the court, whenever a decree has been pronounced for a judicial separation by reason of the adultery of the husband, to order the infant children of the marriage to be placed under the custody of the mother.

When the court is compelled, in consequence of the profligacy or immorality of the father, to remove female children from the contamination of his example, it will not accompany that measure with the great evil of separating one portion of the family from the other; "for, if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court, as far as possible, to guard against" (*c*).

Right of the mother.—When the father of a child under fourteen years of age is dead, the mother is, in general, entitled to the custody of the child, unless, under the circumstances of the case, it would be injurious to the child to order that it should be returned to the mother. The question of the mother's religion, whether she is a Protestant or a Roman Catholic, does not make the slightest difference; nor ought it to influence the court in any way: but her previous conduct, and her motive in making the application,

(*y*) *Shelley* v. *Westbrooke*, Jac. 266.
(*z*) Ld. Cranworth, *Hope* v. *Hope*, 4 De G., M. & G. 328; 23 L. J., Ch. 689. *Agar-Ellis* v. *Lascelles*, 24 Ch. D. 317; 53 L. J., Ch. 10.
(*a*) *In re Curtis*, 28 L. J., Ch. 458.
(*b*) *Ball* v. *Ball*, 2 Sim. 35.
(*c*) *Warde* v. *Warde*, 2 Phill. 791.

599 may be considered in determining whether her application should be entertained (*d*).

The mother of an illegitimate child has a natural right to its custody which the court will regard (*e*).

Now, by the Guardianship of Infants' Act, 1886, on the death of the father of an infant the mother is made guardian, either alone or jointly with any guardian appointed by the father, or by the court if it shall think fit (*f*).

Right of access of mothers to their infant children.—By the 36 Vict. c. 12, which repeals the 2 & 3 Vict. c. 54 (see, however, the 49 & 50 Vict. c. 27, s. 6, *infra*), it is enacted that it shall be lawful for the Court of Chancery, upon hearing the petition by her next friend of the mother of any infant under sixteen years of age, to order that the petitioner shall have access to such infant at such times, and subject to such regulations, as the court shall deem proper, or to order that such infant shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein, until such infant shall attain such age, not exceeding sixteen, as the court shall direct; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant, and otherwise, as the court shall deem proper (*g*).

Before the passing of the repealed Act, a child could not be taken from the custody of its father, unless it was shown, either that he was unfit to remain the custodian of the child, or that his so remaining would be an injury to the child. By the Act, what was formerly the absolute right of the father became subject to the discretionary power of the judge, to be exercised on judicial grounds, not capriciously, but for substantial reasons. One object of the Act was to prevent the husband making use of the guardianship of the children, not for its legitimate object, namely, the proper maintenance and education of the children, but for the purpose of putting pressure on the wife, and compelling her to forego her legal rights and remedies against him in case of his misconduct, or in cases in which he wished to appropriate to himself property which by law was hers, or which had been her separate property, or otherwise to control her in the disposition either of her person or property (*h*). Another motive was that, whereas

(*d*) *In re Turner*, 41 L. J., Q. B. 142. *In re Clarke*, 21 Ch. D. 817; 51 L. J., Ch. 792.

(*e*) *The Queen* v. *Nash*, 10 Q. B. D. 454; 52 L. J., Q. B. 442.

(*f*) 49 & 50 Vict. c. 57, s. 2. By sect. 3, the mother may appoint a guardian in certain cases.

(*g*) Sect. 1.

(*h*) Ld. Cottenham, *Warde* v. *Warde*, 2 Ph. 786.

600 the courts had refused to deprive the father of the custody of the child except in a very extreme case of misconduct, in future, where the wife was innocent, the court was to exercise a wider discretion, and consider other reasons besides; so that, as was observed by Turner, V.-C., in applying the rule of the court, there is to be kept in mind, first of all, the paternal right; secondly, the marital duty; and thirdly, the interest of the children (*i*).

Unless there has been a clear neglect by the father of his duty as a husband in some important particular affecting the interests of the child, the court will not deprive him of his right to the custody of it; nor will it interfere to give the wife access to the child, if it is proved that she is an habitual drunkard, or that intercourse between the mother and child would be likely to be prejudicial to the interests of the child (*k*). Although the child is, at the time of the presentation of a petition by the mother, and continues to be, in the custody of the mother, the court has, within the equity of the Act, jurisdiction to interfere (*l*).

By sect. 5 of the Guardianship of Infants' Act, 1886, it is enacted that, "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."

Custody, &c., of children after judicial separation or dissolution of marriage.—By the 20 & 21 Vict. c. 85, s. 35 (see, however, the Guardianship of Infants' Act, 1886 (49 & 50 Vict. c. 27), s. 7, *infra*), it is enacted that in any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may, from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper, with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children

(*i*) *In re Halliday's Estate*, 17 Jur. 56. *In re Taylor*, 4 Ch. D. 157; 46 L. J., Ch. 399.

(*k*) *In re Halliday*, 17 Jur. 56.

(*l*) *In re Tomlinson*, 3 De G. & Sm. 372.

601 under the protection of the Court of Chancery (*m*). This Act has given the court the widest and most general discretion, so that no general rule can be laid down. The court must consider all the circumstances of the particular case before it—the circumstances of the misconduct which has led to the decree—the general character of the father—the general character of the mother—and, above all, the interests of the children (*n*). Thus, where the husband and wife had been Roman Catholics, and the husband afterwards became a Protestant, the court refused, after a judicial separation, to give the children up to the wife to be educated as Roman Catholics, but committed their custody to a third person, with full access by both parents (*o*). The power of the court under this section of dealing with the custody of and access to children exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or a dissolution of marriage. Where a petition for dissolution of marriage, therefore, is dismissed, the court has no power to make an order as to the custody of, or access to, the children of the marriage (*p*). The words "just and proper" are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and of common law have been governed in questions respecting the custody of infants (*q*).

The above Act only applied to orders made before or as part of the final decree; but by the 22 & 23 Vict. c. 61, s. 4, it is enacted that, *after* a final decree of judicial separation, nullity of marriage, or dissolution of marriage, the court may, upon application (by petition) for this purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree, or by interim orders, in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the judge ordinary alone, or with one or more of the other judges of the court (*r*). In the interval between a decree *nisi* for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as

(*m*) The order may be varied from time to time as may be necessary. 22 & 23 Vict. c. 61, s. 4.

(*n*) *Symington* v. *Symington*, L. R., 2 H. L. Sc. 415.

(*o*) *D'Alton* v. *D'Alton*, 4 P. D. 87; 47 L. J., P. D. & A. 59.

(*p*) *Seddon* v. *Seddon*, 2 S. & T. 640; 31 L. J., P. & M. 101.

(*q*) *Marsh* v. *Marsh*, 2 Sw. & Tr. 276; 28 L. J., P. & M. 16. See *Chetwynd* v. *Chetwynd*, L. R., 1 P. & D. 39; 35 L. J., P. & M. 21. *Barnes* v. *Barnes*, L. R., 1 P. & D. 463.

(*r*) *Webster* v. *Webster*, 31 L. J., P. & M. 184. *Milford* v. *Milford*, L. R., 1 P. & D. 715; 35 L. J., M. C. 63.

602 to the custody of children is an interim order under s. 35 of the 20 & 21 Vict. c. 85 (*s*).

The court under these statutes has no greater power over infants than parents themselves have at common law. It cannot, therefore, interfere with the liberty of children, where the parents themselves, if living together unsuspected, could not interfere with it. It may order maintenance for children up to the age of twenty-one, for that is conferring a benefit upon them; but it cannot control them in the free choice of a residence after the age of sixteen (*t*). Up to that age, however, it has jurisdiction under s. 35 to make orders as to their custody (*u*).

When a wife has been proved to have been guilty of adultery, the court will not give her access to, or the custody of, the children of the marriage (*x*). It is otherwise as to access in the case of cruelty only (*y*).

In all suits and proceedings, other than proceedings to dissolve any marriage, the court is to proceed and give relief (sect. 22 of the 21 & 22 Vict. c. 108), on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted and given relief.

Under the Matrimonial Causes Act, 1884, the court may make such orders with respect to custody, maintenance and education in suits for restitution of conjugal rights, as might have been made by interim orders during a trial for judicial separation (*z*).

As, in the ecclesiastical courts, acts of cruelty to children, committed in the presence of the mother, have, in some instances, been held cruelty to her, such acts may be alleged in a petition to the Divorce Court, praying for a judicial separation on the ground of cruelty, and also for an order respecting the custody of the children of the marriage; but at the hearing the court will confine the inquiry to the conduct of the husband and wife. In the majority of cases, enough will come out in the course of the inquiry to enable the court to give directions as to the custody of the children; but, where this is not the case, the court will require further evidence to be given before making any decree (*a*). The court will not deal with a petition for custody of children under the 22 & 23 Vict. c. 61, s. 4, until both parties are before it (*b*).

(*s*) *Cubley* v. *Cubley*, 31 L. J., P. & M. 161.

(*t*) *Ryder* v. *Ryder*, 2 Sw. & Tr. 225; 30 L. J., P. & M. 44.

(*u*) *Mallinson* v. *Mallinson*, L. R., 1 P. & D. 221; 35 L. J., P. & M. 84.

(*x*) *Bent* v. *Bent*, 30 L. J., P. & M. 175. *Clout* v. *Clout*, 2 S. & T. 391; 10 L. J., P. & M. 176.

(*y*) *Bacon* v. *Bacon*, L. R., 1 P. & D. 167.

(*z*) 47 & 48 Vict. c. 68, s. 6.

(*a*) *Suggate* v. *Suggate*, 28 L. J., P. & M. 46.

(*b*) *Stacey* v. *Stacey*, 29 L. J., P. & M. 63.

603 By the Guardianship of Infants' Act, 1886, s. 7, it is enacted that,—"In any case where a decree for judicial separation, or a decree either *nisi* or absolute for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent, so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children."

Custody of the children of British subjects born abroad.—According to the doctrine of our law, the sovereign, as *parens patriæ*, has an interest in the maintenance and education of all its subjects, whether they are resident within the realm or domiciled abroad. The child of a British father, born abroad, is a British subject, and is, to all intents and purposes, to be deemed as if born in England; and the court, as representing the sovereign, will afford its aid, when requisite, in favour of the children of British subjects born abroad. Relief may be sought, and the jurisdiction of the court exercised, on behalf of an infant that is not, at the time the jurisdiction is asked for, within the control of the court. It may be that a child is out of the jurisdiction under such circumstances that no jurisdiction can be exercised because no order can be enforced; and in such a case there is not a want of jurisdiction, but a want of power to enforce jurisdiction. If persons abroad have property here, the court will proceed against that property to enforce obedience to its decrees (*c*). And where a Frenchwoman, the mother of an infant who had been born and was still resident abroad, and who had no property in this country, but whose paternal grandfather was a natural-born British subject, brought proceedings in the French courts for the appointment of guardians, which proceedings were directed to stand over until the course adopted by the English courts had been ascertained, the English court exercised its jurisdiction and appointed a guardian to the infant (*d*).

Custody of the children of foreigners in this country.—The court exercises the same jurisdiction over the custody of foreign children in this country that it does over native children; and the reason is, that foreign children, as well as foreign adults, owe allegiance to the crown, and are, to a certain extent, subjects of the crown, as long as they are in this country (*e*). But, although guardians in this country have been appointed, the court will not, from any

(*c*) *Hope* v. *Hope*, 4 De G. M. & G. 328; 23 L. J., Ch. 686.
(*d*) *In re Willoughby*, 30 Ch. D. 324.
(*e*) *Hope* v. *Hope*, 4 De G. M. & G. 328; 23 L. J., Ch. 688.

604 considerations of supposed benefit to foreign infants, interfere with the discretion or custody of a guardian who has been appointed by a foreign court of competent jurisdiction, and who wishes to remove them back to their native country to complete their education there (*f*).

General powers of the court to appoint guardians.—Under the Guardianship of Infants' Act, 1886, the court has power to appoint guardians to act jointly with the mother if the guardians appointed by the father are dead, or refuse to act (*g*). It may also remove guardians, and appoint others in their place, on being satisfied that it is for the welfare of the infant (*h*). Every guardian shall have all such powers over the estate and person of an infant as any guardian appointed by will, or otherwise, now has in England under 12 Car. 2, c. 24 (*i*).

SECTION IV.

INJURIES UNDER LORD CAMPBELL'S ACT.

Actions for compensating the families of persons wrongfully killed.—By the 9 & 10 Vict. c. 93, it is enacted that, whensoever the death of a person shall be caused by any wrongful act, neglect, or default, which, if death had not ensued, would have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount in law to felony; and (sect. 2) that every such action shall be for the benefit of the wife, husband, parent, and child (*k*) of the deceased person, and shall be brought by, and in the name of, his executor or administrator (*l*), and the damages recovered, after deducting certain costs, shall be divided amongst the beforementioned relatives, in such shares as the jury by their verdict shall find and direct. But not more than one action shall (sect. 3) be brought in respect of the same subject-matter of complaint; and the action must be commenced within twelve calendar months after the death of the deceased person. If the deceased has

(*f*) *Nugent* v. *Vetzera*, L. R., 2 Eq. 704. See *Foster* v. *Denny*, 2 Ch. Ca. 237.

(*g*) 49 & 50 Vict. c. 27, s. 2, and see *supra*.

(*h*) By sect. 6.

(*i*) By sect. 8. See *ante*, p. 597.

(*k*) An illegitimate child is not within the purview of the statute. *Dickinson* v. *North Eastern Rail. Co.*, 2 H. & C. 735; 33 L. J., Ex. 91.

(*l*) In case there is no executor, &c., or of his unwillingness, &c. to sue, the action may be brought by the persons beneficially interested. 27 & 28 Vict. c. 95.

605 brought an action in his lifetime, or has received satisfaction during his life in respect of the injury, no fresh action, or no action, as the case may be, can be brought by his personal representatives after his death (*m*). Where a sum of money was received by way of compromise of an action under Lord Campbell's Act, it was held that the court had the same power to distribute the fund in the same manner as a jury might have done in an action under the Act (*n*).

Contributory negligence on the part of the deceased will be a bar to an action by his personal representatives, where the deceased himself, if he had lived, could have maintained no action for the injury; but, if the circumstances of the negligence were such that, if death had not ensued, the deceased might have brought his action in respect of it, his representatives may maintain an action in respect of pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased himself, had he lived (*nn*).

A person may contract himself out of the Employers' Liability Act, so as to bind his representatives (*o*).

Injuries under Lord Campbell's Act—Damages recoverable.—The jury, in assessing the damages, must confine themselves to injuries of which a pecuniary estimate may be made, and cannot lawfully increase them by adding a *solatium* in respect of the mental sufferings occasioned by such death. They cannot, therefore, lawfully inquire into the degree of mental anguish which each member of the family has suffered from the bereavement, and cannot take into consideration the mental sufferings of a widow or child for the loss of a husband or a parent (*p*). It is clear, also, that the damages are not to be given merely in reference to the loss of any legal right against the deceased, which might have been turned to profit if he had lived, and which has been lost by his death; for the damages recovered are to be distributed amongst the relations only, and not to all individuals sustaining loss; and the relations are not entitled to compensation under that statute, if the only pecuniary benefit to them from his life was derived from a contract which they had entered into with him (*q*). But a mother may claim damages for the loss of an annuity which the deceased, her son, had covenanted to pay her during his and her joint lives (*r*).

(*m*) *Read* v. *Great Eastern Rail. Co.*, L. R., 3 Q. B. 556; 37 L. J., Q. B. 278.

(*n*) *Bulmer* v. *Bulmer*, 25 Ch. D. 409; 53 L. J., Ch. 402.

(*nn*) *Senior* v. *Ward*, 1 El. & El. 385; 28 L. J., Q. B. 139. *Pym* v. *G. N. Rail. Co.*, 4 B. & S. 396; 32 L. J., Q. B. 377.

(*o*) *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; 51 L. J., Q. B. 543.

(*p*) *Blake* v. *Midland Rail. Co.*, 18 Q. B. 93; 21 L. J., Q. B. 233. *Armsworth* v. *South Eastern Rail. Co.*, 11 Jur. 759.

(*q*) *Sykes* v. *North Eastern Rail. Co.*, 44 L. J., C. P. 191.

(*r*) *Rowley* v. *London & North Western Rail. Co.*, L. R., 8 Ex. 221; 42 L. J., Ex. 153.

606 The practice has been to ascertain what benefit could have been claimed from the deceased, if he had lived, by the person seeking to obtain damages; and, if the latter can show that he had a reasonable expectation of pecuniary benefit from the continuance of the life, and is also within the requisite degree of relationship, his claim may fairly be considered by the jury in assessing the amount of damages (*s*). Thus the loss of the benefit of education, and of the enjoyment of the comforts and conveniences of life, depending upon the possession of pecuniary means to obtain them, through the death of a father whose income ceases with his life, is an injury in respect of which an action can be maintained on the statute; and so, also, is the loss of a pecuniary provision which fails to be made, owing to the premature death of a person by whom such provision would have been made had he lived; for, wherever there is a reasonable expectation of pecuniary advantage from the prolongation of the life of a person, the extinction of such expectation by negligence occasioning his death will be sufficient to sustain an action upon the statute; and it is for a jury to say, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages (*t*). No damages can be given in respect of funeral expenses and mourning, there being no language in the statute referring to these expenses and rendering them recoverable (*u*).

Whatever comes into the possession of the family, who have suffered by the death of their relative, by reason of his death, must be taken into account in estimating the damages; and, therefore, contrary to the general rule, the sum received on an accident policy must be taken in reduction of damages (*x*).

Injuries under Lord Campbell's Act—Actions for the benefit of children.—A claim may be made on behalf of an infant *en ventre sa mère* (*y*).

Injuries under Lord Campbell's Act—Death of an alien.—The provisions of the act extend to cases where the person in respect of whose death damages are sought to be recovered was an alien, and was at the time of the wrongful act, neglect, or default which caused his death, on board a foreign vessel on the high seas (*z*).

(*s*) *Franklin* v. *South Eastern Rail. Co.*, 3 H. & N. 214. *Duckworth* v. *Johnson*, 4 H. & N. 659; 29 L. J., Ex. 25.

(*t*) *Pym* v. *Great Northern Rail. Co.*, 4 B. & S. 396; 32 L. J., Q. B. 377. *Hetherington* v. *N. E. Rail. Co.*, 9 Q. B. D. 160; 51 L. J., Q. B. 495.

(*u*) *Dalton* v. *South Eastern Rail. Co.*, 4 C. B., N. S. 296; 27 L. J., C. P. 227.

(*x*) *Hicks* v. *Newport, &c. Rail. Co.*, 4 B. & S. 403.

(*y*) *The George and Richard*, L. R., 3 A. & E. 466.

(*z*) *The Explorer*, L. R., 3 A. & E. 289; 40 L. J., Adm. 41.

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CHAPTER X.

INJURIES TO PUBLIC RIGHTS.

Public rights—Creation of a highway.—A highway may be created in either of two ways, that is, by dedication or by act of parliament. Except where a highway is created by an express enactment of the legislature, it derives its existence from a dedication to the public by the owner of the land, over which the highway extends, of a right of passage over it (*a*). But it is not compulsory on the public to accept the use of a way when offered them (*b*). Acceptance by the public is ordinarily proved by user by the public; and user by the public is also evidence of dedication by the owner (*c*).

Dedication.—If the owner of the soil makes and throws open a foot-way or carriage-way leading from one part of a public thoroughfare to another part of a public thoroughfare, and neither marks by chain or bar, or visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, and the public notoriously use the way for a number of years, it is presumed to be dedicated to the use of the public, and becomes a public highway, which cannot lawfully be interrupted, though it was originally opened and intended for private convenience (*d*). The user and enjoyment of the way by the public must have been had under circumstances from which an intention on the part of the owner of the soil to dedicate the way may fairly be inferred. If, therefore, the passage of the public was allowed under some special agreement or licence of the owner of the soil, the conditional and permitted user will not establish the public right. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such

(*a*) *Dovaston* v. *Payne*, 2 Sm. Lead. Cas., 6th ed., p. 140.

(*b*) *Fisher* v. *Prowse*, 2 B. & S. 770, 780; 31 L. J., Q. B. 212.

(*c*) *Cubitt* v. *Lady Caroline Maxse*, L. R., 8 C. P. 704; 42 L. J., C. P. 278. In the case of a county bridge not erected in an existing highway, user by the public is not sufficient in itself to prove an acceptance of the dedication by the county. *The Queen* v. *Southampton*, 17 Q. B. D. 424.

(*d*) *R.* v. *Lloyd*, 1 Campb. 260. *Roberts* v. *Carr*, *ib.* 263. *R.* v. *Barr*, 4 *ib.* 16.

608 hamlet should be open to carriages, that the company should pay him five shillings a-year, and find cinders to repair the road, and that the inhabitants of the parish should lay down and spread the cinders, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time, a dispute arising and the road being left unrepaired, the owner of the land stopped up the road, it was held that there had been no dedication of the road to the public, but only a licence to use it on certain terms and conditions, which licence might be withdrawn on the conditions not being complied with (*e*).

Where an ancient highway was illegally stopped, and the public deviated on to the adjoining land, which was an open down, forming a tract nearly parallel with the old road, which track they continued to use for about twenty years, when it was stopped, and the old road was re-opened to the public, it was held that the deviating track had not become a public highway, as it had never been used by the public except when they had been shut out from the old road, and the user, being referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stopped the highway (*f*), would not establish any permanent dedication of the deviating track to the use of the public, so as to make it a permanent public thoroughfare (*g*).

User of a way by the public is by no means conclusive of the way being a public way; it is evidence only, to be weighed in connection with surrounding circumstances. Where, therefore, there was a wood, and divers paths or tracks through it leading in different directions, and people wandered where they pleased through the wood and made tracks, but the tracks were used only in dry weather, and were hardly passable after rain, and led to no public place which could not be reached by a more convenient thoroughfare, it was held that this was a mere permissive user of the wood for purposes of recreation and pleasure, and that there was no dedication of a way to the public to be used "as of right" (*h*). The fact of a road having been repaired by the parish as far back as living memory can go is a strong fact in favour of the road being a public road; but it is not conclusive (*i*).

Animus dedicandi.—There must be on the part of the owner of the soil an *animus dedicandi*, of which the user by the public is evidence and no more, so that a single act of interruption by

(*e*) *Barraclough* v. *Johnson*, 8 Ad. & E. 99; 3 N. & P. 233.
(*f*) *Post*, p. 637.
(*g*) *Dawes* v. *Hawkins*, 8 C. B., N. S. 857; 29 L. J., C. P. 343.
(*h*) *Schuringe* v. *Dowell*, 2 F. & F. 818. *Chapman* v. *Cripps*, *ib.* 867. *Mildred* v. *Weaver*, *ib.* 33.
(*i*) *Reg.* v. *Hawkhurst*, 11 W. R. 9; 7 L. T. R., N. S. 268.

609 the owner of the soil is of much more weight upon the question of intention than many acts of enjoyment (*k*). But the question of dedication does not depend upon what a man says, but upon his acts. "A man may say that he does not mean to dedicate a way to the public; and yet, if he has allowed them to pass every day for a length of time, his declaration alone would not be regarded. The facts may warrant a jury in believing that the way was dedicated, though he has said that he did not so intend; and, if his intention is insisted upon, it may be answered that he should have shown it by putting up a gate, or some other act" (*l*). If the owner of the soil shuts up the way only one day in the year, that is sufficient to show that he does not intend to dedicate, but gives a license only (*m*).

The erection of a bar, though it may have been knocked down, rebuts the presumption that a way has been dedicated to the public; and, where the owner of the soil placed and maintained a gate across a footway, with the view of preventing a public right of passage, and the gate went to decay, and for twelve years there was no gate at all, and then the owner of the soil put up a new gate at the place where the old gate formerly stood, it was held to be a question for the jury whether the owner of the soil, from suffering the gate to be down so long, and permitting the public to use the way without obstruction for so many years, had completely dedicated the way to the public, so that the gate could not be replaced (*n*). Where a bar, placed across a bridge, was kept locked, and opened only in times of flood, when the ford hard by was dangerous or impassable, it was held that this was conclusive to show that there was no general right of passage (*o*).

If there has been a public, uninterrupted user of a road for such a length of time as to satisfy a jury that the owner of the soil, whoever he might be, intended to dedicate the road to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who was the owner of the soil of the road during the time it was so used (*p*). The open user by the public of a way as of right raises a *primâ facie* presumption of the existence of the public right; and, when such user is proved, the *onus* lies on the person who seeks to deny the inference from

(*k*) Parke, B., *Poole* v. *Huskinson*, 11 M. & W. 830.

(*l*) Littledale, J., *Barraclough* v. *Johnson*, 8 Ad. & E. 105; 3 N. & P. 233. *Surrey Canal Co.* v. *Hall*, 1 M. & G. 403; 1 Sc. N. R. 264.

(*m*) *Trustees of British Museum* v. *Finnis*, 5 C. & P. 465.

(*n*) *Lethbridge* v. *Winter*, 1 Campb. 263.

(*o*) *R.* v. *Marquis of Buckingham*, 4 Campb. 190.

(*p*) *Reg.* v. *East Mark*, 11 Q. B. 877. Williams, J., *Dawes* v. *Hawkins*, 8 C. B., N. S. 857; 29 L. J., C. P. 343.

610 such user to show that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed (*q*). There is nothing in the nature of a sea-wall or embankment erected to protect land against the encroachment of the sea inconsistent with the existence of a public right of way along it, except so far as the necessary repairs of the wall might make a temporary stoppage of the way necessary, and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment, as in any other case of uninterrupted and open user by the public (*r*).

Occupation roads, laid out through an estate for the use and convenience of the occupiers, are not thereby dedicated to the public (*s*). But where a road has been set out under the award of inclosure commissioners as an occupation road to be used and repaired by particular persons, there is nothing to prevent the owners from dedicating it to the public, so that it would become, instead of an occupation road only, a public highway (*t*).

If an owner of land lets land on building leases, and houses are built which require a way to them, and a way is made, and used by carts and carriages going to these houses, and which can go nowhere else, there is nothing from these facts alone to establish a dedication of the way to the public (*u*).

No particular time of enjoyment is necessary for evidence of dedication; it is not, like a grant, presumed from length of time. If the act of dedication is unequivocal, it may take place immediately; for instance, if a man builds a double row of houses, opening into an ancient street at each end, making a new street, and sells or lets the houses, that is instantly a highway; and, although the new street may terminate in a *cul de sac*, it may nevertheless be a public place, accessible to all. But, if a bar or rope, or the slightest obstruction, is put up, showing that the owner of the soil does not intend to give a general and unreserved right of passage, that will prevent a dedication. To support a dedication, the street or road must be finished as a perfect street; for, if the foot-ways are not completed, or paving has to be done, or fences to be put up, the evidence of an intention to dedicate is insufficient (*v*), unless the way has been used in its unfinished state as a public thoroughfare for a considerable number of years (*w*).

(*q*) *Reg.* v. *Petrie*, 4 El. & Bl. 737.
(*r*) *Greenwich Board of Works* v. *Maudslay*, L. R., 5 Q. B. 397; 39 L. J., Q. B. 205.
(*s*) *Selby* v. *Crystal Palace District Gas Co.*, 30 Beav. 606; 31 L. J., Ch. 595.
(*t*) *Reg.* v. *Bradfield*, L. R., 9 Q. B. 552; 43 L. J., M. C. 155.
(*u*) *Woodyer* v. *Hadden*, 5 Taunt. 140. But see *Bateman* v. *Bluck*, *infra*.
(*v*) *Woodyer* v. *Hadden*, 5 Taunt. 140.
(*w*) *Jarvis* v. *Dean*, 3 Bing. 447.

611 There may be a highway, by dedication to the public, where there is no thoroughfare. Where there was a public street, and at the side of it a passage leading to a court, consisting of fifteen houses, all of which belonged to the plaintiff, but the court had been freely used by the public for many years without restriction, it was held that this was evidence from which a jury might find a dedication to the public, although the court and the thoroughfare had originally been made for the use of the occupiers of the houses, and led only to their dwellings (*x*). But if a road is made for the accommodation of particular persons only, it is not a public road; and there is no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it, and exclude the public (*y*).

Who may dedicate.—A mere tenant or lessee has no power to throw open land to the public, and create a public thoroughfare, in derogation of the rights of the landlord or reversioner. There cannot be a public way by dedication, unless there is some evidence to show that the owner of the soil has consented to such user. The consent of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance (*z*). There cannot be a dedication of a way to the public by a tenant for ninety-nine years without the consent of the owner of the fee (*a*). But, from long-continued user, going back as far as living memory will extend, over land under lease, a dedication to the public anterior to the lease may be inferred, although no proof of user prior to the lease is given (*b*); and, if the acts of user are notorious, and go on for a great length of time, and notwithstanding a frequent change of tenants, it may be presumed that the owner has been made aware of them, and that the way was used with his concurrence (*c*).

Commissioners of public works have no power to dedicate to the use of the public, as a highway, land which they have been intrusted with the ownership of for a special purpose, and for which special purpose the land may at some future period be required; and the public cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by Parliament, and which, therefore, could not be infringed (*d*).

Limited dedication.—There may be a dedication of a way for a limited purpose, as for a foot-way, horse-way, or drift-way; but

(*x*) *Bateman* v. *Black*, 18 Q. B. 870; 21 L. J., Q. B. 407.
(*y*) Best, J., *Wood* v. *Veal*, 5 B. & Ald. 457.
(*z*) *Wood* v. *Veal*, 5 B. & Ald. 454. *Harper* v. *Charlesworth*, 4 B. & C. 591.
(*a*) *Baxter* v. *Taylor*, 4 B. & Ad. 75. *Daniel* v. *Anderson*, 31 L. J., Ch. 610.
(*b*) *Winterbottom* v. *Lord Derby*, L. R., 2 Ex. 316; 36 L. J., Ex. 194.
(*c*) *Davies* v. *Stephens*, 7 C. & P. 570.
(*d*) Littledale, J., *R.* v. *Leake*, 5 B. & Ad. 485.

612 there cannot be a dedication to a limited part of the public, as to the inhabitants of a particular parish. Such a dedication would be simply void (*d*). The public can take no larger or more extensive right of way than the owner of the fee thinks fit to grant or to allow. They must take *secundum formam doni*; and if they cannot take according to that, they cannot take at all. If a restriction cannot by law exist as to a public way, then the grant is only a revocable licence. Where, therefore, a landowner suffered the public to use for several years a road through his estate for all purposes except that of carrying coals, it was held that this was either a limited dedication of the road to the public, or no dedication at all, but only a revocable licence; and that a person carrying coals along the road, after notice not to do so, was a trespasser (*e*).

If the right of passage has been granted subject to a right vested in the adjoining landowners of depositing goods on the soil of the way, the public must take the right subject thereto (*f*). Where there was a strip of open, uninclosed land between a public carriage-road and a paved footpath, and the owners of the houses by the side of the paved footway had always by permission of the owner of the soil used the space between the footway and the carriage-way for purposes connected with their occupations whenever they had occasion, and such use as the public had of it was of a limited and uncertain character, and was subject to the use of it made by such occupiers, it was held that the dedication to the public of the use of the intermediate space was subject to the use so made of it by the landlord and his tenants (*g*). So, if the highway has been dedicated subject to the right to have door-steps or cellar-flaps projecting into it, the public must take the road as it is given to them, subject to those inconveniences and obstructions (*h*). So the owner of a field may dedicate a footpath to the public over it, subject to his right to plough it up in due course of husbandry, although that, for the time, destroys all traces of the path (*i*).

Where an ancient, unfenced tidal ditch ran alongside a public highway, and the commissioners of sewers took possession of the ditch under the powers of an act of parliament, for the purpose of their sewerage, and the plaintiff, on a dark night, tumbled into

(*d*) *Poole* v. *Huskinson*, 11 M. & W. 830. *Bermondsey Vestry* v. *Brown*, L. R., 1 Eq. 204.

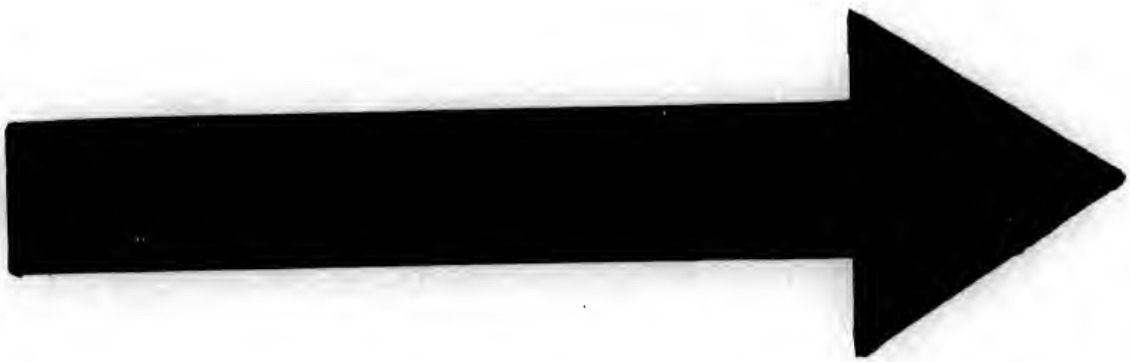
(*e*) *Marquis of Stafford* v. *Coyney*, 7 B. & C. 257.

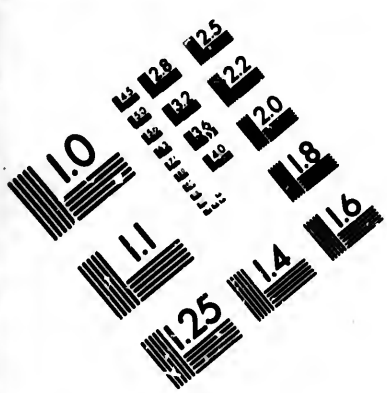
(*f*) *Morant* v. *Chamberlain*, 6 H. & N. 541; 30 L. J., Ex. 299.

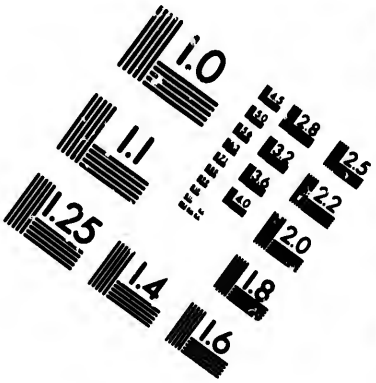
(*g*) *Le Neve* v. *Vestry of Mile End, &c.*, 8 El. & Bl. 1054; 27 L. J., Q. B. 108.

(*h*) *Fisher* v. *Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 213. *Robbins* v. *Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1.

(*i*) *Mercer* v. *Woodgate*, L. R., 5 Q. B. 26; 39 L. J., M. C. 21. *Arnold* v. *Blaker*, L. R., 6 Q. B. 433; 40 L. J., Q. B. 185. See *post*, p. 637.







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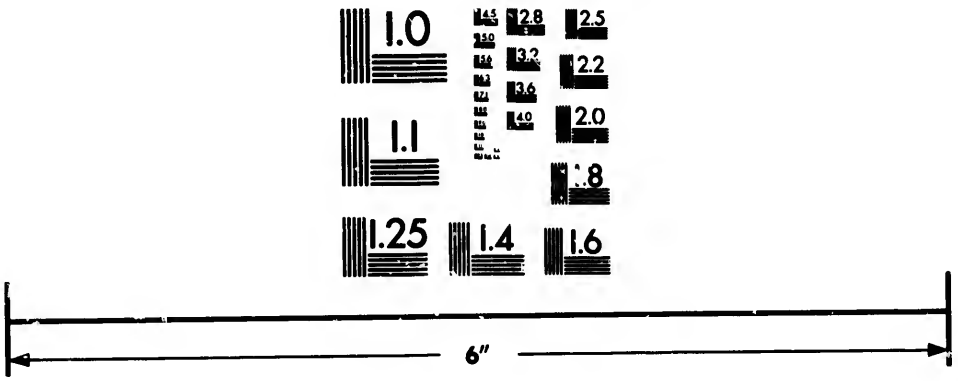

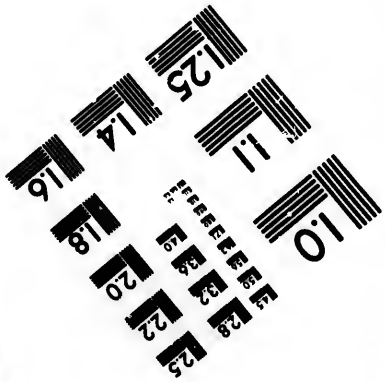

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613 the ditch with his horse and carriage, it was held that the commissioners of sewers were not responsible for the injury, as the highway and the ditch had immemorially existed in the same state, and the commissioners were under no obligation to fence it off from the road. "The road," observes Parke, B., "was dedicated to the public with a ditch beside it. This is an ancient sewer, which has existed with the highway time out of mind, and, therefore, the public have only a right to the highway subject to the sewer" (*j*). But, whenever a highway has been dedicated to the public, subject to certain obstructions left in it for the convenience and accommodation of the occupiers of the adjoining houses, the obstruction or inconvenience to the public must not be increased by any act of commission or omission. Cellar-doors or cellar-flaps must not be left open or unfastened, so as to expose the public to any unusual, unexpected, or unforeseen danger; and all things accessorial to the beneficial use and occupation of the adjoining dwellings must be kept in a proper and safe state, either by the occupiers of the houses, or by those upon whom the law casts the burthen and duty of repairs (*k*).

If an owner of land has been content to allow the public a limited right of way over his lands and across a brook by a certain number of stepping-stones, the surveyors of highways have no right to widen the footpath or the stepping-stones, or to do anything to increase the public accommodation, or enlarge the right of passage, without the consent of the landowner. If, therefore, the surveyor places flag-stones on the stepping-stones, so as to make a kind of rough bridge, the landowner has a right to remove them (*l*).

When a way has been dedicated to the use of the public subject to a gate across it, the public can only take the way subject to the inconvenience of the gate; but, when the way has been dedicated without a gate, the owner of the soil cannot lawfully obstruct the road with a gate (*m*).

There can be no dedication for a limited time, certain or uncertain. If dedicated at all, the way is dedicated in perpetuity. Hence the maxim "once a highway, always a highway"; for the public cannot release their right; and there is no extinguishment of the public right by presumption or prescription (*n*).

Common highway of necessity.—"If there is but one road to a

(*j*) *Cornwall* v. *Metropolitan Commission of Sewers*, 10 Exch. 771. Blackburn, J., *Fisher* v. *Prowse*, *supra*.

(*k*) *Daniels* v. *Potter*, 4 C. & P. 262. *Proctor* v. *Harris*, *ib.* 337.

(*l*) *Sutcliffe* v. *Surveyors, &c. of Sowerby*, 35 L. J., Q. B. 7.

(*m*) *James* v. *Hayward*, Cro. Car. 184; W. Jones, 221.

(*n*) Byles, J., *Dawes* v. *Hawkins*, 8 C. B., N. S. 857; 29 L. J., C. P. 343.

614 place, and no other way of going, that is a way of necessity; if the jury find this, we take it to be a common highway by necessity" (*o*). If a vill is erected, and a way laid out to it, if there is no other way but that to the vill, it is not material *quo animo* it was laid out, it shall be deemed a public way (*p*).

Use by the public—Spaces by the side.—"When," observes Lord Tenterden, "I see a space of fifty feet, through which a road passes between inclosures set out under an act of parliament, I am of opinion that, unless the contrary is shown, the public are entitled to the whole of that space, although, perhaps, from economy, the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun" (*q*). A highway board, therefore, or other authority having jurisdiction over a highway set out under an Enclosure Act, are justified in cutting down trees growing on the space between the highway as actually used, and its boundary as set out in the Enclosure Act, but not, it seems, in selling them, as against the owner of the soil in which they grew (*r*).

The right to the use of a public footway includes the right of bringing on to it all the ordinary accompaniments of a foot-passenger, not being of a size to obstruct the way and interfere with the use of it by other passengers (*s*).

Use by adjoining owners.—A proprietor whose land adjoins a public highway has a reasonable right of access from his land to the highway or *vice versâ*, and also a reasonable right of stopping on the highway for the purpose of exercising his right of access. Thus one who has a house may have his carriage stop a reasonable time in front of the door to take up or set down; and so he may have a waggon stop there to deliver coals (*t*).

Extinction.—A public highway ceases to be such when the access to it at each end has become impossible by reason of ways leading to it having been legally stopped up (*u*). But the stoppage of one end only does not make a road cease to be a public highway, for the public still retain the right to go over it to the end and back (*x*). The public cannot release their right; and there can be no extinction by presumption or prescription (*y*).

(*o*) *Chichester* v. *Lethbridge*, Willes, 72.
(*p*) *Reg.* v. *Inhab. of Hornsey*, 10 Mod. 150.
(*q*) *R.* v. *Wright*, 3 B. & Ad. 683. *Reg.* v. *United Kingdom Telegraph Co.*, 2 B. & S. 647, n.; 31 L. J., M. C. 167.
(*r*) *Turner* v. *Ringwood Highway Board*, L. R., 9 Eq. 418.
(*s*) *Reg.* v. *Mathias*, 2 F. & F. 570.
(*t*) *Original Hartlepool Collieries Co.* v. *Gibbs*, 5 Ch. D. 713; 46 L. J., Ch. 311.
(*u*) *Bailey* v. *Jamieson*, 1 C. P. D. 329.
(*x*) *Wood* v. *Veal*, 5 B. & A. 456. *R.* v. *Downshire* (*Marquis of*), 4 Ad. & E. 698.
(*y*) *Ante*, p. 613.

615 *Navigable rivers—Right of navigation.*—The right of soil in arms of the sea and public, navigable rivers, which is *primâ facie* vested in the crown, independently of any ownership in the adjoining lands, must in all cases be considered as subject to the public right of passage, however acquired; and any grantee of the crown must take subject to such right.

Rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and re-flow or not. "The *Wey*, the *Severn*, and the *Thames*, and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be private property, as in what parts they are of the King's property, are public rivers, *juris publici*" (*z*).

The public have at common law a right of navigation on all navigable streams, so far as the tide ebbs and flows, and may acquire by user rights of navigation on inland waters above the flow of the tide. Those who have occasion to navigate the river have a right to the whole of the space capable of being used for navigation (*a*); and, if a riparian owner or the grantee of the soil places any obstruction in the bed of the river, which deprives another of his right of free passage along it, he is liable to an action for the private and particular injury to the individual (*b*). But, if the obstruction has not deprived any particular individual of his right of passage along the stream, or caused him any personal damage different from, and independent of, that which is sustained by the rest of the public, an action for damages is not maintainable, but the public remedy, by way of indictment, must be pursued (*c*).

Where the public right of free navigation is taken away, and the power of removing obstructions is vested in the hands of conservators of the river by act of parliament, there can be no redress by way of action on account of any disturbance of the individual right. The individual grievance is only accessory; and, the principal being taken away, the accessory follows (*d*).

(*z*) Hale, de Jur. Mar. pt. 1, c. 3.

(*a*) *Attorney-General* v. *Earl of Lonsdale*, L. R., 7 Eq. 377; 38 L. J., Ch. 335. *Attorney-General* v. *Terry*, L. R., 9 Ch. 423.

(*b*) *Rose* v. *Groves*, 5 M. & G. 613; 6 Sc. N. R. 653. *Rose* v. *Miles*, 4 M. & S. 101. *Ante*, p. 11.

(*c*) *Dimes* v. *Petley*, 15 Q. B. 283. And it is to be observed that an indictment in such a case,—*viz.*, where an action would lie, if the complainant had sustained damage different from that of the public,—being substantially a civil and not a criminal proceeding, the rule that a master is responsible for the wrongful act of his servant, though he does not himself personally interfere, and the wrongful act is contrary to his general orders and without his knowledge, will apply. *Reg.* v. *Stephens*, L. R., 1 Q. B. 702; 35 L. J., M. C. 251.

(*d*) *Kearns* v. *Cordwainers' Co.*, 6 C. B., N. S. 388; 28 L. J., C. P. 285. There is a distinction in this respect between duties imposed by statute on trustees or commissioners for the purpose of rendering a river navigable and nothing more, and who have no interest in the soil of the river (*Cracknell* v. *Mayor of Thetford*,

616 Where rights of public navigation have been acquired over a stream the bed of which is private property, the public have a right to pass as fully and freely, and as safely, as they have been wont to do. But the bed of the stream belongs to the owner subject only to such rights of navigation; and an interference by him with the bed of the stream is not wrongful, unless there is a present interference with the right of navigation, or unless it can be shown that what is done will necessarily produce effects which will interfere with that right (*e*).

Navigable rivers—Right of towing.—There is no general, common law right of towing along the banks of a navigable river (*f*); but such a right may be acquired by usage, which is evidence of a dedication of the towing-path to the public as a highway to be used only for the purpose of towing barges or vessels (*g*).

Navigable rivers—Right of fishing.—Where the public at large had from time immemorial fished in a private, non-navigable river, and the defendant claimed a right to fish there as one of the public, it was held that no such right could be acquired by user, however long continued (*h*); but in a navigable river, the soil of which belongs to the crown, the public *primâ facie* have, as of common right, a right of fishing. It falls upon a person who disputes this right to show that he has a right of several fishery (*i*). And if he succeeds in proving this, the public right is ousted; for the public cannot in law prescribe for a profit *à prendre in alieno solo* (*k*); nor acquire any right adversely to the owner under any statutory limitation. Such a several fishery cannot be abandoned except by deed (*l*).

Obstructions in highways.—"If a man hangs a gate upon a post, and shuts it with a catch upon another post across a highway used for horses and carriages, so that men on horseback or in carriages

L. R., 4 C. P. 629; 38 L. J., C. P. 353), and duties imposed for other purposes also, *e. g.*, of drainage. *Parrett Navigation Co.* v. *Robins*, 10 M. & W. 593. See *Holt* v. *Corporation of Rochdale*, L. R., 10 Eq. 354; 39 L. J., Ch. 761. An Act of Parliament empowering a corporation to remove obstructions in a navigable river, giving compensation to owners of the soil where the obstructions are situate, does not constitute them conservators of the river. *Exeter, Corporation of* v. *Earl of Devon*, L. R., 10 Eq. 232.

(*e*) *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 854.

(*f*) *Ball* v. *Herbert*, 3 T. R. 253.

(*g*) *R.* v. *Severn & Wye Rail. Co.*, 2 B. & A. 648.

(*h*) *Hudson* v. *M'Rae*, 4 B. & S. 585; 33 L. J., M. C. 65. *Hargreaves* v. *Diddams*, L. R., 10 Q. B. 453; 44 L. J., M. C. 178.

(*i*) *Reg.* v. *Stimpson*, 4 B. & S. 307; 32 L. J., M. C. 208. In some recent cases (*Reece* v. *Miller*, 8 Q. B. D. 626; 51 L. J., M. C. 64; and *Pearce* v. *Scotcher*, 9 Q. B. D. 162), the true principle has been lost sight of. The right of the public to fish does not depend on whether the river is tidal or non-tidal, but on whether the soil is or is not the property of the crown. Where, as in *Reece* v. *Miller*, the riparian proprietor claims under a grant from the crown, it follows that the soil of the river was in the crown, and it lies on the claimant to prove his title. Where, as in *Pearce* v. *Scotcher*, the public have always exercised the right, that is evidence that the soil of the river is in the crown.

(*k*) *Ante*, p. 341.

(*l*) *Neill* v. *Devonshire* (*Duke of*), 8 App. Cas. 135.

617 cannot pass without opening the gate, this is a common nuisance;" for a man has no right to put such an impediment in the road where none before existed. But gates which have been in highways time out of mind are not any nuisance, because it may be intended that they began by composition with the owner of the land when he consented to the way (*m*).

Whenever one man wilfully interferes with the free right of passage of another along a public highway, there is an injury to a right, and an action for damages is maintainable; and, whenever a private injury has been sustained from an unauthorized obstruction in a public thoroughfare, the injured party is entitled to compensation in damages. If one person wilfully and intentionally runs his carriage before another person's carriage in a public thoroughfare, stopping when he stops, and going ahead of him when he goes on, and crossing his path, so as to prevent him from having the free and uninterrupted use of the highway, and oblige him to pull up or slacken speed, for fear of a collision, the person so obstructing the public thoroughfare will be responsible in damages to the party whose free right of passage has been wilfully and unlawfully obstructed. There is, in such a case, an injury to a right, and substantial damages are recoverable. Where, therefore, the drivers of an omnibus company headed and tailed the omnibus of a private individual with the company's omnibuses, and obstructed the highway with their vehicles, so as to create a nuisance, and interrupt the free passage of the thoroughfare, it was held that the omnibus company were responsible in damages to the private omnibus proprietor, who had been wilfully delayed and impeded in the exercise of his right to pass along the public highway (*n*).

And where a large agricultural roller was left on the highway it was held an unreasonable user, and the owner of the roller was held responsible for damage ensuing from a horse taking fright at the roller (*o*).

If a man builds a house or a bridge, so as to obstruct a public thoroughfare, he cannot escape from liability by saying that it was the fault of the builder or contractor, in not constructing it in some different manner (*p*). If the occupier of a house or building adjoining a highway directs certain repairs to be done to his house, and it becomes necessary to excavate the earth, and remove

(*m*) Vin. Abr. NUISANCE, C. *James* v. *Hayward*, Cro. Car. 184; W. Jones, 221.

(*n*) *Green* v. *London General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*o*) *Wilkins* v. *Day*, 12 Q. B. D. 110.

(*p*) *Hole* v. *Sittingbourne, &c., Rail. Co.*, 6 H. & N. 500; 30 L. J., Ex. 81. *Gray* v. *Pullen*, 5 B. & S. 970; 34 L. J., Q. B. 265.

618 stone, timber, and materials from the premises, and the excavated earth and materials are placed in the high-road in front of the house, with the knowledge and sanction of the occupier of the house, the latter will be responsible for the obstruction, although it was placed there by the servants or workmen of a builder or contractor. If, seeing the obstruction and the danger of it, and having control over everybody working upon his own land, and bringing materials out of his own house, he does nothing to prevent or abate the nuisance, if he silently acquiesces in the conversion of the highway into a place of deposit for materials brought from his own premises, there will be evidence to go to a jury of the things having been placed in the highway by his authority (*q*).

Obstructions in navigable rivers.—If an obstruction has been placed in a navigable river for the more convenient use and occupation of a wharf, those who placed the obstruction in the river, and the occupiers of the wharf who continue it there for the use of the wharf, will be responsible for injuries caused by it to persons lawfully using the wharf who had no knowledge of the obstruction, or, it would seem, to any person navigating the river (*r*). The owner of a ship sunk in a navigable river by accident, without his default or misconduct, is not bound to remove the nuisance, if the vessel is totally submerged, and he has no longer the possession of it; but, if he has possession of the vessel, and exercises the dominion and control of an owner over it, he is bound to take all reasonable and proper care to prevent accidents to other vessels navigating the river, and must remove the obstruction with all reasonable diligence. This duty attaches to the ownership of the vessel for the time being, and will be transferred to a purchaser of the sunken vessel, who takes the wreck into his possession, and under his management and control (*s*). The principle above mentioned has been held to apply to the case of piles left in the bed of a river by a contractor, which were no obstruction when the works for which the piles were used were completed by the contractor and handed over to the Admiralty, but which subsequently became so by the soil around the piles being washed away (*t*).

Nuisances to highways.—Every occupier of a house adjoining a highway is responsible for injuries to passengers arising from

(*q*) *Burgess* v. *Gray*, 1 C. B. 591. *Bush* v. *Steinman*, 1 B. & P. 408. *Ellis* v. *Sheffield Gas Co.*, 2 El. & Bl. 767; 23 L. J., Q. B. 42.

(*r*) *White* v. *Phillips*, 15 C. B., N. S. 245; 33 L. J., C. P. 33.

(*s*) *White* v. *Crisp*, 10 Exch. 312. Where the harbour master has undertaken to lighten the wreck under the 40 & 41 Vict. c. 16, s. 4, the shipowner is no longer liable. *The Douglas*, 7 P. D. 151; 51 L. J., P. D. & A. 53.

(*t*) *Bartlett* v. *Baker*, 3 H. & C. 153; 34 L. J., Ex. 8. *Hyams* v. *Webster*, L. R., 2 Q. B. 264; 4 Q. B. 138; 36 L. J., Q. B. 166; 38 *ib.* 8.

619 things falling from the house into the street, unless he can show that the fall arose from storm or tempest, or some inevitable accident (*u*). He is bound also to secure his shutters, and swing-doors, and things placed against his house, so that they cannot be readily thrown down on passengers by idle or mischievous persons. Thus, where the cellar-door of a tradesman was opened and thrown back against his house, and some little boys playing with the door, threw it over upon the plaintiff and broke his leg, it was held that the tradesman was responsible for the injury, as he had provided no fastening to keep the door back. "A tradesman under such circumstances is not bound to adopt the strictest means for preventing accidents; but he is bound to use reasonable precaution, such as might be expected from a careful man" (*x*). But, if the door is a door of great weight, and so thrown back that it could not be pushed forward into the street without the exercise of great force and strength, the remedy would be against the wilful wrong-doer and not against the tradesman, who reasonably supposed a fastening to be, under such circumstances, unnecessary. Whether proper care has been taken to prevent the door from falling forward is a question of fact.

The occupier of a house, which is in a ruinous state and dangerous to the neighbourhood, is responsible to the public and to the owners and occupiers of the adjoining property who may sustain damage from the want of proper and timely repair; and it is no answer for him to say that he is a mere tenant-at-will or upon sufferance, or has only a temporary or precarious interest in the premises, and is under no obligation to maintain and repair them; for, if he chooses to take the benefit of the occupation of premises, he must take them with the accompanying burthen of preventing them from becoming a source of danger to others. Thus, where the defendant was indicted for not repairing a ruinous house abutting upon a highway, and the indictment charged that the house was likely to fall down, and that the defendant occupied it, and ought to repair it, and the jury found

(*u*) *Byrne* v. *Boadle*, 2 H. & C. 272; 33 L. J., Ex. 13. See *Scott* v. *London Dock Co.*, 3 H. & C. 598; 34 L. J., Ex. 220. So, by the civil law, every occupier of a house, whether he was the proprietor of it or a lessee, was held liable for damage caused by anything thrown out of the house, or the premises belonging to it, into a street or public thoroughfare, or any other place; and the occupier was held responsible for the damage, if the thing was done by any of his family or domestics in his absence or without his knowledge; but, if tiles fell from the roof from the effect of a storm, and the roof was in good repair, the occupier was not answerable for the accident. If the roof was out of repair, then the person bound to keep it in repair was guilty of a breach of duty, and was answerable for the damage to the person injured. Domat, Droit Civ. liv. 2, tit. 8, s. 1. Pandect. lib. 9, tit. 3. Instit. lib. 4, tit. 5, s. 1.

(*x*) Tindal, C. J., *Daniels* v. *Potter*, 4 C. & P. 262. *Proctor* v. *Harris*, *ib.* 337.

620 that the house was ruinous and likely to fall, and that the defendant occupied it, but was only tenant-at-will, the court held that he was nevertheless answerable to the public for its dangerous condition (*y*). But the liability of a mere tenant-at-will, in this respect, ought in reason to be confined to cases where he knew or ought to have known that the house was in a dangerous state, and chose to become and continue the occupier of it, with knowledge of its dangerous condition. All that the occupier is bound to do, in any case, is to shore up the building so as to prevent it from falling. He is not bound, as between himself and the public or the neighbours, to put it into a state of repair.

If a mason contracts to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he is responsible for it to a third person who is injured by the defective construction, and cannot be saved from the consequences of his illegal act in committing a nuisance on the highway by showing that he was also guilty of a breach of contract, and responsible for that to the person with whom he had contracted (*z*). If a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to the passengers; and, if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it (*a*). Where in the district of a local board of health a grid or grating has been put down in a highway to drain the surface water off the road into a sewer below, the local board in whom the sewers are vested by the Public Health Act are responsible for damage sustained by persons using the highway from the grid being in a dangerous state (*b*). Opening a highway, for the purpose of laying down gas pipes, is not necessarily a public nuisance (*c*).

By the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70 (*d*),

(*y*) *Reg.* v. *Watts*, 1 Salk. 357. *S. C.* nom. *Reg.* v. *Watson*, 2 Ld. Raymond, 856.

(*z*) Parke, B., *Longmeid* v. *Holliday*, 6 Exch. 767.

(*a*) *Tarry* v. *Ashton*, 1 Q. B. D. 314; 45 L. J., Q. B. 260.

(*b*) *White* v. *Hindley Local Board*, L. R., 10 Q. B. 219; 44 L. J., Q. B. 114. *Blackmore* v. *Vestry of Mile End Old Town*, 9 Q. B. D. 451; 51 L. J., Q. B. 496. *Kent* v. *Worthing Local Board*, 10 Q. B. D. 118; 52 L. J., Q. B. 377; see this last case commented on in *Moore* v. *Lambeth Waterworks Co.*, 17 Q. B. D. 462, where a fire plug was lawfully fixed and was in good repair, but by ordinary wear of the road projected and injured the plaintiff, and it was held that no action lay.

(*c*) *Edgware Highway Board* v. *Harrow Gas Co.*, L. R., 10 Q. B. 92; 44 L. J., M. C. 16. As to the powers of waterworks companies to do what is necessary in laying down or repairing their pipes, see *East London Waterworks Co.* v. *St. Matthew, Bethnal Green*, 17 Q. B. D. 475.

(*d*) This Act also contains in sects. 72, 73 and 74, other provisions as to persons committing nuisances on highways. A local surveyor was held liable for leaving a heap of stones unfenced and unlighted under sect. 72. *Fearnley* v. *Ormsby*, 4 C. P. D. 136. So the erecting of booths is a nuisance, *Simpson* v. *Wells*, L. R., 7

621 it is enacted, that it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards, nor any windmill within fifty yards, from any part of any carriage-way or cart-way (*e*), unless such pit or shaft, or steam-engine, gin, or other like engine or machinery, shall be within some house or other building, or behind some wall or fence sufficient to conceal or screen the same from the said carriage-way or cart-way, so that the same may not be dangerous to passengers, horses, or cattle (*f*); also, that it shall not be lawful for any person to make or cause to be made any fire for calcining or burning of ironstone, limestone, bricks, or clay, or the making of coke, within fifteen yards from any part of the said carriage-way or cart-way, unless the same shall be within some house or other building, or behind some wall or fence sufficient to screen the same from such carriage-way or cart-way. As persons are prohibited from sinking pits or shafts within the distance of twenty-five yards from any part of a carriage-way or cart-way, being a highway, it follows that any person who has sustained injury from the doing of the prohibited act is entitled to an action to recover compensation in damages from the wrong-doer. If the occupier negligently leaves a vault or area unfenced and unguarded, so close to a street or public highway as to be dangerous to passengers, it is no answer to a claim for damages by persons who have fallen into the vault whilst endeavouring to keep to the high-road, to show that there was a narrow intervening strip of the defendant's land extending between the highway and the area, on which the plaintiff was trespassing at the time he fell into the pit (*g*). But, wherever a person designedly deviates from the highway and commits a trespass, in order to make a short cut across the defendant's land, and in so doing falls into an open, unguarded vault or cellar, the defendant is not responsible for the injury (*h*).

Q. B. 214; 41 L. J., M. C. 105. But permitting or suffering water from the eaves to fall on the highway (*Croasdill* v. *Radcliffe*, 5 L. T. 834), or trees to overhang (*Walker* v. *Horne*, 1 Q. B. D. 4; 45 L. J., M. C. 34), is not. (As to trees overhanging in the south-western counties, see 48 Vict. c. 13.) Lighting a fire within fifty feet of the centre is a nuisance. *Stinson* v. *Browning*, L. R., 1 C. P. 321; 35 L. J., M. C. 145. See also 27 & 28 Vict. c. 101, ss. 25, 51.

(*e*) This is extended to turnpike roads by the 27 & 28 Vict. c. 75. Steam-ploughing machines are excepted by the 28 & 29 Vict. c. 83, s. 6, provided certain precautions are taken whilst they are in use. See also the 41 & 42 Vict. c. 77.

(*f*) As to nuisances from steam-threshing machines, see *Smith* v. *Stokes*, 4 B. & S. 84; 32 L. J., M. C. 199.

(*g*) *Barnes* v. *Ward*, 9 C. B. 392; 19 L. J., C. P. 195. See *Reg.* v. *Dant*, L. & C. 567; 34 L. J., M. C. 119. *Hadley* v. *Taylor*, L. R., 1 C. P. 53.

(*h*) *Hardcastle* v. *South York, &c., Rail. Co.*, 4 H. & N. 74; 28 L. J., Ex. 139. *Stone* v. *Jackson*, 16 C. B. 199. *Blyth* v. *Topham*, Cro. Jac. 159; 1 Roll. Abr. 88. The negligent quarrying of stone near a highway is an indictable offence at common law. *Reg.* v. *Mutters*, L. & C. 491; 34 L. J., M. C. 22.

622 Where the defendants were owners of waste land which was bounded by two highways, and the defendants worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark, and fell into the quarry and broke his leg, and then brought an action for damages, it was held that the action could not be maintained, as there was no legal obligation on the defendant to fence the quarry for the benefit of the plaintiff, who was a mere trespasser upon the land (*i*). But, if the hole is so near a highway that a person lawfully using it may, if he slips on the highway, fall into the hole, the occupier will be liable for not fencing the hole (*k*), even though the obligation to fence the land from the highway it adjoins may be on some other person (*l*).

Where the occupier of a dangerous area adjoining a highway set up as a defence that the premises had been exactly in the same condition as far back as could be remembered, and many years before he took possession of them (*m*), Lord Ellenborough held that, however long the premises might have been in a dangerous state, the defendant, as soon as he took possession of them, was bound to guard against the danger to which the public had been before exposed; that the area belonged to the house, and the law cast upon the occupier the duty of rendering it secure; and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance (*n*). No question was raised in this case, however, as to whether the highway existed before the area was made: for, if the area had been made, and the road afterwards dedicated to the public with the unfenced area beside it, the public would take the right of way subject to the danger and inconvenience of the unfenced area (*o*).

The owner of the land on which a nuisance to a public way exists will be responsible, if he demises the land with the nuisance upon it (*p*). This has been held to be the case when the thing demised consisted of a wall erected so as to impede the access to a public market (*q*), or a dangerous excavation made by order of the landlord, and left unguarded and unfenced by the side of a public thoroughfare (*r*). So, also, the landlord is responsible to

(*i*) *Hounsell* v. *Smyth*, 7 C. B., N. S. 731; 29 L. J., C. P. 203. *Binks* v. *South York & River Dun Co.*, 3 B. & S. 244; 32 L. J., Q. B. 26.

(*k*) *Hadley* v. *Taylor*, L. R., 1 C. P. 53. As to who is an occupier, see *S. C.*

(*l*) *Wettor* v. *Dunk*, 4 F. & F. 298.

(*m*) See *Barnes* v. *Ward*, 9 C. B. 420; 19 L. J., C. P. 200. *Jarvis* v. *Dean*, 11 Moore, 354.

(*n*) *Coupland* v. *Hardingham*, 3 Campb. 398. *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El. 697; 29 L. J., Q. B. 53. *Pickard* v. *Smith*, 10 C. B., N. S. 470. *Gully* v. *Smith*, 12 Q. B. D. 121; 53 L. J., M. C. 35.

(*o*) Blackburn, J., *Fisher* v. *Prowse*, 2 B. & S. 770; 31 L. J., Q. B. 219.

(*p*) *Ante*, p. 375.

(*q*) *R.* v. *Pedley*, 1 Ad. & E. 822.

(*r*) *Leslie* v. *Pounds*, 4 Taunt. 649.

623 the public, if he demises houses which are in a ruinous state and dangerous to the neighbourhood, either from original faulty construction, or from want of proper and timely repair (*s*); unless at the time of the demise he did not know that the house was in a dangerous state, and was not to blame for not knowing it, and the tenant has covenanted to repair (*t*). But, if the houses or buildings are in good repair and condition at the time of the demise, and subsequently become ruinous and dangerous to the neighbourhood, the landlord is not responsible for the nuisance, unless he has taken upon himself the burthen of repairing and maintaining the premises during the existence of the lease (*u*), or has renewed the lease after the houses had become ruinous and in danger of falling; for an owner of a house is not, merely as such, liable for its want of repair (*x*).

Nuisances arising from neglect of statutory duties—Neglect of railway companies to erect and maintain bridges over highways.—By the 8 & 9 Vict. c. 20, s. 46, it is enacted that, if the line of railway cross any turnpike-road or public highway, then (except where otherwise provided by the special Act), either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, such bridge to be maintained "with the immediate approaches" at the expense of the company: but it is provided that, with the consent of two or more justices, in petty sessions, it shall be lawful for the company to carry the railway across any highway other than a public carriage-road on the level (*y*).

Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments; so that, if any injuries are sustained by persons travelling along a highway under a bridge or viaduct, from the ruinous or insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose

(*s*) *Todd* v. *Flight*, 9 C. B., N. S. 377; 30 L. J., C. P. 21. *R.* v. *Pedley*, 1 Ad. & E. 822.

(*t*) *Gwinnell* v. *Eamer*, L. R., 10 C. P. 658.

(*u*) *Payne* v. *Rogers*, 2 H. Bl. 349. *Leslie* v. *Pounds*, 4 Taunt. 648. *Bishop* v. *Trustees of Bedford Charity*, 1 El. & El. 697; 29 L. J., Q. B. 53. *Robbins* v. *Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1.

(*x*) *Chauntler* v. *Robinson*, 4 Exch. 163.

(*y*) Under this section the railway company are bound to keep in repair the immediate approaches to the road, where the road is carried over the railway (*Leek* or *Leech* v. *North Staffordshire Rail. Co.*, 5 H. & N. 160; 29 L. J., M. C. 150), but not where it is carried under it (*London and North Western Rail. Co.* v. *Skerton*, 5 B. & S. 559; 33 L. J., M. C. 158). The railway company are also liable, under sect. 58, to make good the damage done to any road during the construction of the works, by carts, &c., passing along it, although such carts may not be theirs, but may belong to the contractor who has engaged to make the railway (*West Riding Rail. Co.* v. *Wakefield Board of Health*, 5 B. & S. 478; 33 L. J., M. C. 174).

624 from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor (*z*).

Negligent management of railway-gates placed across public carriage-roads.—When a railway crosses any turnpike road or public carriage-road on a level, the company must, unless otherwise authorized by their special Act, erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and employ proper persons to open and shut such gates, and keep them constantly closed across the road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the road shall have to cross the railway; and the gates must be of such dimensions and so constructed as, when closed, to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway (sect. 47). This section does not authorize a person passing along the highway to open the gates himself, although after waiting a reasonable time no servant of the company appears to do so; and, if owing to his opening the gates he sustains an injury, the company are not responsible (*a*).

Wherever this section of the statute, or one of similar import, is in force, it imposes upon the railway company governed by it the duty of closing the gates across public carriage-roads carefully against everything passing lawfully or unlawfully along the high-road. Where, therefore, the plaintiff's horses strayed from his field into the high-road, and passed from thence through an open gate, and got upon a railway, and were killed by a passing train, it was held that the railway company were responsible for the loss, as the obligation to keep the gates closed imposed upon them the duty of closing them carefully against everything passing lawfully or unlawfully along the high-road (*b*). Where one of the public carriage gates at a level crossing is also the only exit out of a private yard across the railway, and the driver of a cart coming out of the private yard asks the railway gate keeper if he may cross, and is answered in the affirmative, the company will be responsible if the cart is run into by a train (*c*).

Where a railway crosses a turnpike-road on a level adjoining to a station, the trains must slacken their speed before arriving at the turnpike-road, and cannot, unless there is some special provision to the contrary in the particular Act under which the com-

(*z*) *Grote* v. *Chester and Holyhead Rail. Co.*, 2 Exch. 251. See 2 Wood on Railway Law, sections 270, 271, 272.

(*a*) *Wyatt* v. *Great Western Rail. Co.*, 6 B. & S. 709; 34 L. J., Q. B. 204 (*diss.* Blackburn, J.).

(*b*) *Fawcett* v. *York and North Midland Rail. Co.*, 16 Q. B. 618.

(*c*) *Lunt* v. *London and North Western Rail. Co.*, L. R., 1 Q. B. 277; 35 L. J., Q. B. 105.

625 pany is incorporated, cross the same at any greater rate of speed than four miles an hour (*d*).

Where a railway company construct their line across a highway on a level under the sanction of an Act of Parliament, it is their duty to keep the crossing in a proper state for the passage of carriages across the rails; and, if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company are liable (*e*). By the 8 & 9 Vict. c. 20, s. 61, when a railway crosses a public highway, other than a public carriage-way, on the level, the company are, if the way is a bridle-way, to erect and maintain gates, and, if a footway, gates or stiles. Where, therefore, the plaintiff, a child of four years and a half, having been sent on an errand, was shortly afterwards found lying on a level crossing, a foot having been cut off by a passing train, it was held that there was evidence to go to the jury of the accident having been caused by the negligence of the railway company, they having omitted to erect any gate or stile (*f*)

When parliament authorizes a railway company to construct a railway and work it, it is implied that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked; and in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway (*g*). Where the plaintiff took the precaution of looking up and down the line, but, owing to the fogginess of the morning, could not see an engine coming, and the engineman never whistled, it was held that there was evidence of negligence (*h*). If there is a public carriage-way over the railway alongside of the footway, and the servant in charge of the carriage-gates has left them open, this is so far equivalent to a representation by the railway company that all is safe as to amount to

(*d*) 8 & 9 Vict. c. 20, s. 48. By the 35 & 36 Vict. c. 8, s. 13, it is enacted that such of the provisions of the 8 & 9 Vict. c. 20, with respect to the crossing of roads and other interference therewith, as relate to turnpike roads, shall continue in force in relation to any road which, having been a turnpike road, may at any time after the passing of that Act (10th of Aug. 1872) become an ordinary highway, in the same manner as if such road had continued to be a turnpike road; and in the construction of the said provisions, when applied to any such road as aforesaid, if the road is within the jurisdiction of a highway board, such board shall be deemed to be the trustees or commissioners thereof, and in other cases the surveyor or other local authority having the care of the road shall be deemed to be such trustees or commissioners.

(*e*) *Oliver* v. *North Eastern Rail. Co.*, L. R., 9 Q. B. 409; 43 L. J., Q. B. 198. See 2 Wood on Railway Law, pp. 971—983.

(*f*) *Williams* v. *Great Western Rail. Co.*, L. R., 9 Ex. 157; 43 L. J., Ex. 105.

(*g*) Per Mellor, J., *Cliff* v. *Midland Rail. Co.*, L. R., 5 Q. B. 261.

(*h*) *James* v. *Great Western Rail. Co.*, L. R., 2 C. P. 634 n.; 36 L. J., C. P. 255 n.

626 evidence of negligence in case the foot-passenger is injured in crossing the line (*i*). Where there are circumstances making a particular crossing exceptionally dangerous, the company are bound to use extra precautions (*k*). *Primâ facie*, however, a foot passenger crossing a railway on the level, is bound to look to his own safety (*l*); and there is no general duty on railway companies to place watchmen at public footways or accommodation roads, crossing the railway on a level, to warn persons using the footway or the road (*m*). Where, therefore, the view of the line from one of the gates was obstructed by a pier, but from the level of the line there was a clear view of 300 yards each way, and a person, crossing the line immediately after a train had passed, was killed by a train coming the other way, it was held that there was no evidence of negligence against the railway company (*n*).

A railway made without statutory authority is not subject to the regulations as to gates and persons in charge at level crossings imposed by these statutes; nor are the proprietors bound at common law to erect such gates (*o*).

Canal companies also are bound to take all reasonable and proper precautions for the protection of the public, where the canal intersects public thoroughfares. In such cases there is a common-law obligation on the company to make and maintain sufficient bridges with proper rails and lights, such as all persons passing along the highway can safely use. When the high-road traverses the canal by a swing-bridge, and the bridge is opened for the passage of boats and vessels, the company are bound to provide sufficient lights, or persons to watch and warn passengers, or to have some apparatus attached to the bridge itself, to protect passengers when the bridge is open, and prevent them from falling into the water (*p*). But, if the canal has been demised to a lessee, who is in the actual possession and occupation of it, and who receives the toll for the use of it, it is not then the duty of the proprietors of the canal to maintain and repair the canal, unless the particular statute under which they are incorporated expressly

(*i*) *Stapley* v. *London, Brighton & South Coast Rail. Co.*, L. R., 1 Ex. 21; 35 L. J., Ex. 7. *Wanless* v. *North Eastern Rail. Co.*, L. R., 6 Q. B. 481; 7 H. L. 12; 43 L. J., Q. B. 185.

(*k*) *Bilbee* v. *London & Brighton Rail. Co.*, 18 C. B., N. S. 584; 34 L. J., C. P. 182. See, however, *Cliff* v. *Midland Rail. Co.*, *infra*.

(*l*) *Skelton* v. *London & North Western Rail. Co.*, L. R., 2 C. P. 63; 36 L. J., C. P. 249. *Ellis* v. *Great Western Rail. Co.*, L. R., 9 C. P. 551; 43 L. J., C. P. 304.

(*m*) *Cliff* v. *Midland Rail. Co.*, L. R., 5 Q. B. 258.

(*n*) *Stubley* v. *London & North Western Rail. Co.*, L. R., 1 Ex. 13; 35 L. J., Ex. 3. *Skelton* v. *London & North Western Rail. Co.*, *supra*. *Davey* v. *London & South Western Rail. Co.*, 12 Q. B. D. 70; 53 L. J., Q. B. 58.

(*o*) *Matson* v. *Baird & Co.*, L. R., 3 App. Cas. 1082.

(*p*) *Manley* v. *St. Helen's Canal & Rail. Co.*, 2 H. & N. 840; 27 L. J., Ex. 164.

627 imposes that duty upon them (*q*). Canal companies are not bound, however, to fence off their canal from an adjoining thoroughfare, unless it is "so near thereto as to be dangerous to persons using the road in the line of the road" (*r*).

Collisions in public thoroughfares.—A person driving a carriage is not bound to keep on "his own" side of the road; but, if he does not, he must use more care, and keep a better look out, to avoid collision, than would be otherwise necessary (*s*). A foot-passenger is not bound to keep on the foot-pavement; he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it (*t*). "It is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully; but it is also the duty of a foot-passenger to use due care and caution in going upon a crossing, so as not recklessly to get among the carriages" (*u*). If a person driving his own carriage takes another person into it as a passenger, such other person cannot be subjected to an action in case of any misconduct by the proprietor of the carriage; but, if two persons were jointly concerned in the carriage, as if both had hired it together, both will be answerable for any accident arising from the misconduct of either in the driving of the carriage whilst it was so under their joint care (*x*). It is not enough to give warning to a person to get out of the way of a carriage to exonerate parties from responsibility for carelessness (*y*).

Where the injury complained of has resulted from negligence in leaving instruments of danger, such as a horse and cart, unattended in a public thoroughfare or place of public resort, it is for a jury to inquire whether the horse was vicious or steady, whether the horse was left for an unreasonable time, and whether there was any excuse for leaving it at all unattended, whether assistance could have been procured to watch the horse, whether the street was unfrequented or thronged, and especially whether large numbers of young children might reasonably be expected to be about the spot (*z*).

If the injury has resulted from circumstances over which the

(*q*) *Walker* v. *Goe*, 3 H & N. 395; 27 L. J., Ex. 427. As to the common-law duty of the actual occupier to keep his premises in such a state as not to be a source of annoyance to his neighbours, see *ante*, p. 374.

(*r*) *Binks* v. *South Yorkshire & River Dun Co.*, 3 B. & S. 244, 350; 32 L. J., Q. B. 26.

(*s*) *Pluckwell* v. *Wilson*, 5 C. & P. 375.

(*t*) *Boss* v. *Litton*, 5 C. & P. 407.

(*u*) Pollock, C. B., *Williams* v. *Richards*, 3 C. & K. 82. Erle, C. J., *Cotton* v. *Wood*, 8 C. B., N. S. 571; 29 L. J., C. P. 333.

(*x*) *Davey* v. *Chamberlain*, 4 Esp. 229.

(*y*) *Woolley* v. *Scovell*, 3 M. & Ry. 105.

(*z*) *Lynch* v. *Nurdin*, 1 Q. B. 38.

628 defendant had no control, he is not then answerable. This has been held to be the case where the defendant's horse, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became ungovernable, and plunged the shaft of a gig into the breast of the plaintiff's horse (*a*); also where a horse, naturally vicious, but not known to be so by the defendant who was riding it, became restive and unmanageable, and ran upon the foot pavement, and knocked down and killed the plaintiff's husband (*b*); and where a horse, ridden by the defendant, was frightened by a clap of thunder, and ran over the plaintiff, who was incautiously standing with others in the carriage-road (*c*). If a horse, not known to be of a vicious disposition by the rider, suddenly kicks out without provocation and injures a bystander, the rider will not be responsible for the injury; but it is otherwise, if the injury is caused by an incautious and dangerous use of the spur (*d*).

Collisions at sea.—According to the general rule of navigation, it is the duty of a port-tacked ship to get out of the way of a ship on the starboard tack. But that rule does not mean that the starboard-tacked vessel is obstinately to continue on her course when she sees that, in the particular circumstances, by a variation from it, she can avoid a collision (*e*).

By the 17th section of the Merchant Shipping Act, 1873, it is enacted that, if, in any case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary (*f*). Where there has been a departure from an important rule of navigation, if the absence of due observance of

(*a*) *Wakeman* v. *Robinson*, 1 Bing. 213; 8 Moore, 63.

(*b*) *Hammack* v. *White*, 11 C. B., N. S. 588; 31 L. J., C. P. 129.

(*c*) *Gibbons* v. *Pepper*, 1 Ld. Raym. 38.

(*d*) *North* v. *Smith*, 10 C. B., N. S. 575. By the civil law, all the losses and damages which result from the act of another, whether through imprudence, rashness, ignorance, or other faults, are to be made good by him whose imprudence, or other fault, caused the mischief; for it is a wrong that he hath done, although he had no intention to do harm. Thus he who plays imprudently at a game in a place where there may be danger to others passing by, is answerable for the harm he does (Domat, liv. 2, tit. 8, s. 4). A waggoner, or a mule-driver, who has not strength or skill enough to hold in a mettlesome horse, or an unruly mule, will be answerable for the damage caused thereby; for he ought not to have undertaken what he had not skill or strength enough to perform. If, by overloading a horse or other beast, or by not avoiding a dangerous path, or by some other neglect, he causes damage to another, he will be answerable; and he who sustains the damage may have his action against the driver, or against the person who employed him (1b., liv. 2, tit. 8, s. 2, § 5).

(*e*) *Wilson* v. *Canada Shipping Co.*, L. R., 2 App. Cas. 389.

(*f*) *The Tirzah*, 4 P. D. 83; 48 L. J., P. D. & A. 15. *The Mary Hounsell*, 4 P. D. 204; 48 L. J., P. D. & A. 54.

629 the rule can by any possibility have contributed to the accident, then the party in default cannot be excused (*g*). Sailing, steering, lighting, and signalling rules were provided under 25 & 26 Vict. c. 63, s. 25, by various Orders in Council (*h*), upon the interpretation of which there have been numerous decisions. The party guilty of an infringement of the regulations has the burthen cast upon him of showing not merely that the infringement did not in fact contribute to the collision, but that it was absolutely necessary to depart from the regulations (*i*). The old rule of the Admiralty Court, therefore, that, if the owner of one ship brings an action against the owner of another ship for damage by collision, and both vessels are to blame, the damage shall be divided, has, to a certain extent, been superseded by the provisions of this statute (*j*). But the owner of cargo on board a ship that has violated the provisions of this statute, and so contributed to the collision, is not prohibited by the Act from recovering compensation, in accordance with the old rule of the Admiralty, to the extent of a moiety of his loss (*k*). This enactment applies only to cases of collision where there has been a material infringement of the regulations which by possibility might have caused or contributed to the collision (*l*); and, therefore, notwithstanding this statute, and the Admiralty regulations founded thereon, persons, in navigating their vessels, are still bound to keep a good look-out, just as they were before these regulations were made; and, if it could clearly be made out that a vessel, having no light, had been run down by another vessel, from sheer carelessness and negligence in not keeping a good look-out, the owners of the former vessel would have a right to compensation from the latter (*m*). Every vessel, whether close-hauled or at anchor, is bound to show a light (*n*); and, if, in consequence of a vessel, which is lying across the channel leading into the harbour, not exhibiting a light, another vessel, to avoid a collision with her, runs aground or against a sea-wall and receives damage, the former vessel will be liable (*o*). It is the duty of those who have charge of a steamship in motion during a dense fog, on first hearing the whistle of a steamship in

(*g*) *Emery* v. *Ackers*, 9 App. Cas. 136; 53 L. J., P. C. 9.

(*h*) Dated 14th Aug. 1879; amended by Orders 24th March, 6th Sept., and 27th Nov. 1880, and 18th Aug. 1882, and 11th Aug. 1884.

(*i*) *Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Nav. Co.*, 5 App. Cas. 876.

(*j*) *Lawson* v. *Carr*, 10 Moo. P. C. 162.

(*k*) *The Milan*, Lush. 388; 31 L. J., Adm. 105.

(*l*) *The Magnet*, L. R., 4 A. & E. 417; 44 L. J., Adm. 34.

(*m*) *Morrison* v. *General Steam Navigation Co.*, 8 Exch. 738. See *Inman* v. *Reck*, L. R., 2 P. C. 25; 37 L. J., Adm. 25. *The Margaret*, 9 App. Cas. 873; 54 L. J., P. D. & A. 18.

(*n*) *The Eclipse*, Lush. 410; 31 L. J., Adm. 201. See *The Esk*, L. R., 2 A. & E. 350; 38 L. J., Adm. 33. *The John Fenwick*, L. R., 3 A. & E. 500; 41 L. J., Adm. 38.

(*o*) *The Industrie*, L. R., 3 A. & E. 303; 40 L. J., Adm. 26.

630 such close proximity to them that risk of collision is involved, to bring their vessel immediately to a standstill on the water, and not execute any manœuvre with their helm until they have definitely ascertained the position and course of the other ship (*p*). The master, when the ship is at anchor, is bound to keep a sufficient crew on board, to protect her against ordinary perils (*q*). Although the damage resulting from a collision may be greatly increased by some neglect or default on the part of the plaintiff, yet, if the plaintiff's neglect had not caused or contributed to the collision, he is not thereby precluded from recovering damages (*r*); but, if the fault of the plaintiff himself is the sole cause of the collision, he cannot recover: if it is only remotely connected with the accident, then the question is, whether the defendant, by ordinary care, might have avoided the accident, and, if he might, the plaintiff is entitled to recover (*s*). Where both parties were to blame, there was formerly a difference between the rule applicable in the courts of common law and that in the Court of Admiralty. By the former neither could recover any damages; by the latter the damages were divided equally; and now, by the Judicature Act, 1873, it is enacted that in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in courts of common law, shall prevail (*t*).

By the 36 & 37 Vict. c. 85, it is enacted that in every case of collision between two vessels it shall be the duty of the master or person in charge of the vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision; and also to give the master or person in charge of the other vessel the name of his own vessel and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof

(*p*) *The Kirby Hall*, 8 P. D. 71; 52 L. J., P. D. & A. 31.

(*q*) *The Excelsior*, L. R., 2 A. & E. 268.

(*r*) *Greenland* v. *Chaplin*, 5 Exch. 247.

(*s*) *Tuff* v. *Warman*, 2 C. B., N. S. 740; 5 C. B., N. S. 585; 26 L. J., C. P. 263; 27 *ib.* 322. *The Vivid*, 1 Swabey, 88.

(*t*) Sect. 25 (9). See *Chartered Mercantile Bank of India* v. *Netherlands Steam Nav. Co.*, 10 Q. B. D. 521; 52 L. J., Q. B. 220; and see also the *Bernina*, 11 P. D. 31; 55 L. J., P. D. & A. 21; where the rules of the Admiralty could not be said to be at variance with the rule of common law, as there were no rules of the Admiralty on the subject.

631 to the contrary, be deemed to have been caused by his wrongful act, neglect, or default (*u*). The person in charge under this section is the mate or master, as the case may be; and the mere fact of there being a pilot compulsorily in charge of the ship, is not sufficient to exempt the owners from responsibility (*x*).

A Queen's officer, stationed on board ship to do his duty there, together with others equally appointed, and stationed there by the same authority to do their several duties, is not responsible in damages for injuries occasioned by the negligence of his subordinate officers in carrying into effect the orders given by him in discharge of his public duty. Therefore, the captain of a sloop-of-war is not answerable for damage done by her in running down another vessel during the watch of the lieutenant, who was upon the deck, and had the actual direction and management of the steering and navigating the sloop at the time (*y*).

The mere fact of a ship being chartered and employed by the government as an armed vessel, and having a commander of the navy on board, under whose orders the vessel is navigated, will not exempt the shipowners from responsibility for injuries occasioned by the negligence of a master and crew shipped on board and paid by them (*z*). But no action is maintainable against the owners of a transport in the employ of Government for damage done in the careful and proper execution of the orders of a Government officer, under whose command the vessel was at the time of the accident, unless the order was only meant to apply to a particular state of circumstances, and left a certain discretion in the master of the transport, and the circumstances having changed, the master carelessly and imprudently failed to direct his conduct in accordance with the altered circumstances and the requirements of good seamanship (*a*).

If a shipowner unnecessarily delays mooring his vessel until night comes on, and darkness prevents him from distinguishing objects, he will be responsible in damages if he comes into collision with any other vessel, and if the collision could have been avoided if it had been daytime (*b*).

If a ship, through the negligent navigation of the master, runs aground, and is then driven on to a sea wall by the force of the wind or tide, the shipowner will be responsible for the damage done to the wall. In the absence of negligence, however, the shipowner has a reasonable time for the recovery of valuable

(*u*) Sect. 16.
(*x*) *The Queen*, L. R., 2 A. & E. 354; 38 L. J., Adm. 39.
(*y*) *Nicholson* v. *Mouncey*, 15 East, 384.
(*z*) *Fletcher* v. *Braddick*, 2 B. & P. N. R. 182. Best, J., *Scott* v. *Scott*, 2 Stark. 438.
(*a*) *Hodgkinson* v. *Fernie*, 2 C. B., N. S. 415; 26 L. J., C. P. 219.
(*b*) *The Egyptian*, 1 Moo. P. C., N. S. 373.

632 property contained in the ship, and, as between him and the proprietor of the wall, is not bound to break up the ship immediately (*c*).

A person navigating the high seas will be liable for injury caused by his negligence in navigation to a telegraph cable lying at the bottom of the sea (*d*).

It is the duty of those who launch a vessel to do so with the utmost precaution, and to give such a notice as is reasonable and sufficient to prevent injury happening from that event (*e*). What is reasonable notice depends on local circumstances, the breadth of the river, the number of vessels passing, and other circumstances of that kind. It must not be a mere general notice of a launch on a particular day; the notice must so specify the time of the launch, that vessels navigating up and down the river may not be damaged or run in danger (*f*). Where a newly-built vessel, not then registered, on being launched ran into and damaged a passing ship, it was held that she was not a recognized British ship when the collision occurred, and that her owner, a natural-born British subject, was not entitled to have his liability limited (*g*).

Collisions at sea—Inevitable accident.—A shipowner is not liable for a collision arising from an inevitable accident, that is, an accident which could not have been prevented by the exercise of ordinary care, caution, and maritime skill (*h*). Where the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not to be held responsible because he may have omitted some possible precaution which the event suggests he might have resorted to (*i*). And where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong and has not been manœuvred with perfect skill and presence of mind (*k*).

Collisions at sea—Compulsory pilotage.—Sect. 388 of the Merchant Shipping Act, 17 & 18 Vict. c. 104, protects the owners or

(*c*) *The Bailiffs of Romney Marsh* v. *Trinity House*, L. R., 5 Ex. 204; 7 *ib.* 247; 41 L. J., Ex. 106.

(*d*) *Submarine Telegraph Co.* v. *Dickson*, 15 C. B., N. S. 759; 33 L. J., C. P. 139.

(*e*) *The Glengarry*, L. R., 3 P. D. 235 n.; 43 L. J., Adm. 37. *The George Roper*, 8 P. D. 119; 52 L. J., P. D. & A. 69. See *The Cachapool*, 7 P. D. 217.

(*f*) *The Blenheim*, 2 Wm. Rob. 421; 4 N. of C. 393.

(*g*) *The Andalusian*, L. R., 3 P. D. 182; 47 L. J., Adm. 65.

(*h*) *The Marpesia*, L. R. 4 P. C. 212. *The Buckhurst*, 6 P. D. 153; 51 L. J., P. D. & A. 10. Where in a collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit and seek to be indemnified for damage sustained, and does not attach to the vessel proceeded against, until a *primâ facie* case of negligence and want of due seamanship is shown. *The Marpesia*, *supra*.

(*i*) *Doward* v. *Lindsay*, L. R., 5 P. C. 338. *The Swansea and the Condor*, 4 P. D. 115; 48 L. J., P. D. & A. 33.

(*k*) *The Bywell Castle*, 4 P. D. 219.

633 masters of a ship from liability for loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of the pilot is made compulsory by law (*l*). If, therefore, a ship, compulsorily in charge of a pilot, is being towed by a steam-tug, and by the negligence of the steam-tug is towed across and brought into collision with another vessel, the owner of the former vessel is not responsible, if by giving proper orders the pilot could have avoided the collision, unless there was negligence on his part in the selection of the tug in the first instance, by which the collision was wholly or in part occasioned (*m*). The owner of a vessel under compulsory pilotage is entitled to recover a moiety of the damage, without any deduction on account of damage sustained by another vessel, in a collision in which both vessels were in fault (*n*). This section, however, will not absolve the owner from responsibility for the neglect of the master to keep a good look-out, if such neglect conduces to the collision. It is the duty of the pilot to attend to the navigation, and of the master to keep a good look-out (*o*). Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty; and under ordinary circumstances his commands are to be implicitly obeyed (*p*). To him belongs the sole direction of the vessel in those respects where his local knowledge is presumably required, such as the direction, the course, and the manœuvres of the ship when sailing, the selection of the

(*l*) *The Schwalbe*, 14 Moore, P. C. 241. *The Annapolis*, 1 Lush. 295. *The Peerless*, 13 Moo. P. C. 444; 30 L. J., Adm. 89. See *Hossack* v. *Gray*, 6 B. & S. 598; 34 L. J., M. C. 209, as to when an English or Scotch pilot is necessary. *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, L. R., 2 Q. B. 65; 36 L. J., Q. B. 22, as to the port of Newcastle. *The Hanna* (L. R., 1 A. & E. 283; 36 L. J., Adm. 1), as to ships (not British) coming up the North Channel, and as to who is a passenger within s. 354 of the Merchant Shipping Act. *The Vesta*, 7 P. D. 240; 51 L. J., P. D. & A. 25. *The Lion*, L. R., 2 A. & E. 102; 2 P. C. 525; 38 L. J., Adm. 51. *The Maria*, L. R., 1 A. & E. 358. *The Rigborgs Minde*, 8 P. D. 133; 52 L. J., P. D. & A. 75, as to the port of Hull. *Rodrigues* v. *Melhuish*, 10 Exch. 110, as to the port of Liverpool. *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R., 3 Ex. 330; 4 Ex. 238; 38 L. J., Ex. 97; *The Hankow*, 4 P. D. 197; 48 L. J., P. D. & A. 29, as to the limits of the port of London. *Wood* v. *Smith*, L. R., 5 P. C. 451; 43 L. J., Adm. 11; *The Princeton*, 3 P. D. 90; 47 L. J., P. D. & A. 33; *The Cachapool*, 7 P. D. 217, as to compulsory pilotage in the Mersey; and the *Johann Sverdrup*, 11 P. D. 49; 55 L. J., P. D. & A. 28, in the Tyne. This section protects the owners or masters from responsibility for injuries done within the limits of the Thames Conservancy Act, 1857. *Thames Conservators* v. *Hall*, L. R., 3 C. P. 415.

(*m*) *Marshall* v. *Moran*, L. R., 3 P. C. 205; but see *The Sinquasi*, 5 P. D. 241; 50 L. J., P. D. 5.

(*n*) *The Hector*, 8 P. D. 218; 52 L. J., P. D. & A. 51.

(*o*) *The Iona*, L. R., 1 P. C. 426. *The Velasquez*, L. R., 1 P. C. 494; 36 L. J., Adm. 19. *The Calabar*, L. R., 2 P. C. 238.

(*p*) It would appear, however, that the master must not allow an obvious breach of navigation rules. *The Ripon*, 10 P. D. 65; 54 L. J., P. D. & A. 56.

634 proper anchorage place, and the mode of anchoring and preparing to anchor (*p*). The pilot also is to decide in all cases whether the ship is to anchor or to proceed (*q*).

If a pilot has been taken on board in pursuance of an Act of Parliament rendering such employment compulsory, and is in fact in charge of the ship at the time of the accident, and the accident occurs through his negligence, the shipowner is absolved from liability under the above section, even though, by reason of an exception in the Act, such employment ceased to be compulsory shortly before the accident occurred (*r*). But, when the employment of the pilot has fairly ceased, the responsibility of the shipowner recommences (*s*); and, if the employment of the pilot is not compulsory, the shipowner, of course, remains liable for his negligence (*t*).

Collisions with foreign ships.—The regulations for preventing collisions contained in the 25 & 26 Vict. c. 63, are expressly extended to foreign ships navigating within British jurisdiction (*u*), and may be extended to the high seas by consent of foreign countries in the manner therein mentioned (*x*). If a foreign shipowner sues a British shipowner here for a collision occurring in foreign waters, and the defendant pleads that by the foreign law pilotage was compulsory in the place where the collision occurred, and that the damage was caused by the pilot's negligence, the plaintiff cannot reply that by the foreign law the defendant continued liable for the damage; for, in a case of tort, the municipal law of a foreign country cannot be invoked against the admitted principles and practice of our own (*y*).

Remedies—Limitation of liability for collisions at sea.—The Merchant Shipping Acts regulate the extent of the liability of shipowners and owners of shares in sea-going ships where, without any actual fault or privity on their parts, any loss of life or personal injury is caused to any person being carried in such ship; also, where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; also, where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ship, caused to any person carried in any other ship or boat, or is caused to any other ship or boat, or to any

(*p*) Per Parke, B., *The Christiana*, 7 Moo. P. C. 171. *The Meteor*, Ir. Rep., 9 Eq. 567.

(*q*) Per Lord Kingsdown, *The Lochlibo*, 7 Moo. P. C. 430. *The Oakfield*, 11 P. D. 34; 55 L. J., P. D. & A. 11.

(*r*) *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, L. R., 3 Ex. 330; 4 Ex. 238; 38 L. J., Ex. 97.

(*s*) *The Woburn Abbey*, 38 L. J., Adm. 28.

(*t*) *The Lion*, L. R., 2 A. & E. 102; 2 P. C. 525; 38 L. J., Adm. 51.

(*u*) See sects. 57—64.

(*x*) See *The Amalia*, 1 Moo. P. C., N. S. 471; 32 L. J., Adm. 191.

(*y*) *The Halley*, L. R., 2 A. & E. 3; 2 P. C. 193; 37 L. J., Adm. 33. *Ante*, p. 135.

635 goods, merchandise, or other things whatsoever on board any other ship or boat (*a*). The cargo laden on board ship is not liable, like the ship itself, to make good the damage (*b*); but the freight earned may be (*c*).

In case of loss of life or personal injury, the Board of Trade may cause juries to be summoned to assess compensation (sects. 507, 508) of a very limited character. Provision is made (sect. 510) for the application and distribution of these damages to the parties entitled to them; and, if they are dissatisfied with the amount, they may, on procuring the amount thereof to be refunded, bring an action for the recovery of damages under various discouraging limitations and restrictions. Nothing, however, in the Act is to lessen or take away any liability to which any master or seaman, being also owner, or part owner, of the ship to which he belongs, is subject in his capacity of master or seaman (sect. 516).

The liability of a shipowner for damage done by the negligent management of his vessel, causing a collision with another vessel, is limited to the value of his vessel and freight at the time of such collision; and if the vessel instantly founders, he is not thereby exempted from liability (*d*). The value is to be taken at the moment of collision (*e*). Where the plaintiff, in consequence of the collision, has been obliged to avail himself of the assistance of persons who demand an exorbitant sum for salvage, and it is reasonable and prudent to resist this demand, and costs are incurred in resisting it, the plaintiff will be entitled to recover these costs, as part of the damages (*f*). Where both vessels are found to blame, and the Merchant Shipping Act does not preclude the recovery of damages (*g*), the shipowners can only recover a moiety of the damage which they have respectively sustained; and the same rule applies to actions by the owners of the cargoes on board the delinquent ships (*h*). Where by reason of the improper navigation of a steam-ship she ran into and damaged a ship, and immediately afterwards ran into and sank a steam-tug which was near the ship, and about to take the ship in tow, it was held that the damage to the ship and that to the tug were caused substan-

(*a*) As to the method to be adopted in ascertaining the liability of the defendants for the several sorts of damage, see *Nixon* v. *Roberts*, 1 Johns. & Hem. 742—748; 30 L. J., Ch. 844. *Glaholm* v. *Barker*, L. R., 2 Eq. 598; 1 Ch. 223; 35 L. J., Ch. 657. *The Franconia*, L. R., 3 P. D. 164. See as to interest upon the amount of limited liability from the date of the collision, *The Northumbria*, L. R., 3 A. & E. 6.

(*b*) *The Victor*, 1 Lush. 72.

(*c*) *The Orpheus*, L. R., 3 A. & E. 308; 40 L. J., Adm. 24.

(*d*) *Brown* v. *Wilkinson*, 15 M. & W. 391.

(*e*) *The Mary Caroline*, 3 W. Rob. 101. The owner of a cargo is not entitled to recover damages for loss of market. *The Notting Hill*, 9 P. D. 105; 53 L. J., P. D. & A. 56. Loss from the abandonment of a charter-party is recoverable. *The Consett*, 5 P. D. 229; 49 L. J., P. D. & A. 24.

(*f*) *Tindall* v *Bell*, 11 M. & W. 228.

(*g*) *Ante*, p. 634.

(*h*) *The Milan*, Lush. 388; 31 L. J., Adm. 105.

636 tially at the same time and on the same occasion, and that the liability of the owner of the steam-ship must be limited as if there had been only one collision (*f*). Where both vessels are to blame, and the owners of one claim a limitation of liability, the owners of the other are entitled to prove against the fund for a moiety of the damage sustained by the former vessel; and they are entitled to be paid, in respect of the balance due to them after such deduction, *pari passu* with the other claimants out of such fund (*g*).

Remedies for public nuisances.—In informations and proceedings for the prevention of public nuisances, the ordinary course is for the Attorney-General to sue, as representing the public; but individuals may come forward and invoke the assistance of the court, when they have themselves individually sustained damage, and the interposition of the court is required for the protection of their property (*h*), or the preservation of the beneficial use, occupation, and enjoyment of it (*i*).

Where an illegal act is being committed which in its nature tends to the injury of the public, such as the interference with a public highway or navigable stream, the Attorney-General can maintain an action without adducing any evidence of actual injury to the public, and in such a case an injunction will be granted with costs (*k*).

Remedies—Removal of obstructions in public thoroughfares.—A private individual cannot, of his own authority, abate an obstruction in a public highway, unless it does him a special injury; and he can only interfere with it as far as is necessary to enable him to exercise his right of passing along the highway. He cannot, therefore, justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience (*l*). To justify a private individual in pulling down a wall or destroying a fence, on the ground of its being an obstruction in a public highway, it must be shown, not only that the wall or fence encroached upon the public thoroughfare, but that the defendant was unable to enjoy his right of passing along the road without the removal of the obstruction (*m*). The placing of a gate across

(*f*) *The Rajah*, L. R., 3 A. & E. 539; 41 L. J., Adm. 97.

(*g*) *The Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.*, 7 App. Cas. 795; 52 L. J., P. D. & A. 1.

(*h*) *Crowder* v. *Tinkler*, 19 Ves. 621. *Att.-Gen.* v. *Forbes*, 2 Myl. & Cr. 129. *Spencer* v. *London and Birmingham Rail. Co.*, 1 Rail. C. 159; 8 Sim. 193. *Sampson* v. *Smith*, 8 Sim. 272. *Hepburn* v. *Lordan*, 2 H. & M. 345; 34 L. J., Ch. 293.

(*i*) *Soltau* v. *De Held*, 2 Sim. N. S. 133; 21 L. J., Ch. 159.

(*k*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 Ch. D. 752; 51 L. J., Ch. 746.

(*l*) *Dimes* v. *Petley*, 15 Q. B. 283. *Davies* v. *Mann*, 10 M. & W. 546. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*m*) *Bateman* v. *Bluck*, 18 Q. B. 876; 21 L. J., Q. B. 406.

637 the public carriage road, where no gate existed before, is, as we have seen, a nuisance, so that any one having occasion to pass along the thoroughfare may cut down and destroy the gate (*n*).

Remedies—Removal of obstructions to the navigation of navigable rivers.—To justify a private individual in breaking down a weir or sluice, or removing an obstruction in the channel of a navigable river, it must be shown that the obstruction was of such a nature as to prevent him from passing up and down the river. If there was sufficient space left for him to pass with reasonable safety, he cannot justify the removal of the obstruction (*o*). So, if oysters and oyster-brood are so placed in a navigable creek or river, and in such masses, as unlawfully to diminish the depth of water and obstruct the navigation, a shipowner or shipmaster is not, by reason thereof, justified in negligently or wilfully running his vessel upon the oyster-beds and destroying the oysters, if there was abundance of room and water for the vessel to have passed up the river without going upon the beds (*p*).

Remedies—Obstruction—Deviation.—Where an adjoining owner has stopped up a highway, those who require to use the road, and are unable to pass by reason of the obstruction, are justified in deviating from the highway and passing over the land of him who has placed the obstruction (*q*). But the right to deviate does not exist as incident to a limited dedication; and, therefore, where a footpath has been dedicated to the public, with a reservation of the right to plough it up, the public have no right, on its becoming impassable after being ploughed up, to deviate over the adjoining parts of the field, unless they have from time immemorial been accustomed to deviate (*r*).

(*n*) *James* v. *Hayward*, Cro. Car. 184; W. Jones, 221.

(*o*) *Eastern Counties Rail. Co.* v. *Dorling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202. The 4th statute of 25 Ed. 3, c. 4 (repealed), reciting that the common passage of boats and ships in the "great rivers" of England is often annoyed by the setting up of gorces, mills, weirs, stanks, stakes, and kiddles, provides for the destruction of all such as have been levied and set up in the time of Edward I. and after, and directs writs to be sent to the sheriffs, to survey and inquire, and do execution thereof. The effect of this statute appears to be to legalize weirs which can be shown to have been erected prior to the time of Edward I., although, from changes in the bed of the river, they may have the effect of totally preventing the navigation of the stream. *Williams* v. *Wilcox*, 8 Ad. & E. 329. But this and the earlier statutes on the subject apply only to navigable rivers. *Rolle* v. *Whyte*, L. R., 3 Q. B. 286; 37 L. J., Q. B. 105. *Leconfield* v. *Lonsdale*, L. R., 5 C. P. 657; 39 L. J., C. P. 305. The 2 Hen. 6, c. 15 (now repealed), prohibits, not only the use of nets which are permanently fixed day and night, but also those which are fixed for intervals of time only, if they obstruct the navigation of the river and the passage of the fish. *Holford* v. *George*, L. R., 3 Q. B. 639; 37 L. J., Q. B. 185.

(*p*) *Mayor of Colchester* v. *Brooke*, 7 Q. B. 377.

(*q*) *Absor* v. *French*, 2 Show. 28. *Steel* v. *Prickett*, 2 Stark. 463.

(*r*) *Arnold* v. *Holbrook*, L. R., 8 Q. B. 96; 42 L. J., Q. B. 40. *Duncomb's case*, Cro. Car. 366. See *ante*, p. 608.

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CHAPTER XI.

DUTIES OF PUBLIC OFFICERS.

Duties of public officers.—The duties of public officers are so numerous and varied, that it would be impossible to give even an outline of them here. It may be useful, however, to treat shortly of the peculiar remedy by mandamus for breach of duty by public officers.

Public officers—Remedy by mandamus.—The prerogative writ of mandamus is a writ issuing in the Queen's name from the Queen's Bench Division of the High Court (*a*), directed to some chartered, corporate, or public body, or official or other person, commanding the performance of some public act or duty therein specified, in the performance of which the party claiming the writ is interested, or by the non-performance of which he is aggrieved or injured (*b*). It was termed a prerogative writ, because the power to award it rested with the justices of the court of Queen's Bench, in which court the sovereign was supposed to be personally present (*c*). Through the medium of this writ, the court exercises control over all public officers, corporations, chartered companies, and persons intrusted with extensive powers for public purposes, and enforces the exercise of such powers within reasonable limits, more especially where there is no other efficient or convenient remedy (*d*). The issue of the writ is in the discretion of the court, and will not be ordered, if the effect of it will be to enable some persons to avoid the performance of some duty which they ought in equity to perform (*e*). A mandamus may be obtained whenever a public duty, in the fulfilment of which the plaintiff is interested, has been neglected, whether the plaintiff has sustained damage or not (*f*).

Mandamus—In what cases granted.—Whenever the law requires a thing to be done, and the public at large are interested in the

(*a*) See *Glossop* v. *Heston Local Board*, 12 Ch. D. 122, and Order LIII. rule 5.

(*b*) *Reg.* v. *Chichester (Bishop of)*, 2 El. & El. 209; 29 L. J., Q. B. 23. *Ex parte Briggs*, 1 El. & El. 881; 28 L. J., Q. B. 272.

(*c*) Com. Dig. MANDAMUS, A.

(*d*) Ld. Denman, C. J., *Reg.* v. *Eastern Counties Rail. Co.*, 10 Ad. & E. 531.

(*e*) *Reg.* v. *Garland*, L. R., 5 Q. B. 269; 39 L. J., Q. B. 86.

(*f*) *Fotherby* v. *Metropolitan Rail. Co.*, L. R., 2 C. P. 188; 36 L. J., C. P. 88.

639 doing of it, a mandamus will go to order it to be done by the person upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself in motion to do the thing, though it cannot control his discretion (*g*). Permissive words, authorizing a thing to be done, are often held to be directory and compulsory, when the power or authority has been given in order that it may be exercised for the public benefit, and the public interests manifestly require the authority to be acted upon (*h*). Thus, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats *may*, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, &c.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants (*i*). So a mandamus will go to the mayor and assessors of a borough, commanding them to hold a court to revise the list of burgesses (*k*).

But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it is shown that the public interests manifestly require such a construction to be put upon them. Railway Acts, incorporating railway companies, and authorizing the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public; but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or refrain altogether from using them (*l*). When the words of a statute or charter are imperative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances have arisen rendering the exercise of the statutory power and command impracticable (*m*); or, in cases of private Acts of Parliament, not imposing a duty relating to the public interest, that a previous agreement had been made by the person applying for the

(*g*) Best, J., *R.* v. *North Riding, &c. Justices*, 2 B. & C. 291. *R.* v. *Kent Justices*, 14 East, 395. *R.* v. *Cumberland Justices*, 1 M. & S. 194.

(*h*) Com. Dig. PARLIAMENT, R. 22.

(*i*) *R.* v. *Mayor of Hastings*, 5 B. & Ald. 692, n.; 1 D. & R. 148. *R.* v. *Havering Atte Bower*, 5 B. & Ald. 691. *R.* v. *Wells (Mayor of)*, 4 Dowl. P. C. 562.

(*k*) *Reg.* v. *Mayor, &c. of Monmouth*, L. R., 5 Q. B. 251; 39 L. J., Q. B. 77.

(*l*) *York and North Midland Rail. Co.* v. *The Queen*, 1 El. & Bl. 861; 22 L. J., Q. B. 225. *Great Western Rail. Co.* v. *The Queen*, 1 El. & Bl. 174. Erle, J., *Reg.* v. *North Midland Rail. Co.*, 1 El. & Bl. 203. *R.* v. *Birmingham Canal Navigation*, 2 W. Bl. 708.

(*m*) *Reg.* v. *London & North Western Rail. Co.*, 16 Q. B. 884. *Reg.* v. *Ambergate, &c. Rail. Co.*, 1 El. & Bl. 381; 22 L. J., Q. B. 191.

640 performance of the duty, not to exact its performance (*n*). Where the alleged obligation is founded on an Act of Parliament, the obligation is at an end, if the statutory power has expired (*o*). With reference to the inferential repeal of a previous statute by a subsequent one, the principle is that a *general* Act is not to be construed to repeal a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or the two Acts are necessarily inconsistent (*p*).

Mandamus—Where there is another remedy.—It is no answer to an application for a mandamus to enforce the performance of a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by mandamus (*q*). Where there is another remedy equally convenient, beneficial, and effectual, a mandamus will not be granted. "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus" (*r*). Thus, where the duty sought to be enforced is the payment of a sum of money, and an action of debt is maintainable for the money, and affords as convenient and effectual a remedy as a writ of mandamus, the court will leave the party to the ordinary remedy by action, and will refuse a mandamus (*s*); and the writ is never granted as a remedy for a mere private wrong, where there is a clear cause of action and compensation in damages would be an effectual or appropriate remedy (*t*). But it is no answer to an application for a mandamus to show that the defendant may be proceeded against by indictment (*u*), unless it is also shown that an indictment would be a more effectual and suitable course of proceeding.

A party applying for a mandamus must make out a legal right and a legal obligation (*x*). A legal obligation, which is the proper foundation for a mandamus, can only arise from common law, from statute, or from contract. An officer in the Queen's army, therefore, has no claim for a mandamus against the Paymaster of the Forces, to compel the payment of pay improperly withheld from him, as the obligation, though binding in equity and con-

(*n*) *Savin* v. *Hoylake Rail. Co.*, L. R., 1 Ex. 9; 35 L. J., Ex. 52.

(*o*) *Reg.* v. *London & North Western Rail. Co.*, 16 Q. B. 884. *Reg.* v. *Ambergate, &c. Rail. Co.*, 1 El. & Bl. 381.

(*p*) *Thorpe* v. *Adams*, L. R., 6 C. P. 125; 40 L. J., M. C. 52.

(*q*) *Clarke* v. *Bishop of Sarum*, 2 Str. 1082.

(*r*) Hill, J., *In re Barlow*, 30 L. J., Q. B. 271.

(*s*) *Reg.* v. *Hull & Selby Rail. Co.*, 6 Q. B. 70; 13 L. J., Q. B. 257. *Reg.* v. *Bristol & Exeter Rail. Co.*, 3 Rail. Cas. 777.

(*t*) Com. Dig. MANDAMUS, A. *R.* v. *Clear*, 4 B. & C. 901. *Reg.* v. *Ponsford*, 1 D. & L. 116; 12 L. J., Q. B. 313.

(*u*) *R.* v. *Severn & Wye Rail. Co.*, 2 B. & Ald. 650. *Reg.* v. *Bristol Dock Co.*, 2 Q. B. 70. *Reg.* v. *Victoria Park Co.*, 1 Q. B. 291.

(*x*) *Reg.* v. *Balby, &c. Turnpike Trust*, 1 B. C. C. 134; 22 L. J., Q. B. 164. *Reg.* v. *Abrahams*, 4 Q. B. 161. *Reg.* v. *Orton Trustees*, 14 Q. B. 146. *Ex parte Bassett*, 7 El. & Bl. 280.

641 science, wants the *vinculum juris*, and is not a legal obligation (*y*). The mere receipt of a lump sum of money by public officers, to be distributed or administered by them, does not render them liable to a mandamus for not paying the money (*z*). Where an annuity has been granted by Act of Parliament, and charged upon the consolidated fund, and the annuity is in arrear, and payment can only be obtained by warrant of the Lords of the Treasury, and the duty of granting the warrant is imposed upon them by statute, and they refuse to fulfil this duty, and to do what is necessary to be done to enable the prosecutor to obtain payment, there is a case for a mandamus (*a*); but, if the prosecutor fails in establishing a clear statutory duty, the court will decline to interfere (*b*); and as against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie (*c*).

Mandamus—Judicial officers.—Courts of quarter sessions, recorders of boroughs, justices of the peace (*d*), and judges of inferior courts of record (other than county court judges (*e*)), may be compelled to fulfil the duties of their several offices, and to receive, hear, and adjudicate upon an information, complaint, claim, dispute, or appeal brought before them, which they have refused to hear and adjudicate upon from some erroneous view of the law, or of the extent of their powers and jurisdiction (*f*). But, where they have entered upon the matter, and have decided, the court will not, by mandamus, review their decision or compel them to re-hear the case, on the ground that they have come to a wrong conclusion in point of law (*g*).

The court never grants a mandamus except it indisputably appears that the party to whom it is directed has, by law, power to

(*y*) *Ex parte Napier*, 18 Q. B. 695; 21 L. J., Q. B. 332. *Reg.* v. *Commissioners of Treasury*, L. R., 7 Q. B. 387; 41 L. J., Q. B. 178.

(*z*) *Ex parte Walmsley*, 1 B. & S. 81.

(*a*) *Reg.* v. *Treasury* (*Lords of*), 16 Q. B. 361. *Reg.* v. *Ambergate, &c. Rail. Co.*, 1 El. & Bl. 381. But see *Reg.* v. *Commissioners of Treasury*, *supra*.

(*b*) *Reg.* v. *Treasury* (*Lords of*), 4 Ad. & A. 981. And see *Reg.* v. *Receiver of Metropolitan Police*, 4 B. & S. 593; 33 L. J., Q. B. 52.

(*c*) *In re Bode* (*Baron de*), 6 Dowl. P. C. 792. *In re Hand*, 4 Ad. & E. 984. *In re Smith*, *ib.* 976. *Ex parte Ricketts*, *ib.* 999.

(*d*) In the case of justices of the peace more simple means have been substituted by the 11 & 12 Vict. c. 44, for the ordinary remedy by mandamus. *Reg.* v. *Boteler*, 4 B. & S. 959; 33 L. J., M. C. 101. *Post*, p. 681.

(*e*) In the case of county court judges a simpler remedy is substituted by the 19 & 20 Vict. c. 108, s. 43, and the 21 & 22 Vict. c. 74, s. 4.

(*f*) *Reg.* v. *Richards*, 5 Q. B. 932. *Reg.* v. *Richmond Recorder*, El. Bl. & El. 253; 27 L. J., M. C. 197. *Reg.* v. *Newport Guardians*, 33 L. J., M. C. 155.

(*g*) *Reg.* v. *Leicester Deputies*, 15 Q. B. 674. *S. C.* nom., *Reg.* v. *Goodrich*, 19 L. J., Q. B. 413. *Reg.* v. *Blanshard*, 13 Q. B. 325. *Reg.* v. *Liverpool Recorder*, 20 L. J., M. C. 37. *Ex parte Buller*, 1 Jur., N. S. 709. *Reg.* v. *East Riding Justices*, 13 Jur. 441. Cockburn, C. J., *Ex parte Cook*, 2 El. & El. 586; 29 L. J., Q. B. 68. *Ex parte Bird*, 1 El. & El. 931; 28 L. J., Q. B. 223. *Reg.* v. *Mainwaring*, El. Bl. & El. 474; 27 L. J., M. C. 278.

642 do what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction (*h*).

Mandamus—Ministerial officers.—The writ of mandamus lies also against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there is a penalty for their neglect (*i*). It will go to a gaoler to compel him to give up the body of a deceased prisoner for debt to his executors (*k*), or to receive a prisoner (*l*); to the trustees of a public charity, whose duty it is to furnish a churchwarden with the keys of a chest, enjoining them to deliver the keys (*m*); to justices and clerks of the peace of a borough, to permit a ratepayer to inspect and take copies of a rate (*n*); also to a corporation, commanding them to permit a member of the body corporate to inspect the minute-books, bye-laws, and records of the corporation, for the purpose of determining a matter in controversy between the corporation and the individual member, respecting the rights and privileges of the latter under the charter (*o*). But the court will not by mandamus compel the justices and the clerk of the peace of a county to allow ratepayers an inspection of the accounts and bills of charges of county officers settled and ordered to be paid at the sessions and deposited by the clerk of the peace amongst the county records, the ratepayers having no right to examine such accounts (*p*); nor will the court interfere by mandamus with the administration of the funds of charities (*q*), nor compel trustees of turnpike roads to repair and keep in repair a turnpike road (*r*); nor will a mandamus lie to a Crown officer to compel him to deliver up property which he holds in his hands on behalf of the Crown; for a mandamus to the officer in such a case would be like a mandamus to the Crown, which the court cannot grant (*s*).

A mandamus will go to a lord of a manor to compel him to hold a court baron, and to the homage to present conveyances of burgage tenure (*t*); also to hold a court leet to swear in a constable, or to admit persons entitled to a franchise (*u*); also to a corpora-

(*h*) *R.* v. *Bishop of Ely*, 1 W. Bl. 58. *R.* v. *Sillifant*, 4 Ad. & E. 361. *Reg.* v. *London & North Western Rail. Co.*, 6 Rail. Cas. 634. *Ex parte Lee*, El. Bl. & El. 863.

(*i*) Com. Dig. MANDAMUS, 31 B. R. H. 261.

(*k*) *Reg.* v. *Fox*, 2 Q. B. 246.

(*l*) *Reg.* v. *Colvill*, 34 L. J., M. C. 137. *Reg.* v. *Governors of Whitecross Street Prison*, 6 B. & S. 371; 34 L. J., M. C. 193.

(*m*) *Reg.* v. *Abrahams*, 4 Q. B. 161.

(*n*) *R.* v. *Leicester Justices*, 4 B. & C. 891.

(*o*) *In re Burton*, 31 L. J., Q. B. 62.

(*p*) *R.* v. *Staffordshire Justices*, 6 Ad. & E. 84.

(*q*) *Ex parte Rugby Charity*, 9 D. & R. 214.

(*r*) *Reg. v. Oxford, &c. Roads*, 12 Ad. & E. 427.

(*s*) *R.* v. *Commissioners of Customs*, 5 Ad. & E. 380.

(*t*) *R.* v. *Montacute* (*Ld.*), 1 W. Bl. 60. *R.* v. *Midhurst*, 1 Wils. 283.

(*u*) *R.* v. *Colebrooke*, 2 Kenyon, 163. *R.* v. *Milverton* (*Ld. of*), 3 Ad. & E. 284.

643 tion, to permit a court leet and court baron to be held, according to immemorial custom, in the town hall (*x*).

The court will by mandamus compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of the duty has passed (*y*); and, if the public officer to whom the performance of the duty belongs has in the meantime quitted his office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform (*z*).

In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his superiors or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus, and has left the parties to the ordinary remedies (*a*). Thus, in the ordinary case of disobedience, by surveyors, treasurers, and ministerial officers, of an order of sessions, the proper remedy is by indictment, or by removal of the order into the Court of Queen's Bench (*b*), and not by mandamus (*c*). "The court," observes Lord Kenyon, C. J., "grants a mandamus to justices to make an order, when they refuse to do their duty. But it would be descending too low to grant a mandamus to inferior officers to obey that order: we might as well issue a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him" (*d*). So a mandamus will not go to a clerk of justices to return a record of all summary convictions pursuant to the 11 & 12 Vict. c. 43, s. 14, although such return ought to be made, and proceedings by rule or indictment might be taken against the justices to enforce it (*e*). But, where a ministerial officer is put forward as the nominal party, and a chartered company or corporation is in the background disputing the liability, and is the party really to be acted upon by the mandamus, the court will direct the writ to issue (*f*).

Mandamus to overseers or clergymen to bury the dead body of a pauper.—It would seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep it unburied, nor do any-

(*x*) *R.* v. *Grantham*, 2 W. Bl. 716. *R.* v. *Ilchester Bailiffs, &c.*, 2 B. & C. 764; 4 D. & R. 324.

(*y*) *Reg.* v. *Mayor, &c. of Monmouth*, L. R., 5 Q. B. 251; 39 L. J., Q. B. 77.

(*z*) *Rochester* (*Mayor, &c. of*) v. *Reg.*, El. Bl. & El. 1024; 27 L. J., Q. B. 436.

(*a*) Coleridge, J., *R.* v. *Payn*, 6 Ad. & E. 401.

(*b*) 12 & 13 Vict. c. 45, s. 18.

(*c*) *R.* v. *Bristow*, 6 T. R. 168. *R.* v. *Jeyes*, 3 Ad. & E. 416. *Ex parte Downton Overseers*, 8 El. & Bl. 856.

(*d*) *R.* v. *Bristow*, 6 T. R. 170.

(*e*) *In re Hayward*, 3 B. & S. 546; 32 L. J., M. C. 89.

(*f*) *Reg.* v. *Wood Ditton Surveyors, &c.*, 18 L. J., M. C. 218.

644 thing which prevents Christian burial; he cannot, therefore, cast it out, so as to expose the body, or offend the feelings, or endanger the health, of the living; and for the same reason he cannot carry it uncovered to the grave. It will probably be found, therefore, that, where a pauper dies in any parish-house, poor-house, or union-house, of the parish or union, the overseers of the parish, or the guardians of the union, may be compelled by mandamus to bury the body; but the court will not grant a mandamus to overseers to bury the body of a pauper who has died in a private house in the parish, or in a hospital not belonging to the parish authorities (*g*).

A mandamus to a rector to bury a corpse will be granted, if it is shown that the rector has refused altogether to bury it. But there is no common-law right of burial in any particular part of the churchyard; and the court will not, by mandamus, enforce private rights of burial in any particular vault (*h*), or in any unusual or extraordinary manner (*i*).

Mandamus to compel the surrender of public documents.—The court has refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents (*k*). But the remedy by action is not an effectual remedy for the recovery of the documents themselves; and, wherever a private individual, who has quitted office, keeps back public documents of which he obtained the custody whilst acting in an official character or capacity, and by colour of his office, the court will by mandamus compel the production of the documents; and if private and public documents have been so mixed up together that they cannot be severed, the whole must be produced (*l*). Thus, a mandamus will be granted to a person who has previously served the office of town-clerk in a borough, directing him to deliver up records and books connected with the administration of public justice in the borough, which came into his custody as town-clerk, and to hand them over to his successor in the office (*m*); also to a retired overseer of the poor, to compel him to deliver over the parish books to the new overseer (*n*); also to a dismissed clerk of a chartered company, requiring him to deliver up to the company all books, papers, &c., which he had in his custody by virtue of being their clerk (*o*). But, where a vestry clerk moved for a mandamus to certain churchwardens to give up to him the custody of the vestry-book, which

(*g*) *Reg.* v. *Stewart*, 12 Ad. & E. 773.
(*h*) *Ex parte Blackmore*, 1 B. & Ad. 122.
(*i*) *R.* v. *Coleridge*, 2 B. & Ald. 809.
(*k*) *Reg.* v. *Hopkins*, 1 Q. B. 169.
(*l*) *R.* v. *Payn*, 6 Ad. & E. 399.
(*m*) *Nottingham Town Clerk's Case*, 1 Sid. 31. *R.* v. *Ingram*, 1 W. Bl. 49.
(*n*) *R.* v. *Clapham*, 1 Wils. 305. *Reg.* v. *Fox*, W. W. & H. 4.
(*o*) *R.* v. *Wildman*, 2 Str. 879.

645 had been taken from him at a vestry meeting, the court refused the application, as the vestry clerk had no certain tenure of office, and was the mere servant of the vestry, and could be dismissed, and the book taken away from him, at their will (*p*).

Mandamus to elect public officers.—A mandamus lies to the inhabitants of a parish, directing them to meet together and elect churchwardens (*q*), or an organist (*r*), but not to churchwardens, to call a vestry to elect a sexton, where the office is full by the appointment of the rector, and there is a remedy by refusing the sexton his fees, or bringing an action if they are taken (*s*).

Mandamus to admit to a public office.—It is the duty, also, of the court to see that the functions appertaining to public offices are discharged by persons duly elected to the office. When, therefore, a public office is vacant, and a party has been elected to serve the office, the court will by mandamus enforce the right to the office; but, where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder, and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo warranto*, and not by mandamus (*t*). If, however, there is only a colourable election, it is void, and a mandamus to hold an election will be granted (*u*); and there are occasions where a *quo warranto* will lie, and yet the remedy by mandamus may be deemed a more appropriate remedy (*x*). The mere rejection of votes at an election of corporate officers furnishes no ground for interference by mandamus, where it does not appear that the election has been thereby vitiated. It must be shown that the rejection of the votes led to the declaration of a candidate as duly elected, who would have failed if the votes had been received (*y*). The validity of an election by parishioners of churchwardens may, under certain circumstances, be tried by mandamus (*z*); and, where it is the custom for the parishioners to elect one churchwarden and for the rector to nominate the other, the validity of the rector's nomination may be tested by mandamus (*a*).

Wherever a person has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected to

(*p*) *Anon.*, 2 Chit. 255. *R.* v. *Croydon Churchwardens*, 5 T. R. 714.
(*q*) *R.* v. *Wix*, 2 B. & Ad. 197.
(*r*) *Reg.* v. *St. Stephens, &c.*, 2 D. & L. 571; 14 L. J., Q. B. 34.
(*s*) *R.* v. *Stoke Damerel*, 5 Ad. & E. 584.
(*t*) *R.* v. *Colchester* (*Mayor of*), 2 T. R. 259. *Reg.* v. *St. Martins, &c.*, 17 Q. B. 149; 20 L. J., Q. B. 423. *Darley* v. *The Queen*, 12 Cl. & Fin. 520. *Hill* v. *Reg.*, 8 Moo. P. C. 139. *R.* v. *Winchester* (*Mayor of*), 7 Ad. & E. 222. *Reg.* v. *Derby*, *ib.* 419.
(*u*) *R.* v. *Cambridge*, 4 Burr. 2010. *R.* v. *Oxford* (*Mayor of*), 6 Ad. & E. 353. *Reg.* v. *Leeds* (*Mayor of*), 11 Ad. & E. 517.
(*x*) Lawrence, J., *R.* v. *Bedford Level*, 6 East, 367.
(*y*) *Ex parte Mawby*, 3 El. & Bl. 718.
(*z*) *R.* v. *Birmingham* (*Rector of*), 7 Ad. & E. 254.
(*a*) *In re Barlow*, 30 L. J., Q. B. 271.

646 serve the office, and the corporation refuses to institute him in the office, a mandamus lies to compel them to do so (*b*); but the court will not interfere, where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote (*c*).

The writ of mandamus lies also against a rector or a parson, to compel him to receive and swear in a person who has been duly appointed to the office of churchwarden, sexton, parish-clerk, &c. (*d*); to a dean and chapter, to admit a prebendary to his stall and voice (*e*); to the lord of a manor, to admit a copyholder to a copyhold estate (*f*), or to permit him to inspect the court-rolls of the manor (*g*); and to the trustees of a meeting-house, to compel them to admit to the pulpit thereof a dissenting minister duly elected (*h*). But a mandamus does not lie to compel the admission of a person to any mere private appointment, situation, or employment (*i*), such as that of clerk or secretary to a joint-stock company (*k*), vestry-clerk, or toll-gate keeper (*l*).

The writ of mandamus will not lie to compel the institution of a clergyman to a presentative benefice, as the appropriate remedy by *quare impedit* is open to those who present him, and he has himself no legal right whatever (*m*).

A mandamus to restore a public officer to a freehold office, from which he has been wrongfully dismissed, may be obtained on due proof of the wrongful dismissal (*n*). A public officer appointed for life, or during good behaviour, cannot lawfully be removed from his office for misconduct without being called upon to make, and being afforded an opportunity of making, his defence; for "*Nullus liber homo disseisietur de libero tenemento suo, nisi per legale judicium parium suorum vel per legem terræ*" (*o*). If he has committed a felony or misdemeanour, he must be tried and convicted by a jury before the offence can work a forfeiture of his office; and, if he has been guilty of misconduct in the discharge of his official duties, he must have an opportunity given him of answering the charge, or have been heard in his own defence, before he can lawfully be removed. Where a vicar removed a

(*b*) *R.* v. *Cambridge University*, 1 W. Bl. 551. *R.* v. *Windham*, 1 Cowp. 377. See now 45 & 46 Vict. c. 50, s. 225.

(*c*) *Reg.* v. *Dolgelly Guardians, &c.*, 8 Aq. & E. 564.

(*d*) *In re Barlow*, 30 L. J., Q. B. 271.

(*e*) *R.* v. *Dean, &c. of Norwich*, 1 Str. 159. *Clarke* v. *Bishop of Sarum*, 2 *ib.* 1082.

(*f*) *R.* v. *Hendon* (*Lord of the Manor, &c.*), 2 T. R. 484. See *Reg.* v. *Garland*, L. R., 5 Q. B. 269; 39 L. J., Q. B. 86.

(*g*) *R.* v. *Tower*, 4 M. & S. 162.

(*h*) *R.* v. *Barker*, 3 Burr. 1265. *R.* v. *Jotham*, 3 T. R. 577.

(*i*) *Ile's case*, 1 Ventr. 143.

(*k*) *White's case*, 6 Mod. 18.

(*l*) *R.* v. *Croydon Churchwardens, &c.*, 5 T. R. 713.

(*m*) *Reg.* v. *Orton* (*Trustees of*), 14 Q. B. 146. See *Heywood* v. *Bishop of Manchester*, 12 Q. B. D. 404.

(*n*) *R.* v. *Morpeth Ballivos*, 1 Str. 58.

(*o*) MAGNA CHARTA, c. 29. *Reg.* v. *Liverpool* (*Mayor of*), 2 Burr. 733. *R.* v. *Faversham Fish Co.*, 8 T. R. 352. *R.* v. *Lyme Regis* (*Mayor, &c.*), 1 Doug. 149.

647 parish clerk for acts of misconduct alleged to have been committed in the vicar's own view, the court granted a mandamus to compel the vicar to restore the clerk to his office. For the vicar it was contended that, as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous, and that the law invested the vicar with the functions of accuser, witness, and judge, in respect of indecent conduct publicly exhibited in his presence; but the court held that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in which the accused should have an opportunity of being heard, and explaining his behaviour. "The important principle that every man ought to be heard before he is condemned, so strenuously asserted by Lord Kenyon (*p*), is not excluded," observe the court, "because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions, while we think it indispensable, for the sake of the party charged, in all cases, to the due execution of every judicial power" (*q*).

Even although the officer, having been duly elected, has procured himself to be admitted to the office by means of fraudulent misrepresentation and deceit, he must be called upon to come in and defend himself before he can lawfully be removed (*r*). Where, however, the election itself was void *ab initio*, on the ground of fraud, so that the party has never become a member, his admission may, it seems, be cancelled without a hearing (*s*); and a mandamus will not be granted to restore to an office a person who is admitted to have been rightly removed (*t*).

There seems to be a great deal of difference between a mandamus to admit, and a mandamus to restore, to a freehold office. The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the court has always looked much more strictly to the right of the party applying for a mandamus to be restored. In these cases

(*p*) In *R.* v. *Gaskin*, 8 T. R. 290. And see per Lord Ellenborough, C. J., in *Buchanan* v. *Rucker*, 1 Campb. 65.

(*q*) *Reg.* v. *Smith*, 5 Q. B. 623; 14 L. J., Q. B. 166. *Doe* v. *Gartham*, 1 Bing. 357. *Cooper* v. *Wandsworth Board, &c.*, 14 C. B., N. S. 180; 32 L. J., C. P. 186.

(*r*) *Reg.* v. *Sadlers' Co.*, 10 H. L. C. 404; 30 L. J., Q. B. 186; 32 *ib.* 337.

(*s*) *Reg.* v. *Sadlers' Co.*, *supra*. *Reg.* v. *General Council Med. &c.*, 3 El. & El. 525; 30 L. J., Q. B. 201.

(*t*) *R.* v. *Mayor of Axbridge*, 2 Cowp. 523.

648 he must show a *primâ facie* title; for, if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him (*u*).

Mandamus to restore freehold offices.—If a man grants an office to another for the term of his life, the freehold estate which the grantee has in the office is upon condition in law that he shall well and faithfully do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and grant the office to another (*x*). There are, says Lord Coke, three causes of forfeiture, or seizure of offices: 1, by abuser; 2, non-user; 3, refusal (*y*). If the officer is removed by reason of the forfeiture of his freehold office, through breach of the implied trust upon which it was granted, that will be a removal "*per legem terræ.*" If he is not so removed, he ought to be convicted, "*per judicium parium suorum,*" of some public crime before he can lawfully be dispossessed of his freehold (*z*); and the crime must be of such a nature as to render the officer publicly infamous, and unfit to hold any public office; for, if he has been convicted of an assault, or any other offence which does not carry such infamy with it, the conviction will be no ground of disfranchisement (*a*).

"There are," observes Lord Mansfield, "three sorts of offences for which an officer or corporator may be discharged: first, such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise; secondly, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office; thirdly, such as are of a mixed nature, as being an offence not only against the duty of his office, but also a matter indictable at common law. For the first sort of offences there must be an indictment and conviction before removal; but in respect of the second class of offences the party must be tried by the corporation" (*b*). There cannot, it seems, be any cause to disfranchise a member

(*u*) *R.* v. *Jotham*, 3 T. R. 575.

(*x*) Litt. sect. 378. The grantee may be ousted, "*s'il non attend sur son office, s'il fait contrariant chose à son office, ou misfeseance de son office,*" 11 Edw. 4, fol. 1. As to the duties annexed to the freehold office of clerk of the peace, see *Harding* v. *Pollock*, 6 Bing. 50.

(*y*) *Earl of Shrewsbury's case*, 9 Rep. 46 b. See *Wildes* v. *Russell*, L. R., 1 C. P. 722; 35 L. J., M. C. 241.

(*z*) *Bagg's case*, 11 Co. 99. *Harcourt* v. *Fox*, 1 Show. 431, 506; 4 Mod. 169.

(*a*) *R.* v. *Richardson*, 1 Burr. 538; Buller's N. P. 7th ed. 206. *Reg.* v. *Clerk of the Peace of Cumberland*, 11 Mod. 81. 1 Roll. Abr. OFFICE, 155. Cruise's Digest, FRANCHISE.

(*b*) *R.* v. *Richardson*, 1 Burr. 537. *R.* v. *Mayor of Liverpool*, 2 Burr. 733. *Reg.* v. *Baines*, 6 Mod. 192; 2 Salk. 680.

649 of a corporation, unless it is for a thing done which tends to the destruction of the body corporate, or to the destruction of the liberties and privileges thereof. Any mere personal offence of one member thereof affords no cause for disfranchisement (*c*). Mere misapplication of the money of the corporation is not a good ground for the disfranchisement of a corporator; the corporation may have an action for the money (*d*).

Mandamus to restore.—Offices held at will, or during the good pleasure, or at the discretion, of the parties appointing to them, may be taken away without any reason assigned, or any summons or hearing of the party removed (*e*); and a mandamus will not lie to restore an officer removable at will (*f*). This is the case with the office of a vestry-clerk (*g*), clerk to justices (*h*), clerks and treasurers of guardians of the poor (*i*), and the minister of a dissenting congregation, who is elected by the majority of the members of the congregation, and who may be removed by such majority, and be turned out of his house, premises, and chapel, if they are dissatisfied with his doctrines and religious teaching (*k*), or restrained by injunction from further officiating (*l*).

Where the charter by which a charity was founded conferred on the governors full power to appoint the schoolmaster, and to remove him and to appoint another according to their sound discretion, and a schoolmaster was appointed and afterwards dismissed, it was held that the court could not interfere with the discretion of the governors, or review their reasons for the dismissal (*m*).

Mandamus—Visitatorial power excluding the proceeding by mandamus.—Where corporate offices are held in private or eleemosynary corporations, on the terms that, if any dispute should arise respecting the right to the office, or the validity of a discharge or amotion from it, such dispute should be settled or determined by a visitor or judge whom the founder has nominated, the court will not interfere by mandamus (*n*). But one branch of a corporation has no visitatorial power over another. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the sovereign exercises the power by his chancellor. In corpora-

(*c*) *Earl's case*, Carth. 176.
(*d*) *R.* v. *Chalke*, 1 Ld. Raym. 225. *R.* v. *Wilton (Mayor, &c.)*, 5 Mod. 257.
(*e*) *R.* v. *Stratford (Mayor, &c.)*, 1 Lev. 291.
(*f*) *Le Roy* v. *Campion*, 1 Sid. 14.
(*g*) *Ante*, p. 645.
(*h*) *Ex parte Sandys*, 4 B. & Ad. 863.
(*i*) *R.* v. *St. Nicholas, &c.*, 4 M. & S. 324.
(*k*) *Doe* v. *Jones*, 10 B. & C. 718. *Doe* v. *McKaeg*, *ib.* 721.
(*l*) *Cooper* v. *Gordon*, L. R., 8 Eq. 249; 38 L. J., Ch. 489.
(*m*) *Reg.* v. *Darlington School Governors*, 6 Q. B. 696, 715.
(*n*) *Reg.* v. *Dean and Chapter of Chester*, 15 Q. B. 513. *Reg.* v. *Dean and Chapter of Rochester*, 17 Q. B. 1.

650 tions established for the government of cities and towns, the sovereign may be said to exercise the power by mandamus through the court (*o*).

Mandamus to restore the name of a medical practitioner to the medical register.—By the 21 & 22 Vict. c. 90, s. 29, it is enacted that, if any medical practitioner shall be convicted of any felony or misdemeanour, or shall, after due inquiry, be judged by the general council of medical education and registration (*p*) to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register. The decisions of the council under this section, made after due inquiry, are final, and cannot be reviewed by the court. Where, therefore, the medical council, after communicating to a medical practitioner certain charges made against him of infamous conduct in his profession, and having heard and considered his answers and explanations, directed the registrar to remove his name from the medical register, the court refused a mandamus to restore him (*q*).

Mandamus—Conditions precedent to the issue of the writ.—To entitle a person to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce (*r*), and a refusal or withholding of compliance on the part of the defendant (*s*).

Mandamus—Action for a false return.—Actions for a false return are maintainable by the party injured or aggrieved thereby (*t*), unless damages have been recovered by him, under the statute of Anne, against the person making the return, upon a traverse of the facts contained therein, and an issue thereupon raised under the statute. The action must be brought against the party or parties who caused the return to be made (*u*). It is not maintainable against one who voted against the false return, and was consequently no party to it (*x*).

(*o*) *R.* v. *London* (*Mayor of*), 4 M. & R. 62.

(*p*) See the 25 & 26 Vict. c. 91, and the 31 & 32 Vict. c. 29.

(*q*) *Ex parte La Mert*, 4 B. & S. 582; 33 L. J., Q. B. 69.

(*r*) *Reg.* v. *Bristol and Exeter Rail. Co.*, 4 Q. B. 162; 12 L. J., Q. B. 106.

(*s*) *R.* v. *Brecknock, &c. Canal Co.*, 3 Ad. & E. 222. *Reg.* v. *Trustees of Cheadle Highway*, 7 Jur. 373. *Reg.* v. *Norwich and Brandon Rail. Co.*, 3 D. & L. 385. The proceedings upon a mandamus are regulated by Jud. Act, 1875, s. 25 (8); Ord. LIII.; Ord. L. r. 6; Ord. XLII. r. 30, and Crown Office Rules, 1886, rr. 60—79.

(*t*) *Green* v. *Pope*, 1 Ld. Raym. 125. *Vaughan* v. *Lewis*, Carth. 227. No action or proceeding can be taken against any person in respect of anything done in obedience to a writ of mandamus issued by the supreme court or any judge thereof. Ord. LIII. r. 12.

(*u*) *R.* v. *Ripon* (*Mayor of*), 1 Ld. Raym. 564.

(*x*) *R.* v. *Pilkington*, Carth. 172.

651 *Judicial officers—Liabilities of judicial officers.*—When the executive power of the sovereign has been delegated to others, to be by them put in force in the form prescribed by law, the power thus conferred is termed an authority in law, and affords a justification for all acts and trespasses committed in the exercise of it, so long as the authority has not been abused or exceeded. Neither the judges in the king's courts, nor any judicial officers are liable to answer personally for their judicial acts. An action, therefore, will not lie against a judge for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity (*y*).

The general rule as regards judges and judicial officers is that, if they do any act beyond the limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but, if the act done is within the limit of their authority, though an erroneous or mistaken judgment, they are not liable to an action (*z*). A judge is not answerable for slander spoken by him in the exercise of his judicial functions in reference to a matter before him, although it is spoken maliciously and without reasonable cause (*a*).

Where parties are not acting as judges, but have only a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, will not render them answerable in damages, provided they have due legal authority and power to act in the matter (*b*).

This freedom from action and suit is given to judges, not so much for their own sake as for the sake of the public and for the advancement of justice, "that, being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice," observes Lord Tenterden, "ought to be."

Who are judges and judicial officers.—The steward of a court-baron is a judicial officer, and cannot, therefore, be made responsible for the mistakes and irregularities of the bailiffs and ministerial officers of the court (*c*). So also was the sheriff when presiding in the county court as anciently constituted (*d*). The vice-chancellors of the Universities of Oxford and Cambridge are also judges of a court of record; and so are all persons who have power to fine and imprison (*e*). Wherever power is given to examine, hear, and punish, it is a judicial power, and they in

(*y*) *Hamond* v. *Howell*, 1 Mod. 184; 2 Mod. 219.
(*z*) *Doswell* v. *Impey*, 1 B. & C. 169. *Groham* v. *Laffitte*, 5 Moo. P. C. 382.
(*a*) *Ante*, p. 183.
(*b*) *Ferguson* v. *Kinnoul* (*Earl of*), 9 Cl. & Fin. 290; and see *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 379.
(*c*) *Holroyd* v. *Breare*, 2 B. & Ald. 473.
(*d*) *Tunno* v. *Morris*, 2 C. M. & R. 298.
(*e*) *Kemp* v. *Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158.

652 whom it is reposed act as judges; and persons who are made judges are not liable to have their judgments examined in actions brought against them (*g*).

A coroner is a judicial officer. If a coroner thinks that an inquest ought to be conducted in secrecy, he has power to exclude all persons not necessarily engaged in the inquiry; and, if the exclusion of any particular person appears to him to be necessary or proper, it is for him to decide who is to be excluded. If a person has by order of the coroner been forcibly turned out of a room when an inquisition was about to be taken, the person so expelled has no right of action against the coroner for an assault (*h*).

"Arbitrators whom parties by consent have chosen to be their judges shall never," observes Lord Holt, "be arraigned more than any other judges" (*i*); for, if it should be allowed to make arbitrators defendants, and give them the trouble to defend their judgments and set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference. If there is any palpable mistake made by an arbitrator, or any miscalculation in an account laid before him, the person aggrieved may take proceedings to have the award set aside (*k*). Arbitrators and *quasi* arbitrators, therefore, are not responsible in damages for their mistakes or omissions, or for negligence or carelessness in the discharge of the duties intrusted to them; but, if they abuse the office of judge, and act fraudulently and corruptly, or maliciously, they are answerable in damages to the parties grieved (*l*).

The functions of a returning officer are not wholly ministerial, but are partly judicial and partly ministerial; and a judicial officer cannot be made responsible for an erroneous or wrong judgment, where he has acted *bonâ fide* in the matter of which the law gives him cognizance. "It cannot be contended that he is to exercise no judgment, no discretion whatever, in the admission or rejection of votes; and he could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action" (*m*).

Judicial officers—Delegation of functions.—Judicial functions cannot be delegated; and, if it has been the practice of a particular

(*g*) *Groenvelt* v. *Burwell*, 1 Ld. Raym. 467.
(*h*) *Garnett* v. *Ferrand*, 6 B. & C. 611.
(*i*) *Morris* v. *Reynolds*, 2 Ld. Raym. 857.
(*k*) Ld. Hardwicke, *Anon.*, 3 Atk. 644.
(*l*) *Wills* v. *Maccarmick*, 2 Wils. 148. *Tozer* v. *Child*, 7 El. & Bl. 383; 26 L. J., Q. B. 151. See *In re Hopper*, L. R., 2 Q. B. 367; 8 B. & S. 100; 36 L. J., Q. B. 97. *Pappa* v. *Rose*, L. R., 7 C. P. 32, 525; 41 L. J., C. P. 11, 187. *Tharsis Sulphur Co.* v. *Loftus*, L. R., 8 C. P. 1; 42 L. J., C. P. 6.
(*m*) Abbott, C. J., *Cullen* v. *Morris*, 2 Stark. 587.

653 court to delegate to its clerk the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of judge is responsible for the orders he gives. If he takes upon himself to issue a warrant without the order or direction of the judge, he is liable for the trespasses occasioned by its execution. Where commissioners of a court for the recovery of small debts were empowered by statute to order payment of judgment debts by instalments, and, in case of default in payment of the instalments, the commissioners present in court, at the instance of the plaintiff, and *upon due proof of the default*, were empowered to award execution against the judgment debtor, with such costs as to them should seem just, and it was shown to be the practice of the court for the commissioners, at the time they gave judgment for the plaintiff, to direct the debt to be paid by monthly instalments or execution to issue, it was held that the commissioners had no power to make such a practice or such an order at the time of the judgment, because, if made then prospectively, it dispensed with that proof of non-payment which the statute required, and with the exercise of any discretion on their part as to the execution or further costs; that the direction, therefore, for issuing execution, engrafted on the original judgment, and made part of it, was not merely irregular, but a nullity; and that the clerk had issued the warrant without authority, and was, consequently, liable for the imprisonment occasioned by its execution (*n*).

Judicial officers—Disqualification on the ground of interest.—In accordance with the maxim, *nemo debet esse judex in propriâ suâ causâ*, it has been held that, whenever it appears that the judge is a party to the suit, the judgment is erroneous (*o*). If, therefore, he has any private or pecuniary interest in the subject-matter of the suit, he cannot adjudicate upon it (*p*). Such interest, however, must be direct and certain, and not merely remote or contingent (*q*).

Judges of the superior courts—Power to commit for contempt (*r*). —The superior courts at Westminster have by immemorial usage power to punish by fine or imprisonment for contempt, whether

(*n*) *Andrews* v. *Marris*, 1 Q. B. 3. *Whitelegg* v. *Richards*, 2 B. & C. 45.

(*o*) *London* (*City of*) v. *Wood*, 12 Mod. 688.

(*p*) *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. C. 759. *Reg.* v. *Aberdeen Canal Co.*, 14 Q. B. 866. *Kemp* v. *Rose*, 1 Giff. 258.

(*q*) *Reg.* v. *Manchester & Sheffield Rail. Co.*, L. R., 2 Q. B. 336; 36 L. J., Q. B. 171. The case was decided under s. 39 of the Lands Clauses Act; but it was considered that the words "interested in the matter in dispute" used in that section were merely declaratory of the common law. See *Reg.* v. *Rand*, L. R., 1 Q. B. 230; 35 L. J., M. C. 157.

(*r*) As to commitments by legislative assemblies, see *Doyle* v. *Falconer*, L. R., 1 P. C. 328; 36 L. J., P. C. 34. *The Speaker of the Legislative Assembly of Victoria* v. *Glass*, L. R., 3 P. C. 560. *Attorney-General of New South Wales* v. *Macpherson*, L. R., 3 P. C. 268. *Barton* v. *Taylor*, 11 App. Cas. 197; 55 L. J., P. C. 1.

654 committed in the face of the court or not. A superior court of record has power to punish, by commitment for contempt, a libel upon the court, published when the court is not sitting as well as when it is sitting; and the question whether the particular publication is libellous or contemptuous is a question for the court which commits. Any publication tending to influence the result of a pending suit, or to prejudice the minds of the public with regard to it, is a contempt of court (*s*).

When the committal is by way of punishment, it ought to be certain as a sentence, and the term of imprisonment should be specified (*t*). The court cannot for contempt suspend a barrister from practising, if the contempt is not in his character as barrister, but as suitor; for the proper punishment for contempt of court is fine and imprisonment (*u*). The court cannot delegate to a single judge the power of issuing a warrant for the apprehension and committal of the person in contempt (*x*). A superior court may adjudge a man to be guilty of a contempt, and may imprison him for a certain time for such contempt, without setting forth on the face of the warrant the grounds upon which its adjudication proceeded (*y*).

Judges of inferior courts of record.—Every judge of a court of inferior jurisdiction must have before him some cause of action, charge, or complaint, into which he has by law authority to inquire, or his proceedings will be extra-judicial, and he will be responsible for the injurious consequences which result from them to others (*z*).

A judge of a court of record in England with limited jurisdiction is not responsible in damages for the consequences of his acts and proceedings in respect of matters over which he had no jurisdiction, if he had a *primâ facie* jurisdiction in the matter, and had not the knowledge, or means of knowledge of which he ought to have availed himself, of his want of jurisdiction. Thus it has been held that, if one is arrested by process out of an inferior court for a cause of action which did not arise within its jurisdiction, the party arrested may well maintain an action against the plaintiff who levied the plaint and should be intended to know where the cause of action arose, but not against the judge or the officer who entered the plaint or executed it; for, when it was impossible for them to know that the cause of action did not arise within their

(*s*) *Daw* v. *Eley*, L. R., 7 Eq. 49; 38 L. J., Ch. 113. *Re Cheltenham, &c. Carriage and Waggon Co.*, L. R., 8 Eq. 580; 38 L. J., Ch. 330.

(*t*) *Crawford's case*, 13 Q. B. 629. *R.* v. *James*, 5 B. & Ald. 894.

(*u*) *In re Wallace*, L. R., 1 P. C. 283; 36 L. J., P. C. 9.

(*x*) *Van Sandau* v. *Turner*, 6 Q. B. 785.

(*y*) *Ex parte Fernandez*, 10 C. B., N. S. 25; 30 L. J., C. P. 321.

(*z*) *Hopper* v. *Warburton*, 32 L. J., Q. B. 104.

655 jurisdiction, it would not be agreeable to any rules of justice to make them liable to an action; but the proper and just remedy was against the plaintiff (*a*). It has accordingly been held, that the judge of a court of record in a borough is not responsible as a trespasser for the imprisonment of a defendant, where he had no means of knowing, except through the plaintiff or defendant, and did not know, that the cause of action arose without the limits of the borough (*b*). Where the facts of the case before a county court judge, although subsequently found to be false, were such as, if true, would have given the judge jurisdiction, the judge was held not to be responsible for his judgment and order in the matter; but, where the facts showed that he had no jurisdiction, and the judge mistook the law as applied to these facts, and wrongfully ordered a party to be committed, it was held that he was responsible in damages for the imprisonment (*c*).

If an action is brought in a court of limited jurisdiction, and the defendant pleads to the jurisdiction, the court must decide whether they have jurisdiction or not; and, if they decide that they have jurisdiction in a case where they clearly have no pretence for it, and give judgment against the defendant, all the members of the court present, and taking part in the judgment, may render themselves liable to an action (*d*). A county court judge is not ousted of his jurisdiction by a notice of a *bonâ fide* claim of title in those cases to which his jurisdiction to try cases of title does not extend. It is his duty to inquire into the claim, and determine whether there really is a question of title involved in the issue before him (*e*).

Judges of inferior courts—Power to commit for contempt.—Inferior courts of record have power to fine and imprison for any contempt committed in the face of the court, such a power being necessary for the due administration of justice, to prevent the court being interrupted; but they have no authority to punish for contempt not committed in the face of the court (*f*). If an inferior court having power to commit or fine for contempt treats that as a contempt which there was no reasonable ground for so treating, the superior courts will interfere to protect the person subjected to an improper exercise of the power. But the court cannot take upon itself the functions of a court of appeal from the decision of the court below; and, if there was any colourable ground for the exercise of its jurisdiction, the superior courts will

(*a*) *Olliet* v. *Bessey*, 2 W. Jones, 214.
(*b*) *Gwynn* v. *Poole*, Lutw. App. 1566. *Calder* v. *Halkett*, 3 Moo. P. C. 77. *Taaffe* v. *Downes*, *ib.* 36, n.
(*c*) *Houlden* v. *Smith*, 14 Q. B. 852.
(*d*) *Wingate* v. *Waite*, 6 M. & W. 746.
(*e*) *Emery* v. *Barnett*, 4 C. B., N. S. 431; 27 L. J., C. P. 216.
(*f*) *Reg.* v. *Lefroy*, L. R., 8 Q. B. 134; 42 L. J., Q. B. 121.

656 not interfere with its judgment in the matter (*g*). A contempt of court being a criminal offence, no person can be punished for it, unless the specific offence charged against him is distinctly stated, and an opportunity given him of answering (*h*).

The County Courts Act (*i*) gives the judge the power to commit for any insults wilfully offered to him or his officers, or for any wilful interruption of the proceedings in court, or any other misbehaviour in court; and it has been held that the judge has jurisdiction to decide conclusively whether any particular act does amount to an insult, or interruption, or misbehaviour, and that it is unnecessary for a judge to say more in the warrant of commitment than that he has been wilfully insulted (*k*). The power of a county court judge to punish for contempt committed in the face of the court is limited to imprisonment for any period not exceeding seven days, or a fine not exceeding 5*l*., with the alternative of imprisonment of the same duration in default of payment (*l*).

Judges of inferior courts—Notice of action.—All judges of courts of inferior jurisdiction acting under the authority of an Act of Parliament, are, in general, entitled to notice of action, and to an opportunity of tendering amends and paying money into court; and the action against them must, in general, be brought within a certain limited period. By the 9 & 10 Vict. c. 95, s. 138, notice of action is required to be given to all persons acting in execution of the County Courts Act. If, therefore, a county court judge, in making an order of commitment, acts under the *bonâ fide* belief that his duty as judge of the county court renders it incumbent on him to do so, notwithstanding a prohibition has been issued, the act done by him must be considered as done in pursuance of the County Courts Act, and he is entitled to notice of action (*m*).

Of the jurisdiction of justices of the peace.—The ancient conservators of the peace, the nature and extent of whose power and authority are now unknown, were formerly elected by the freeholders of the county; but, since the reign of Edward III., they have been appointed by the crown. By the 34 Edw. 3, c. 1, it is enacted, that in every county of England there shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, with some learned in the law; and they shall have power to restrain offenders, rioters, and all other barrators, and cause them to be imprisoned and duly punished according to the law and customs of the realm, and inform them-

(*g*) *In re Pater*, 5 B. & S. 299; 33 L. J., M. C. 142.
(*h*) *In re Pollard*, L. R., 2 P. C. 106. See *M'Dermott* v. *Judges of British Guiana*, L. R., 2 P. C. 341; 38 L. J., P. C. 1.
(*i*) 9 & 10 Vict. c. 95, s. 113.
(*k*) *Levy* v. *Moylan*, 10 C. B. 211.
(*l*) 9 & 10 Vict. c. 95, s. 113.
(*m*) *Booth* v. *Clive*, 10 C. B. 835; 2 L. M. & P. 283.

657 selves of pillors and robbers who go wandering about and will not labour, and put them in prison, and take of all them that be not of good fame sufficient surety and mainprize of their good behaviour, and duly punish others, and hear and determine, at the king's suit, all manner of felonies and trespasses done in their several counties, according to the laws and customs of the realm. From this statute, therefore, it appears that justices of the peace were to be appointed by commission from the crown; that they were to have authority to hold a court, and were to be judges of a court of record. Courts accordingly were holden by them for hearing and determining offences within their cognizance; records were kept by them of their proceedings in these courts; and each justice named in the commission came to be called *custos rotulorum*, or keeper of the records and rolls of the county (*n*).

The power to "hear and determine" gave justices of the peace authority only to hear and determine through the medium of the common-law method of inquisition, by the verdict of a jury; "for that is implied by law; and the court will adjudge as the law appoints, although it be not so expressed" (*o*). Hence, justices were under the necessity of holding sessions and assembling juries for the trial of all offences of which they had cognizance; and these sessions were by the 36 Edw. 3, stat. 1, c. 12, commanded to be held at least four times a-year. Special sessions were afterwards directed to be held for executing certain statutes which the justices were charged to execute; and they were enjoined the diligent perusal and study of these statutes at the Easter sessions in every year (*p*).

The form of the commission of the peace as it exists at present, is said to have been settled by the judges in the 33rd year of Queen Elizabeth's reign (*q*). It assigns the several persons named in it, and every one of them, jointly and severally, the queen's justices, to keep the peace in a particular county; and to cause to be kept all statutes made for the good of the peace and the quiet government of the people; and to punish all who offend against any of the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behaviour; and, if they shall refuse to find such surety, to cause them to be safely kept in prison till they shall find it: also to inquire, upon the oath of good and lawful men of the county, of all felonies, trespasses, and offences, of which justices of the peace may lawfully inquire (*r*).

(*n*) Holt, C. J., *Harcourt* v. *Fox*, 1 Show. 507; 4 Mod. 169.
(*o*) See *Holland's case*, 4 Co. 74a, 74b.
(*p*) 33 Hen. 8, c. 10.
(*q*) 2 Hawk. P. C. c. 8, § 2.
(*r*) Dalt. J. P., Ch. 5.

658 Besides the general authority confided to justices by the commission of the peace, they are clothed by various Acts of Parliament with a special and particular jurisdiction over particular offences, which jurisdiction must be exercised sometimes by one justice and sometimes by two; sometimes in their sessions, and sometimes out of their sessions. Whenever these statutory powers are exercised by justices, care must be taken that the special authority is strictly pursued.

Every single justice has regularly a jurisdiction for the preservation of the peace through the whole county by virtue of his commission; but the power of hearing and determining offences is by the commission given to two or more; and, whenever a thing is required to be done by two justices, they must both be present at the execution of it. A justice has no power to do any judicial act out of his county; but he may do a merely ministerial act, such as the taking of an information (*s*).

A justice of the peace has jurisdiction to require sureties for good behaviour from persons charged with aggravated defamation, and with persisting in a continued course of libelling. Therefore, where a person persisted in writing libels upon a wall against a private individual, and was required to find sureties for his good behaviour, and in default was committed to prison, it was held that the justice had acted in a matter over which he had jurisdiction (*t*). If the charge is of an offence over which, if the offence charged is true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti;* nor can the jurisdiction be ever held to depend upon the value or credibility of the evidence (*u*).

Acts of a justice of the peace who has not duly qualified are not absolutely void; and, therefore, persons seizing goods under a warrant of distress, signed by a justice who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers. Many persons acting as justices of the peace in virtue of offices of corporations, have been ousted of their offices from some defect in their election or appointment; and, although all acts, properly corporate and official, done by such persons are void, yet acts done by them as justices, or in a judicial character, have in no one instance been thought invalid (*x*).

Jurisdiction founded on their own view.—A conviction before a justice or justices of the peace, without the intervention of a jury,

(*s*) 2 Hale, P. C. 51.
(*t*) *Haylock* v. *Sparke*, 1 El. & Bl. 471; 22 L. J., M. C 72.
(*u*) *Cave* v. *Mountain*, 1 M. & G. 262.
(*x*) *Margate Pier Company* v. *Hannam*, 3 B. & Ald. 271.

659 is always, as we have seen, under some statute, the common law sanctioning no such proceeding. In some cases, and under particular Acts of Parliament, a summary remedy is provided for particular offences, by enabling a magistrate to convict and punish upon his own view of the commission of the offence, without making any inquiry upon oath or taking any information (*y*). The record of the proceedings in such cases need only set forth such circumstances as were necessary to give the magistrate jurisdiction, and show that he pursued the directions of the statute (*z*).

Jurisdiction founded upon information or complaint.—When the magistrate has not been authorized by statute to act upon his own view, he must have some information or complaint before him in order to give him jurisdiction in the matter. He may have jurisdiction over the offence in the abstract; but, to give him jurisdiction in any particular case over a particular individual, there must be a proper charge or information before him (*a*). If, therefore, he grants a warrant against a person upon a supposed charge of felony, without taking any deposition or information on oath, and the party is arrested under the warrant, this is a trespass, for which an action may forthwith be maintained against such justice for compensation in damages (*b*). So, if he makes an order for the removal of a pauper, without having before him a complaint by the parish officers of the chargeability of such pauper to the removing parish, he acts wholly without jurisdiction in the matter, and is a trespasser (*c*).

Indictable offences—Power to issue warrants of apprehension.—By the 11 & 12 Vict. c. 42, s. 1, where a charge or complaint is made before a justice that any person has committed or is suspected to have committed an indictable offence within the jurisdiction of the justice, or, having committed or being suspected of having committed the offence elsewhere, is within the jurisdiction, the justice may issue his warrant for the arrest of such person; but, before the warrant is issued, the justice must have before him an information or complaint in writing on oath (sect. 8). When a warrant is intended to be issued on the strength of the information, the information must, in order to give the justice jurisdiction in the matter, disclose a complaint about something that the justice has authority to inquire into and adjudicate upon, and the facts necessary to show jurisdiction must be substantiated on oath. An information on oath laid before a magistrate, charging an offence within his cognizance, is sufficient

(*y*) *Jones* v. *Owen*, 2 D. & R. 602.
(*z*) *Basten* v. *Carew*, 3 B. & C. 649.
(*a*) *Caudle* v. *Seymour*, 1 Q. B. 892.
(*b*) *Morgan* v. *Hughes*, 2 T. R. 225.
(*c*) *Reg.* v. *Justices of Bucks*, 3 Q. B. 807.

660 to give the magistrate jurisdiction over the charge and the person charged, although the information does not disclose any legal evidence of the guilt of the prisoner, and states nothing beyond mere hearsay, upon which neither judges nor juries could properly act. The commitment by the magistrate of a person to gaol upon the strength of such an information amounts at the utmost to no more than an error in judgment on the part of the magistrate, for which, if acting within his jurisdiction, he is not liable (*d*). But the information must impute a criminal offence within the jurisdiction of the magistrate, and not a mere civil wrong, in respect of which he has no jurisdiction (*e*).

When constables have arrested a man, and are taking him before a magistrate for the purpose of inquiring into a charge, it is not competent for a magistrate who meets them in the street to order the constables to take the man back to gaol, and keep him in prison. "It is a magistrate's duty," observes Patteson, J., "on all occasions, either to examine into a charge, or, if there is a reason why he cannot examine into it, he is not to interfere at all, and should let the constable take the party before some other magistrate. It would be a very fearful thing, indeed, if any magistrate were at liberty, meeting a man in custody of the constables in the street, to say, 'Take him back for twenty-four hours, and bring him up to-morrow'" (*f*).

Commitment for trial.—By the 11 & 12 Vict. c. 42, s. 17, it is enacted, that in all cases where any person shall appear or be brought before any justice of the peace, charged with any indictable offence, the justice, before he commits the accused person for trial, or admits him to bail, shall, in the presence of such accused person, who is to be at liberty to put questions to any witnesses produced against him, take the statement on oath or affirmation of those who know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to, and signed respectively by, the witnesses who shall have been so examined, and also by the justice or justices taking the same, and shall afterwards be delivered to the proper officer of the court in which the trial is to be had (sect. 20). Every magistrate taking

(*d*) *Cave* v. *Mountain*, 1 M. & G. 257.

(*e*) *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 185. A justice's warrant put in by the plaintiff is evidence for the defendant of an information on oath before the justice recited in the warrant. The recital must be considered part of the warrant, and admissible evidence for the defendant, when the warrant is produced against him by the plaintiff, for the purpose of showing on what grounds, and in relation to what subject-matter he was acting when he granted it; in the same manner as, if a magistrate were to commit for a felony on his own view, the warrant reciting that he had seen the felony committed, when put in evidence against him, would be admissible evidence for him that he had seen the felony committed. *Haylock* v. *Sparke*, 1 El. & Bl. 471; 22 L. J., M. C. 71.

(*f*) *Edwards* v. *Ferris*, 7 C. & P. 542.

661 the depositions on oath of the party making the charge, has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given, and to determine in many cases whether bail can or shall be taken. If, therefore, the depositions are taken by the magistrate's clerk in the absence of the magistrate, and the magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction: there is no proper charge before him: and, if he directs the imprisonment of the person accused by them, he is responsible for a trespass (*g*). The magistrate is not answerable for the correctness of the charge, or for any erroneous judgment of his own upon the facts. "The only question is, whether the magistrate had jurisdiction to investigate and commit" (*h*).

Certain indictable offences mentioned in the First Schedule of the Summary Jurisdiction Act, 1879 (*i*), may now be dealt with summarily under certain conditions, and the form of procedure in such cases is provided by that statute (*j*).

Summary jurisdiction.—By the 11 & 12 Vict. c. 43, s. 10, it is enacted, that every complaint upon which a justice of the peace is authorized by law to make an order, and every information for any offence or act punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except in cases of informations where the justice receiving the same shall thereupon issue his warrant in the first instance to apprehend the defendant; and in every such case the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness on his behalf, before any warrant shall be issued. The information must disclose upon the face of it some offence, neglect, or default, into which the magistrate has authority to inquire, and respecting which he has jurisdiction to adjudicate (*k*).

Where the statute creating the offence directs the issue of a summons, and gives the party summoned a certain time to appear and plead, there will be a clear want of jurisdiction, if the justices proceed to hear the complaint before the expiration of the full period allowed (*l*).

There must be some evidence before the magistrate of the commission of the particular offence charged in the information or complaint, in order to justify a conviction upon it (*m*).

(*g*) *Caudle* v. *Seymour*, 1 Q. B. 892.
(*h*) *Mills* v. *Collett*, 6 Bing. 92. *Windham* v. *Clere*, Cro. Eliz. 130; 1 Leon. 187.
(*i*) 42 & 43 Vict. c. 49.
(*j*) See also 47 & 48 Vict. c. 43.
(*k*) *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 185. *Reg.* v. *Scotton*, 5 Q. B. 499. *In re Perham*, 5 H. & N. 30; 29 L. J., M. C. 33.
(*l*) *Mitchell* v. *Foster*, 12 Ad. & E. 475.
(*m*) *Kirkin* v. *Jenkins*, 32 L. J., M. C.

662 If a person is summoned before a magistrate for an offence under a particular statute, and appears to answer the charge stated in the summons, he cannot be lawfully convicted on a charge, although an analogous one, under a different statute (*m*); nor, if the evidence fails to substantiate the particular charge specified in the summons, can the summons be altered or amended so as to alter the nature of the offence originally charged, and to answer which the party has appeared (*n*). A magistrate cannot justify a commitment for one offence by a conviction for another and different offence (*o*); but, if the accused party or his solicitor appears before the magistrate, and cross-examines the witnesses, and makes no objection to his proceeding until after the case for the prosecution has closed, he cannot then object to the hearing and adjudication on the ground that no information had been laid, or that the accused had not been duly summoned to answer the particular charge (*p*). Magistrates cannot give themselves jurisdiction by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offence, for the purpose of giving themselves jurisdiction (*q*). Every accused person must, of course, be heard in his own defence before he can lawfully be convicted (*r*).

A magistrate is not at liberty to detain a known person to answer a charge not yet made against him; he ought to have an information regularly before him, that he may be able to judge whether it charges any offence which the person ought to answer. It may be otherwise in the case of a mere vagabond, who, if he were once allowed to depart from the presence of the magistrate, would, probably, never be seen again (*s*).

In an action against a magistrate for an assault and false imprisonment, it appeared that the plaintiff had been summoned, and had appeared before the magistrate to answer a complaint of having unlawfully killed a dog; that the magistrate proposed an arrangement which was rejected by the plaintiff, upon which the magistrate told him that, unless he paid a certain sum of money, he should convict him in a penalty of that amount, and commit him to prison; that he then called in a constable, and ordered him to take the plaintiff outside, and, if the matter was not settled, to bring him in again, when he would proceed to commit him; and

141. *Sherborn* v. *Wells*, 3 B. & S. 784; 32 L. J., M. C. 179. *Evans* v. *Botterill*, 3 B. & S. 787; 32 L. J., M. C. 50.

(*m*) *Reg.* v. *Brickhall*, 33 L. J., M. C. 157.

(*n*) *Martin* v. *Pridgeon*, 1 El. & El. 778; 28 L. J., M. C. 179.

(*o*) *Rogers* v. *Jones*, 3 B. & C. 412.

(*p*) *Turner* v. *Postmaster-Gen.*, 5 B. & S. 756; 34 L. J., M. C. 11. *Reg.* v. *Hughes*, 4 Q. B. D. 614; 48 L. J., M. C. 151.

(*q*) *In re Thompson*, 6 H. & N. 193; 30 L. J., M. C. 19.

(*r*) *Cooper* v. *Wandsworth Board, &c.*, 14 C. B., N. S. 180; 32 L. J., C. P. 185.

(*s*) Ld. Tenterden, C. J., *R.* v. *Birnie*, 1 Moo. & R. 160; 5 C. & P. 206.

663 that the plaintiff then went out with the constable and settled the affair by paying a sum of money. It was held that the magistrate was guilty of an assault and false imprisonment; and was responsible in damages, as there was no evidence of any conviction, and he had no right to give the plaintiff into the hands of a constable, in order to drive him into a settlement of the complaint (*t*).

Magistrates have no jurisdiction to convict summarily and impose a fine for an assault, when it is an established fact that a complainant before them does not complain of the assault, and does not intend to give them jurisdiction to deal with it. Therefore, where a person who had been assaulted went before magistrates to have the assaulting party bound over to keep the peace, and the magistrates, finding that an assault had been committed, proceeded to deal with the assault by summary conviction notwithstanding a protest by the complainant against their deciding on the assault, it was held that the justices had acted without any jurisdiction in the matter, the assault not having been brought before them with a view to their adjudicating upon it, and a rule for a *certiorari* to remove and quash the conviction was made absolute, in order that the conviction might be no bar to ulterior proceedings by indictment or by action (*u*). Where, however, a complaint has been duly laid before a magistrate, it does not rest with the complainant himself to abandon the charge, or to proceed further with it. Thus, where a complaint of an assault was duly laid before justices, and a summons issued for the appearance of the defendant, and the defendant went and settled the matter with the complainant by paying him a sum of money, and the complainant told one of the justices that the affair was settled, and that he did not intend to prosecute, but the justices nevertheless issued warrants for the apprehension of the parties, and compelled the complainant under the exigency of a warrant to appear and give evidence, and then convicted the defendant, it was held that the justices had not exceeded their authority; for the original complaint gave them jurisdiction in the matter, and, the complaint having been made before them, they were justified in exercising all the powers vested in them by law for the purpose of enabling them to investigate it, and adjudicate upon it; and, that it was not competent to the complainant to deprive them of jurisdiction by settling the matter with the accused party (*x*).

Where there is no evidence at all before justices of the facts necessary to give them jurisdiction, they cannot lawfully adjudicate

(*t*) *Bridgett* v. *Coyney*, 1 Man. & R. 215.

(*u*) *Reg.* v. *Deny*, 2 L. M. & P. 230; 20 L. J., M. C. 189.

(*x*) *Reg.* v. *Hawkins*, 2 N. R. 62.

664 or convict (*y*). Where the nature of the offence is such that it can only be committed once on the same day by the same person, and the magistrate proceeds to hear and convict, he is *functus officio*, and has no power to entertain or adjudicate upon a charge of a second offence on the same day by the same person. Thus, where a magistrate convicted a baker in four separate penalties for exercising his ordinary calling by baking rolls on a Sunday, and there were four separate convictions for selling four rolls, upon which the magistrate issued four distress-warrants, it was held that the magistrate, after he had convicted the baker in the first penalty, had no jurisdiction to convict him again for the same offence on the same day. "The Act of Parliament," observes Lord Mansfield, "gives authority to the justice to punish a man for exercising his ordinary calling on a Sunday. The justice exercises his jurisdiction by convicting him in the penalty for so doing. But then he has proceeded to convict him for three other similar offences on the same day. Now, if there are four convictions for one and the same offence, committed on one and the same day, three of them must necessarily be bad" (*z*). So, *e converso*, a single conviction for several distinct offences is bad; and, if a distress issues to levy the penalty imposed, trespass will lie against the justices (*a*). But the swearing a profane curse several times repeated may constitute one offence only, although it subjects the swearer to a cumulative penalty of a certain sum for each oath (*b*).

Summary jurisdiction—Ouster by setting up a claim of title.—Whenever a criminal statute authorizes justices to punish trespassers on land, a wilful trespass is intended, and not an entry on land in the *bonâ fide* assertion of some legal right or title. Whenever, therefore, in summary proceedings before magistrates, a *bonâ fide* claim of title to real property, or to the possession of some incorporeal right or privilege over land, is set up before justices by a defendant in answer to some complaint of trespass, the jurisdiction of the justices in the matter is ousted, and the information or complaint ought to be dismissed (*c*). So, also, by the 24 & 25 Vict. c. 100, s. 46, the jurisdiction of justices to determine a case of assault is ousted, where a question as to title to land is involved; and the justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title (*d*). But the complaint ought not to be

(*y*) *Reg.* v. *Johnson*, 34 L. J., M. C. 86.
(*z*) *Crepps* v. *Durden*, Cowp. 465.
(*a*) *Newman* v. *Bendyshe*, 10 Ad. & E. 11.
(*b*) *Reg.* v. *Scott*, 4 B. & S. 368; 33 L. J., M. C. 15.
(*c*) *Reg.* v. *Cridland*, 7 El. & Bl. 867; 27 L. J., M. C. 28. *R.* v. *Burnaby*, 2 Ld. Raym. 900.
(*d*) *Reg.* v. *Pearson*, L. R., 5 Q. B. 237; 39 L. J., M. C. 76.

665 dismissed on the strength of the mere assertion of the claim; for it is the duty of the justices to inquire into the circumstances, and ascertain whether there is any plausible or colourable ground for the claim, and whether the act was done in the *bonâ fide* exercise of what the defendant supposed to be his right in the matter (*e*). When the defendant sets up some pretended right, which is unknown to the law, or some impossible claim, the title to property cannot be said to come in question. Thus, where a man, in answer to an information under the Game Act, set up a right of shooting in gross, which he alleged he had acquired by a forty years' user as of right, it was held that justices were right in disregarding the claim, as the uisition of such an easement in gross was an impossibility int of law (*f*). The mere belief of the party himself that he has the right he asserts is not sufficient under the Trespass in Pursuance of Game Act (1 & 2 Will. 4, c. 32, s. 30), or the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 24) (*g*), to oust the justices of their jurisdiction, as it might under the Malicious Trespass Act (*h*). Whenever a question of title is raised before them, and there is fair and reasonable evidence in support of it, the justices ought not to proceed; for they cannot themselves decide whether the claim is well or ill-founded in fact, although, if it can have no foundation in law, they may disregard it as above stated. Whenever a real question is raised between the parties as to the right, the justices ought not to convict (*i*). Where the question of title is necessarily involved in the matter which the justices have to determine, their jurisdiction is not ousted by a claim of title. Thus, in a proceeding to recover possession of a house alleged to belong to a parish under the 59 Geo. 3, c. 12, s. 24, the justices have jurisdiction to decide the question of title (*j*). So upon a question of highway arising before justices under the Highway Act, their jurisdiction is not ousted, although the information or complaint is laid against the owner of the land, who disputes the existence of a highway across his land (*k*).

The jurisdiction of justices under the 1 & 2 Vict. c. 74, for facilitating the recovery of possession, by landlords, of premises held over by tenants, after the due determination of their tenancy,

(*e*) *Reg.* v. *Dodson*, 9 Ad. & E. 712. *Morden* v. *Porter*, 7 C. B., N. S. 641; 29 L. J., M. C. 213. *Reg.* v. *Cridland*, *supra*. *Legg* v. *Pardoe*, 9 C. B., N. S. 289; 30 L. J., M. C. 108. *Leatt* v. *Vine*, 30 L. J., M. C. 207. *Everefield* v. *Newman*, 4 C. B., N. S. 418.

(*f*) *Cornwall* v. *Sanders*, 3 B. & S. 206; 32 L. J., M. C. 6. *Hudson* v. *MacRae*, 4 B. & S. 585; 33 L. J., M. C. 65. See *Simpson* v. *Wells*, L. R., 7 Q. B. 214; 41 L. J., M. C. 105.

(*g*) *White* v. *Feast*, L. R., 7 Q. B. 353; 41 L. J., M. C. 81.

(*h*) *Cornwall* v. *Sanders*, *Hudson* v. *MacRae*, *supra*.

(*i*) *Reg.* v. *Stimpson*, 4 B. & S. 307; 32 L. J., M. C. 209.

(*j*) *Ex parte Vaughan*, L. R., 2 Q. B. 114; 36 L. J., M. C. 17; 7 B. & S. 902.

(*k*) *Williams* v. *Adams*, 2 B. & S. 312; 31 L. J., M. C. 109.

666 cannot be ousted by the tenant's setting up the title of some third party, under whom he claims to hold; for, as soon as the tenancy is proved to the satisfaction of the justice, the tenant is estopped from disputing the title of his landlord, and no question of title can be raised between them (*l*).

Justices cannot, of course, give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which their jurisdiction depends (*m*). "Magistrates," observes the court, "cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it" (*n*). But it is obvious that this may have two senses: in the one it is true; in the other, on sound principle and on the best-considered authority, it will be found untrue. Where the charge laid before the magistrate does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty in the very terms of the statute, would not avail to give him jurisdiction. If, the charge being really insufficient, the magistrate has misstated it in drawing up the proceedings, so that they appear to be regular, it would be clearly competent to the defendant to show what the real charge was, and, that appearing to be insufficient, we should quash the conviction. Whenever a charge has been presented to the magistrate over which he has no jurisdiction, he has no right to entertain the question, or commence an inquiry into the merits; and his proceeding to a conclusion will not give him jurisdiction. But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction; but, in the course of the inquiry, evidence being offered for and against the charge, the proper, or the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that, if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determin-

(*l*) *Rees* v. *Davies*, 4 C. B., N. S. 56. 852; 27 L. J., M. C. 261.
(*m*) *Reg.* v. *Nunneley*, El. Bl. & El. (*n*) *Welch* v. *Nash*, 8 East, 404.

667 able on the commencement, not on the conclusion, of the inquiry" (*o*).

Thus, although an information under the 4 Geo. 4, c. 34 (now repealed), for punishing certain classes of servants who have contracted to serve, and have refused to enter upon the service, or who have absented themselves therefrom without leave, or have misconducted themselves in such service, is good on its face, as showing that there was the requisite contract to serve, yet it is competent to an accused person to show that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was any contract of service at all, and that there was nothing from which he could legally or reasonably infer that he had any jurisdiction in the matter (*p*).

Where their jurisdiction depends upon whether the objection to the validity of a rate is *bonâ fide* or not, if there are facts before the justices tending to show that the objection is not *bonâ fide*, the justices are not responsible for an erroneous judgment upon those facts (*q*). But there must be some reasonable ground before them to warrant them in coming to that conclusion; if there is no such evidence, they act wholly without jurisdiction, and may become liable in trespass for their acts (*r*). Whenever the defendant, however, submits his case and objections to the decision of the magistrates, and invites them to decide upon them, and makes no objection to their jurisdiction until after they have heard and adjudicated, he is estopped from afterwards objecting to their decision and the proceedings taken thereon (*s*).

Summary jurisdiction—Wrongful proceedings by justices interested in the matter before them.—A justice of the peace ought never to execute his office in his own case, or in any case in which he is himself personally interested (*t*), but must cause the offender to be carried before some other justice. "And therefore the Mayor of Hereford was laid by the heels for sitting in judgment where he himself was the complainant, though by the charter he was the sole judge of the court" (*u*). Although any direct pecuniary interest, however

(*o*) *Reg.* v. *Bolton*, 1 Q. B. 72. *Thompson* v. *Ingham*, 14 Q. B. 718. *Ex parte Thompson*, 6 H. & N. 193; 30 L. J., M. C. 23. *In re Penny*, 7 El. & Bl. 660; 26 L. J., Q. B. 225.

(*p*) *Bailey's case*, 3 El. & Bl. 618; 23 L. J., M. C. 161. *Reg.* v. *Dickenson*, 7 El. & Bl. 831; 26 L. J., M. C. 204. *Pedgrift* v. *Chevallier*, 8 C. B., N. S. 246; 29 L. J., M. C. 225. *Ellis* v. *Kelly*, 6 H. & N. 222; 30 L. J., M. C. 35. *Craven* v. *Stubbins*, 34 L. J., Ch. 126.

(*q*) *Reg.* v. *Blackburn*, 32 L. J., M. C. 41.

(*r*) *Pease* v. *Chaytor*, 1 B. & S. 658; 3 B. & S. 620; 32 L. J., M. C. 121. *Reg.* v. *Huntsworth*, 33 L. J., M. C. 131.

(*s*) *Reg.* v. *Salop*, 29 L. J., M. C. 39. Some of the above are cases of church rates, for the enforcement of which all compulsory proceedings are abolished by the 31 & 32 Vict. c. 109, unless they have been made under a statutable authority.

(*t*) *Reg.* v. *Allen*, 4 B. & S. 915; 33 L. J., M. C. 38. *R.* v. *Hoseason*, 14 East, 606.

(*u*) Per Holt, C. J., *Anon.*, 1 Salk. 396. *Foxham Tithing case*, 2 Salk. 607.

668 small, in the subject of inquiry disqualifies a person from acting as judge, the interest, if not pecuniary, must be substantial, and the mere possibility of bias in favour of one of the parties will not have that effect (*x*); and, if the magistrate has no interest in the matter at the time that the order is made, the fact that he subsequently becomes interested will not invalidate the order (*y*).

By the 30 & 31 Vict. c. 115, a justice is not incapable of acting on the trial of an offence under a statute to be put into execution by a municipal corporation, local board of health, improvement commissioners, trustees, or any other local authority, by reason only of his being one of several ratepayers or other class of persons liable, in common with others, to be benefited by any fund, to which the penalty payable for such offence is to be carried, being thereby increased, or to contribute to any rate, &c., in diminution of which such penalty will go.

If the magistrate, being disqualified by interest or otherwise, remains on the bench and takes any part at all in the proceedings, his presence will vitiate them (*z*). If he remains, he should give public notice that he is there merely as a spectator, and will not take any part in the adjudication of the matter (*a*).

Where magistrates are acting strictly in the discharge of a public duty in ordering a prosecution to be instituted, and have no private object to serve, they are not disqualified from adjudicating upon the prosecution or complaint which they have themselves directed to be preferred (*b*). A somewhat analogous case is where they have directed a charge to be brought against the clerk of the peace for misdemeaning himself in his office (within the 1 W. & M. c. 21, s. 6), and have themselves heard the charge and dismissed the clerk (*c*); and, in cases where a contempt of court is supposed to have been committed, it becomes the unfortunate duty of the court to act both as party and judge, and to decide whether it has been treated with contempt (*d*). Therefore, where words are spoken in the presence and hearing of a justice of the peace reflecting upon him in the execution of his office: if he is to his face called a rogue and a liar, the justice may make himself both party and judge, and punish the offender immediately (*e*). So, if he is assaulted, he may at once commit the offender for trial; or, if he is abused to his face in the execution of his office, he may commit

(*x*) *Reg.* v. *Rand*, L. R., 1 Q. B. 230; 35 L. J., M. C. 157. See *Reg.* v. *Manchester & Sheffield Rail. Co.*, 8 Ad. & E. 417.

(*y*) *Reg.* v. *Surrey Justices*, 21 L. J., M. C. 198.

(*z*) *Reg.* v. *Suffolk Justices*, 18 Q. B. 416; 21 L. J., M. C. 169. *Reg.* v. *Hertfordshire Justices*, 6 Q. B. 756.

(*a*) *Reg.* v. *Herefordshire Justices*, 2 D. & L. 500, n.

(*b*) *Reg.* v. *Pettimangin*, 4 B. & S. 921; 33 L. J., M. C. 99, n.

(*c*) *Wildes* v. *Russell*, L. R., 1 C. P. 722; 35 L. J., M. C. 241.

(*d*) Ld. Denman, C. J., in *Carus Wilson's case*, 7 Q. B. 1015.

(*e*) *R.* v. *Revel*, 1 Str. 421.

669 the party, until he finds sureties for his good behaviour (*f*). If, however, the magistrate himself begins a breach of the peace, he forfeits the protection of the law in the execution of his office (*g*).

Summary jurisdiction—Convictions upon bye-laws.—If a corporation or a local board exceed their powers in making a bye-law, a justice exceeds his power in convicting upon it; and the allowance of the bye-law by the Secretary of State does not prevent the court from granting a *certiorari* for the purpose of bringing up and quashing the conviction (*h*). If the validity of a bye-law, and the jurisdiction of a justice to convict upon it, depend upon the existence or non-existence of a particular fact, the justice cannot give himself jurisdiction by finding the existence of the fact, unless there is reasonable evidence before him to support his finding. It is open to the person convicted to show by affidavit that there was no evidence before the justice on which he was warranted in coming to the conclusion that the bye-law was valid, and that he had authority to enforce it, because it shows that the justice has exceeded his jurisdiction (*i*): and, if, upon the facts proved before the justice, and the circumstances under which the conviction took place, it appears, either that the justice did not determine upon the validity of the bye-law, but thought himself bound to enforce it whether valid or invalid, and the bye-law is invalid, or that the justice came to a wrong conclusion in point of law in determining that the facts before him gave him jurisdiction, the court will correct his mistake and quash the conviction; for the "magistrate has no power to hear at all, or to convict, except in the case of a valid bye-law" (*k*). But, if there are facts before the justice warranting him in coming to the conclusion that he had jurisdiction in the matter, and he adjudicates accordingly, his decision cannot be impugned on the ground that there were other facts before him from which he ought to have drawn a contrary conclusion (*l*).

Summary jurisdiction—Drawing up of convictions and orders.—If the justices convict or make an order against the defendant, a minute or memorandum thereof must then be made (11 & 12 Vict. c. 43, s. 14), and the conviction or order afterwards drawn up in form, and lodged with the clerk of the peace, to be filed among the records of the quarter sessions (*m*). Any omission by the clerk of the justices to perform this duty may render the justices liable to

(*f*) Dalt. Just. c. 173.

(*g*) *R.* v. *Symonds*, Ca. temp. Hardwicke, 240.

(*h*) *Reg.* v. *Wood*, 5 El. & Bl. 49; *S. C.*, nom. *Reg.* v. *Rose*, 24 L. J., M. C. 130.

(*i*) *Bailey's case*, 3 El. & Bl. 618; 23 L. J., M. C. 161. *Reg.* v. *Dickinson*, 7 El. & Bl. 831; 26 L. J., M. C. 204.

(*k*) Campbell, C. J., and Crompton, J., *Reg.* v. *Wood*, 5 El. & Bl. 57, 58.

(*l*) *Bailey's case*, 3 El. & Bl. 618; 23 L. J., M. C. 161.

(*m*) As to indictable offences dealt with summarily, see 42 & 43 Vict. c. 49.

670 have proceedings taken against them (*n*). The conviction may be drawn up in form at a future time, after it has been acted upon, and may then be exhibited to authenticate the proceeding and protect the magistrate (*o*).

Summary jurisdiction—Enforcing convictions—Warrants of distress.—By the 11 & 12 Vict. c. 43, s. 19, it is enacted that, where a conviction adjudges a pecuniary penalty to be paid, or where an order requires the payment of money, and, by the statute authorizing the conviction, or order, such penalty or money is to be levied upon the goods of the defendant by distress and sale thereof, and also in cases where no mode of levying the penalty, &c., is provided, the justice making the conviction or order, or any justice for the same county, &c., may issue a distress-warrant for the levying of the same (*p*). It is also enacted (sect. 20), that in all cases where a justice shall issue any such warrant of distress, it shall be lawful for him to suffer the defendant to go at large, or verbally, or by a written warrant, to order the defendant to be detained in custody until return be made to such warrant of distress, unless security is given by recognizance or otherwise, to the satisfaction of such justice, for his appearance (*p*). "It is to be remembered," observes Coleridge, J., "that such an imprisonment is not a part of the punishment under the conviction, but is a mere detention until the return of the warrant, in case there should be no distress. It is a power to imprison *quia timet extra* the punishment; and such a power should be strictly pursued. Now, assuming that magistrates, acting in the exercise of that power, have detained a party by parol commitment for an indefinite time (the warrant of distress not being returnable on a day certain), there is an excess of jurisdiction" (*q*). In all cases of commitment of persons to prison, the exact period of imprisonment must be stated on the face of the warrant; for, "if it is left indefinite, a man may be imprisoned for life" (*r*). The wearing apparel and bedding of a person and his family, and, to the value of 5*l*., the tools and implements of his trade may not be distrained (*s*).

If there are no goods, or no sufficient goods to satisfy the distress, or if the levying of the distress will be more injurious to the defendant or his family than imprisonment, the defendant, in the case of a conviction or of an order for the payment of a sum of money not a civil debt, may be imprisoned for certain terms pro-

(*n*) *In re Hayward*, 3 B. & S. 546; 32 L. J., M. C. 89.
(*o*) *Massey* v. *Johnson*, 12 East, 81.
(*p*) The proviso at the end of this section is repealed, see 47 & 48 Vict. c. 43.
(*q*) *Leary* v. *Patrick*, 15 Q. B. 274.
(*r*) Lord Denman, C. J., *Prickett* v. *Gratrix*, 8 Q. B. 1029.
(*s*) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), ss. 21, 43.

671 portioned to the amount payable; but, in the case of an order for the payment of a sum which is to be deemed a civil debt, the defendant can only be imprisoned if he has, or has had since the date of the order, the means to pay, and has neglected or refused to pay, and in such cases he is liable to such imprisonment as may be awarded by a county court under the Debtors Act, 1869 (*t*).

Where an imprisonment, warrant of justices, and seizure of goods thereunder, are all defended on the ground that there was an adjudication to pay costs, and there is no such adjudication, the warrant is illegal, and the imprisonment and seizure of the goods are wrongful, and an excess of jurisdiction (*u*).

Summary jurisdiction—Warrant of commitment.—A commitment by way of punishment, by word of mouth only, without warrant in writing, cannot be supported (*x*). The commitment should be in writing, under the hand and seal of the justice by whom it is made, and should set forth his office and authority on the face of it, and the time and place at which it is made; also the cause of the commitment, and the period of the imprisonment. A commitment for an indefinite period cannot be supported (*y*). It need not be immediately made out, the detention of the person during the time necessarily required to make it out being justifiable; but it should be made out as soon as possible. A commitment is in no respect like a conviction, which is only an entering on parchment the proceedings of a court which have already taken place, like recording a judgment (*z*).

Summary jurisdiction—Execution of convictions and orders after notice of appeal.—Some statutes giving an appeal against summary convictions expressly stay execution pending the appeal (*a*). From the 27th section of the 11 & 12 Vict. c. 43, it may be argued that, pending an appeal, justices are not at liberty to grant a warrant of execution, as they are expressly authorized to grant the warrant after the appeal is determined. But sect. 35 enacts that the Act shall not extend to any complaints, orders, or warrants in matters of bastardy, with certain exceptions. The pendency of an appeal, therefore, against an order on a putative father, and the granting of a case for the opinion of the Court of Queen's Bench, as to whether the order ought to be enforced, does not take away the jurisdiction of justices to issue a warrant in execution of the conviction, and to enforce payment of the money due under the order in the interim; for, if the putative father could, as a matter of

(*t*) 11 & 12 Vict. c. 43, ss. 21—24; 42 & 43 Vict. c. 49, ss. 5, 6, 21 and 35; see 44 & 45 Vict. c. 24.
(*u*) *Leary* v. *Patrick*, 15 Q. B. 274.
(*x*) *Mayhew* v. *Locke*, 7 Taunt. 69.
(*y*) *Prickett* v. *Gratrix*, 8 Q. B. 1029.
(*z*) *Hutchinson* v. *Lowndes*, 4 B. & Ad. 121. *Leary* v. *Patrick*, *supra*.
(*a*) *Reg.* v. *Aston*, 1 L. M. & P. 491.

672 right, entirely escape all liability to contribute to the maintenance of the child pending the appeal, he might for three months allow the child to starve and oppress the mother, although he never meant *bonâ fide* to prosecute the appeal. "In a vast majority of cases, however," observes Lord Campbell, "it would be exceedingly improper in the justice to grant a warrant after notice of appeal had been given and recognizances entered into, and before the hearing of the appeal, or before the time for hearing it has expired; and, acting from a corrupt motive, he might be liable to an action for maliciously granting it. But I do not think that in granting it he could be said to have acted without jurisdiction; and, possibly, he might show that he had acted laudably in granting it. It might, on the other hand, be highly improper for the justice to try to enforce the order, when the justices at quarter sessions had expressed a grave doubt as to its validity; and his doing so might be evidence of malice" (*b*).

Summary jurisdiction—Effect of the conviction.—So long as the conviction remains in force, it cannot be contradicted, nor the facts recorded therein be controverted (*c*); and it is a principle of law that, where justices of the peace have an authority given to them by an Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done, unless they have acted corruptly, and have convicted and granted a warrant maliciously, and without any reasonable and probable cause (*d*). And now, although the magistrate had no jurisdiction in the matter, and had no legal authority to make the conviction or order, the conviction is nevertheless conclusive, and protects him from an action until it has been quashed.

Of the granting of search-warrants.—Upon a representation to a magistrate that a person has reason to suspect that his property has been stolen and is concealed in some specified place, the magistrate may lawfully issue his warrant to search the place, and to bring the occupier or owner before him. It need not be a positive and direct averment upon oath that the goods are stolen, in order to justify the magistrate in granting his warrant. If a warrant is issued without due authority on the part of the magistrate, and a house is entered and searched under it, that is a trespass on the part of the magistrate; and, if a person goes

(*b*) *Kendall* v. *Wilkinson*, 4 El. & Bl. 690; 24 L. J., M. C. 89.
(*c*) *Strickland* v. *Ward*, 7 T. R. 633, n.
(*d*) *Basten* v. *Carew*, 3 B. & C. 650. *Post*, p. 673.

673 before a magistrate, and falsely and maliciously, and without reasonable and probable cause, makes such a representation to a magistrate as induces him to grant a search-warrant, the person so acting is responsible in damages in an action for a malicious prosecution (*e*). The power of a justice to grant a search-warrant is now extended to property in, or near, or with respect to which, any offence, punishable either upon indictment or summary conviction by virtue of the Larceny Consolidation Act (24 & 25 Vict. c. 96), has been committed (*f*).

Wrongful acts—Abuse of jurisdiction.—A justice of the peace who acts corruptly in the discharge of the duties of his office, and uses the power of the law for the purpose of injuring and oppressing those over whom he has authority, and gratifying his own private animosity, is responsible in damages to the parties injured; but it must be proved that he has acted wrongfully from personal motives of spite or ill-will, or, in legal parlance, that he "has acted maliciously, and without reasonable and probable cause;" for he cannot be made responsible for an erroneous judgment, or for mere mistake, or for ignorance, negligence, or misconduct, not amounting to an abuse of his authority (*g*). There is a wide distinction between an action against a prosecutor for a malicious prosecution, and an action against a magistrate for a malicious conviction and imprisonment thereunder. In the former case, proof that there was in reality no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence; but in an action against a magistrate for a malicious conviction, the question is not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone; and it is impossible to show that there was no probable cause for the conviction without showing what that evidence was. There may be a malicious prosecution without a malicious conviction; and there may be an unfounded conviction by the magistrate without malice (*h*).

(*e*) *Elsee* v. *Smith*, 1 D. & R. 105. *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J., Ex. 193; 4 Inst. 177.

(*f*) 24 & 25 Vict. c. 96, s. 103. Search-warrants may also issue under certain statutes relating to specific offences.

(*g*) 11 & 12 Vict. c. 44, s. 1. *Pease* v. *Chaytor*, 1 B. & S. 658; 3 B. & S. 620; 32 L. J., M. C. 121. *Burley* v. *Bethune*, 5 Taunt. 583. Erle, J., *Taylor* v. *Nesfield*, 3 El. & Bl. 730; 23 L. J., M. C. 169.

(*h*) *Burley* v. *Bethune*, 5 Taunt. 583.

674 The question as to whether the magistrate has acted in the discharge of his duty with *bona fides*, and with reasonable and probable cause, is a question at the trial for the decision of the judge, and not for determination by a jury (*i*).

Wrongful acts—Absence or excess of jurisdiction.—By the 11 & 12 Vict. c. 44, s. 2, it is enacted that, for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice as he might have done before the passing of the Act, without proving that the act was done maliciously and without reasonable and probable cause (*k*); but no such action shall be brought for anything done under such conviction or order, until after the conviction shall have been quashed, either upon appeal or upon application to the Court of Queen's Bench: nor shall any such action be brought for anything done under any warrant which shall have been issued by such justice to procure the appearance of a party before him, and which shall have been followed by a conviction or order in the same matter, until after the conviction or order shall have been quashed; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a summons was issued previously to such warrant, and served upon the party, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of the summons (*l*), in such case no action shall be maintained against such justice for anything done under such warrant.

When, therefore, the action is brought in respect of things done without jurisdiction, or in excess of jurisdiction, as where a warrant is made, or an order granted, which the justice had no authority to make or grant, and the warrant or order has been enforced, and any person has been imprisoned or his goods have been seized under it, an action for a trespass is maintainable against the justice (*m*).

Where an information was laid before a justice, upon which he convicted and awarded a penalty and costs, and ordered them to be levied by distress, and so far pursued his jurisdiction, but he then exceeded it, by adding an alternative that the plaintiff should

(*i*) *Kirby* v. *Simpson*, 10 Exch. 367; 23 L. J., M. C. 165.

(*k*) See *Midelton* v. *Gale*, 8 Ad. & E. 155. *Pease* v. *Chaytor*, 1 B. & S. 658; 3 B. & S. 620; 32 L. J., M. C. 121.

(*l*) An appearance by counsel or solicitor is a sufficient appearance. *Bessell* v. *Wilson*, 1 El. & Bl. 496.

(*m*) *Leary* v. *Patrick*, 15 Q. B. 272. *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 185.

675 be put in the stocks in case the penalty and costs were not paid or raised by distress, and the plaintiff's goods were seized under a distress, but the plaintiff was not put in the stocks, and the conviction was afterwards quashed, and an action was brought against the justice for the distress, it was held that the justice was entitled to the protection afforded by the first section of the statute, and could not be treated as a trespasser. "It cannot be doubted," it was observed, "that the justice had jurisdiction in everything except the alternative order; and the action is brought, not for putting the plaintiff in the stocks under it, but for doing that which the defendant might have justified if he had drawn up his conviction in proper form. The construction of sect. 2 of the statute must be so controlled by sect. 1 as to be consistent with it; and that is done by so construing sect. 2 as to confine its application to cases in which the cause of action arises from the excess of jurisdiction, as it would have done in this case, if the plaintiff had been put in the stocks, and had brought his action for that" (*n*).

Wrongful acts—Exemption from actions in cases where justices had a primâ facie jurisdiction.—If under the special powers of particular Acts of Parliament, justices have a *primâ facie* jurisdiction to inquire into and adjudicate upon certain matters that have been brought before them, and nothing appears, either on one side or the other, to show any want of jurisdiction, they are exempt from liability in respect of their proceedings in the matter (*o*). Thus, where an Act of Parliament gave certain magistrates a general jurisdiction over disputes between certain friendly societies and their members, excepting where the rules of the society contained an arbitration clause, and certain disputes were brought before a magistrate, who adjudicated thereon in ignorance of the existence of the arbitration clause in the rules of the society, which deprived him of jurisdiction, it was held that he was not responsible for his want of jurisdiction. "When a party," it was observed by the court, "relies on an exception from a general law, the burthen is on him to show that his case falls within the exception. If the society had produced before the magistrate the clause in their rules enabling them to refer their disputes to arbitration, the magistrate would have had an opportunity of judging whether he had any jurisdiction or not; but they omitted to do this, and the magistrate's attention was never called to the denial of his jurisdiction" (*p*).

(*n*) Per Coleridge and Erle, JJ., *Barton* v. *Bricknell*, 13 Q. B. 393; 20 L. J., M. C. 1. *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 185.

(*o*) *Calder* v. *Halkett*, 3 Moo. P. C. 68. *Pease* v. *Chaytor*, 1 B. & S. 658; 3 B. & S. 620; 32 L. J., M. C. 121.

(*p*) *Pike* v. *Carter*, 3 Bing. 78; 10 Moore, 376.

676 So, if a person is exempted from serving a particular office, and if, on being called before a magistrate to show cause why he refuses to do so, he does not inform the magistrate of the particular ground of his exemption, he cannot maintain an action against the magistrate who orders proceedings to be taken against him in consequence of such refusal (*q*).

In a case that arose on the 20 Geo. 2, c. 19 (now repealed), giving magistrates jurisdiction to determine differences between masters and servants in husbandry, and other labourers, respecting wages (*r*), it was held that an action of trespass would not lie against magistrates, acting upon a complaint made to them on oath, by the terms of which it appeared they had jurisdiction, although the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, he having notice of such complaint, and being duly summoned to attend. "The facts stated in the case," observes Lord Ellenborough, "are not stated as facts appearing before the magistrates at the time; and, in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates before whom he had notice to appear; for how, otherwise, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were facts whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement?" (*s*).

Wrongful acts—Wrongful convictions and orders by one justice acted upon by another justice.—By the 11 & 12 Vict. c. 44, s. 3, it is enacted that, where a conviction or order shall be made by one justice, and a warrant of distress or of commitment shall be granted thereon by some other justice, *bonâ fide* and without collusion, no action shall be brought against the latter by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice who made the same; but the action, if maintainable, is to be brought against the justice or justices who made the conviction or order.

Wrongful acts—Exemption of justices from actions in respect of warrants of distress for poor-rate.—By the 11 & 12 Vict. c. 44, s. 4, it is enacted that where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against the person named and rated therein, no action shall be brought against the justice who shall have granted such warrant by reason of any

(*q*) Best, C. J., *Pike* v. *Carter*, *ante*, p. 675.

(*r*) See the 30 & 31 Vict. c. 141, continued by the 31 & 32 Vict. c. 111, both of which are repealed; see now 38 & 39 Vict. c. 86.

(*s*) *Lowther* v. *Radnor* (*Earl of*), 8 East, 113.

677 irregularity or defect in the rate, or by reason of such person not being liable to be rated therein.

Wrongful acts—Exemption from liability where a defective conviction or order has been confirmed upon an appeal.—By the 11 & 12 Vict. c. 44, s. 6, it is enacted, that in all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall be confirmed upon appeal, no action shall be brought against the justice who granted the warrant for anything which may have been done under the same by reason of any defect in such conviction or order. But it does not follow that, because a plaintiff had a power of appeal and failed to exercise it, he is thereby precluded from having recourse to the ordinary remedy by action to try the right. There is a great distinction in this respect between cases where there was jurisdiction to convict or to make an order and issue a warrant, and the aggrieved party had a ground of appeal against the conviction or order made with jurisdiction, and the case where there was no jurisdiction to convict or to make the order, and so no jurisdiction to issue the warrant. "If, in the first instance, the court has gone beyond its jurisdiction, the act is void. The party aggrieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and, if the court of appeal erroneously confirms the act of the court below, it may be that the party appealing cannot object to the want of jurisdiction in any collateral proceeding. His own act may estop him personally; but he is not bound to appeal, because he is at liberty to treat the act as void" (*t*).

Wrongful acts—Exercise of discretionary powers.—By the 11 & 12 Vict. c. 44, s. 4, it is enacted, that in all cases where a discretionary power shall be given to a justice of the peace by any Act of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power. But, for the justice to secure his exemption under this section, it is essential that he should be clothed with a legal authority to do the act concerning which he exercises his discretion. If he has no jurisdiction in the matter, he has no valid discretionary power, and is not within the exemption. The magistrate, moreover, must be acting judicially in the exercise of his discretion; for, if he is merely determining upon the propriety or expediency of per-

(*t*) *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 880; 18 L. J., M. C. 89. *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 379.

678 forming some mere ministerial function, and makes a wrong exercise of his discretion by doing what he has no legal authority to do, he cannot claim the statutory exemption. Where magistrates, for example, exercise their discretion as to the granting or withholding a distress-warrant to enforce payment of a rate, the existence of a valid rate, and a legal liability to pay on the part of the person distrained upon, are essential to the magistrates' exemption from liability, unless the rate is a poor-rate, and they can shelter themselves under that part of sect. 4 of the 11 & 12 Vict. c. 44, which expressly exempts justices from actions in respect of the issue of warrants of distress for poor-rate against persons not liable to pay the rate (*u*). So, when the discretion exercised by the magistrate respects the issuing of a distress-warrant to enforce the payment of money ordered to be paid by some third person, the validity of the order, and the legal liability to pay the money, are preliminary conditions to the magistrates having any authority to act at all in the matter (*x*). Where an Act of Parliament empowered the owners, occupiers, &c., of abbey-lands to make a rate for certain purposes upon the owners of such lands, and provided that, if any owner who had been rated should neglect or refuse to pay the rate after demand, then, upon proof thereof before a justice, the same should be levied by distress, the defaulter having been first duly summoned to appear and show cause for his neglect or refusal, and the plaintiff, being rated and refusing to pay, was summoned before the defendant, and denied his liability, but failed to show cause for his refusal to the satisfaction of the defendant, who issued a distress-warrant, under which the plaintiff's goods were seized, and the plaintiff then brought his action for a wrongful seizure, and proved that his land was not abbey-land, and that he was not liable to be rated, and recovered damages, it was held that the defendant could not shelter himself from liability on the ground that he was acting judicially when inquiring into, and determining upon, the facts preliminary to the issue of the warrant. The statute, it was observed, gave the defendant no power to try the question of the plaintiff's claim to exemption from the rate, on the ground that his land was not abbey-land, or to inquire into the validity of the rate, or to adjudicate upon the liability to pay. He was directed to begin by inquiring whether the rated owner had refused to pay, not whether the rate was valid; and his inquiry and determination had reference to the discharge of a mere ministerial function, and were not

(*u*) *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 378. *Ante*, p. 677.

(*x*) *Newbould* v. *Coltman*, 6 Exch. 201; 20 L. J., M. C. 149.

679 of a judicial character (*y*). So, where an Act of Parliament (2 & 3 Vict. c. 84, s. 11) provided that, when any contribution from overseers of moneys required by a board of guardians should be in arrear, it should be lawful for justices to summon the overseers to show cause, &c., and, after having heard the complaint, &c., to issue their distress-warrant for the recovery of such contribution, and, a distress-warrant having been issued under the above section, the overseers brought an action of trespass against the justices, it was held that, as the statute did not require any conviction, or order, or act of adjudication at all, but simply a warrant of distress for the levying of the sums legally due, the justices, in hearing and deciding upon the facts which were to guide them in the exercise of their discretion as to the issue or refusal of the warrant, were not acting in the discharge of any judicial functions, but were exercising their discretion respecting the performance of a mere ministerial duty, and that a valid order from the board of guardians, and a legal liability to pay on the part of the overseers, were essential to give the magistrates any jurisdiction at all to act in the matter (*z*).

Wrongful acts—Discharge—Limitations of actions.—By sect. 8 it is enacted that no action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within six calendar months after the act complained of has been committed. The period of limitation runs from the termination, not from the commencement, of the wrongful act (*a*). Therefore, when a person has been wrongfully imprisoned under an illegal commitment, the time of limitation will run from the period of the termination of the imprisonment, and not from the time of the making out of the warrant of commitment (*b*); and, where goods have been sold under an illegal warrant of distress, the time of limitation will run from the period of the sale of the goods, and not from the time of the original seizure. The seizure is not made absolutely in the first instance, but with a view only to the detention of the goods until the amount ordered to be levied should be paid, and their subsequent sale if it should not be paid, so that the seizure and sale form part of one continued grievance, which distinguishes it from cases where the seizure is for a forfeiture (*c*).

(*y*) *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 378. *Ex parte May*, 2 B. & S. 426; 31 L. J., M. C. 161. *Reg.* v. *Higginson*, 2 B. & S. 471; 31 L. J., M. C. 189. *Pease* v. *Chaytor*, 1 B. & S. 658; 32 L. J., M. C. 121.

(*z*) *Newbould* v. *Coltman*, 6 Exch. 189; 20 L. J., M. C. 149.

(*a*) *Jacomb* v. *Dodgson*, 3 B. & S. 461; 32 L. J., M. C. 113.

(*b*) *Massey* v. *Johnson*, 12 East, 67. *Hardy* v. *Ryle*, 9 B. & C. 607. *Violett* v. *Sympson*, 8 El. & Bl. 346; 27 L. J., Q. B. 138.

(*c*) *Collins* v. *Ross*, 5 M. & W. 202.

680 Where an action is intended to be brought against a justice of the peace for a wrongful imprisonment, under a conviction or order of commitment which the justice had no jurisdiction to make, the time of limitation will run from the time of the making of the conviction or order, and not from the date of the quashing thereof. The quashing of the conviction is only a condition to the prosecution of the action, like the delivery of a solicitor's bill, or the giving a notice of action (*d*).

Wrongful acts—Notice of action.—When a justice of the peace is sued in respect of anything done by him in the execution of his office, he is entitled to notice of action (*e*).

Wrongful acts—Damages.—By the 11 & 12 Vict. c. 44, s. 13, it is enacted that, where the plaintiff in any action against a justice of the peace, for anything done by him in the execution of his office, shall be entitled to recover, and shall prove the levying or payment of any penalty or money, under any conviction or order, as parcel of the damages he seeks to recover; or if he prove that he was imprisoned under such conviction or order, and seeks to recover damages for such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of 2*d.* as damages for such imprisonment, or any costs of suit whatever, if it is proved that he was actually guilty of the offence of which he was convicted, or that he was liable by law to pay the sum he was ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was convicted, or for non-payment of the sum he was ordered to pay.

If the magistrate has committed the plaintiff to prison in a case in which he has no jurisdiction, and the conviction is quashed, the magistrate is liable for all the usual and ordinary injurious consequences of a conviction and commitment, such as handcuffing, cutting off the hair, immersion in a bath, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but the magistrate is not responsible for any unnecessary or excessive violence on the part of the officers executing the warrant (*f*).

Wrongful acts—Writ of habeas corpus.—The legality of an imprisonment under a warrant of commitment may be brought under the consideration of the superior courts, or a judge in chambers, by writ of *habeas corpus* (*g*). It is directed to the gaoler

(*d*) *Haylock* v. *Sparke*, 1 El. & Bl. 471; 22 L. J., M. C. 67, 71.
(*e*) *Post*, p. 777.
(*f*) *Mason* v. *Barker*, 1 C. & K. 100. And see *ante*, pp. 163, 164, as to damages recoverable in actions for false imprisonment.
(*g*) *In re Boyce*, 22 L. J., Q. B. 393.

681 in whose custody the prisoner is detained, directing him to bring up the body of such prisoner before the court or judge, together with the cause of his being taken and detained (*h*). Where a prisoner has been lodged in gaol under a bad warrant of commitment in execution of a conviction, a good warrant of commitment subsequently made out and delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to the rule (*i*).

The validity of the commitment may be tried on moving for a rule to show cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged, without the writ actually issuing, or the prisoner being personally brought before the court (*k*). On moving for a writ of *habeas corpus*, the conviction may be brought before the court, verified by affidavit, for the purpose of defeating the magistrate's commitment; but in such case the commissioner before whom the affidavit is sworn ought to certify on the exhibit annexed that it is the document referred to in the affidavit (*l*). Although a return to a writ of *habeas corpus* may be good on the face of it, it may be shown that the conviction and commitment, under which the prisoner is detained, were substantially a civil proceeding, and that the arrest took place on a Sunday (*m*).

Upon a return to a *habeas corpus* affidavits are not admissible to show that the offence was not committed within the jurisdiction of the committing justice (*n*).

When a prisoner is entitled to his discharge from custody as a matter of right, the court has no power to impose any terms upon him as the condition of his release, and will not make his discharge from custody dependent upon his undertaking to bring no action against those who have unlawfully caused him to be imprisoned (*o*).

Rule to compel justices to act in particular cases.—By the 11 & 12 Vict. c. 44, s. 2, it is enacted, that in all cases where a justice of the peace shall refuse to do any act relating to the duties of his office as such justice (*p*), it shall be lawful for the party requiring such act to be done to apply to the Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice, and

The procedure with respect to the writ of *habeas corpus* is now regulated by Crown Office Rules, 1886, 235—245.

(*h*) Fry's HABEAS CORPUS (*Canadian Prisoner's case*).

(*i*) *Ex parte Cross*, 26 L. J., M. C. 201. *Reg.* v. *Richards*, 5 Q. B. 932. *Ex parte Smith*, 27 L. J., M. C. 186.

(*k*) *Eggington's case*, 2 El. & Bl. 731; 23 L. J., M. C. 41.

(*l*) *In re Allison*, 10 Exch. 561; 24 L. J., M. C. 73.

(*m*) *Eggington's case*, 2 El. & Bl. 717; 23 L. J., M. C. 41. *Swan* v. *Dakins*, 16 C. B. 93.

(*n*) *Ex parte Smith*, 27 L. J., M. C. 186.

(*o*) *Downey's case*, 7 Q. B. 281.

(*p*) As to what is a refusal, see *Reg.* v. *Paynter*, 7 El. & Bl. 328; 26 L. J., M. C. 102.

682 also the party to be affected by such act, to show cause why such act should not be done; and, if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of, costs, as to them shall seem meet; and the justice, upon being served with such rule absolute, is to obey the same and do the act required; and no action or proceeding whatsoever is to be commenced or prosecuted against such justice for having obeyed the rule and done the act thereby required (*q*).

Before the court will make an order under this section of the statute, it must be satisfied that the act sought to be enforced would be a lawful act. Where a rule was obtained calling upon justices to show cause why they should not issue a distress-warrant to enforce an order made by them, and it appeared that the order was invalid, and that the issuing and execution of a distress-warrant upon it would be an act of trespass, the court discharged the rule (*r*). But the court cannot inquire into the merits; and, if the justices have jurisdiction, and the order is good upon the face of it, they will be compelled to enforce it (*s*).

The court will not try a doubtful question of title on an application for an order under this section. "It would be very awkward," observes Patteson, J., "if the new statute had the effect of bringing all questions of title before us on affidavit" (*t*).

Ministerial officers.—Where the law neither confers judicial power nor any discretion at all, everybody on whom the duty of obedience attaches is bound to do the act required, and is responsible in damages for the consequences of his disobedience or neglect (*u*). Persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts, although their refusal or neglect may not have been malicious (*x*); for a ministerial officer who is guilty of any misfeasance in the exercise of the powers entrusted to him, or in the discharge of his duty as such public officer, is liable for the damage which results from his act, although he may not have been actuated by malicious motives (*y*).

Ministerial officers—Neglect of duty.—Every ministerial officer of a court of justice is liable to an action for neglecting the duties of his office. Thus, an action lies against the chief clerk of a court for not entering a judgment on the roll, when it is his duty so to

(*q*) *Reg.* v. *Mainwaring*, El. Bl. & El. 474; 27 L. J., M. C. 278.
(*r*) *Reg.* v. *Collins*, 21 L. J., M. C. 73.
(*s*) *In re Hartley*, 31 L. J., M. C. 232.
(*t*) *Reg.* v. *Browne*, 13 Q. B. 654.
(*u*) *Ferguson* v. *Kinnoul* (*Earl of*), 9 Cl. & Fin. 290. *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 378.
(*x*) *Ferguson* v. *Kinnoul* (*Earl of*), 9 Cl. & Fin. 251.
(*y*) *Brasyer* v. *Maclean*, L. R., 6 P. C. 398; 44 L. J., P. C. 79.

683 do (*z*). An action also lies against the clerk of the court at the suit of a judgment creditor for unlawfully, without the sanction or authority of the court, taking upon himself to issue an order, purporting to be the order of the court, for the discharge of the judgment debtor, whereby the plaintiff lost the fruits of his judgment. It is no part of the duty of the clerk of the county court to prepare notices of judgments or orders of court for the payment of money; and no action, therefore, lies against him for omitting to prepare such a notice, or for negligently preparing it, whereby a party was misled as to the times of payment of certain instalments ordered by the judge to be paid, and had his goods taken in execution (*a*).

Ministerial officers—Liability where the court has no jurisdiction and no authority to issue process.—At the common law, a grievous responsibility was thrown upon ministerial officers of courts of inferior and limited jurisdiction, where the court had made orders and directed the issue of process without jurisdiction in the matter, or where it had exceeded its jurisdiction. It was held that, when the court had not jurisdiction of the cause, then, the whole proceeding being *coram non judice*, actions would lie against the person who sued out, and against the officer or minister of the court who executed, the precept or process of the court, without any regard to such precept or process; "for the officer is not bound to obey him who is not judge of the cause, any more than he is bound to obey the mere precept or order of a stranger; for the rule is, *judicium a non suo judice datum nullius est momenti*" (*b*). Therefore, where an officer acting under a warrant of a commissioner of bankrupts took and detained a person in custody under it, and it appeared that the commissioner had no jurisdiction to make the warrant, it was held that an action of trespass was maintainable against the officer (*c*). If an order has been made in a cause in court over which the judge has a general jurisdiction, the mere ministerial officer who receives the warrant or order from the clerk to execute, and has no knowledge that it was issued without the authority of the court, is not responsible for things done under it (*d*); and the clerk of the court, so long as he confines himself to the mere ministerial duties of his office, and does not take upon himself the exercise of the office of judge, is not responsible for things done under the orders that are signed and issued by him in the discharge of the duties of his office, unless there is a total absence of jurisdiction on the part of the judge (*e*).

(*z*) *Douglas* v. *Yallop*, 2 Burr. 722.
(*a*) *Robinson* v. *Gell*, 12 C. B. 191.
(*b*) *Marshalsea case*, 10 Co. 76 a.
(*c*) *Watson* v. *Bodell*, 14 M. & W. 57.
(*d*) *Andrews* v. *Marris*, 1 Q. B. 3.
(*e*) *Dews* v. *Riley*, 11 C. B. 434.

684 *The high sheriff—Duties as returning officer.*—The functions of the high sheriff as a returning officer are, as we have seem (*f*), not wholly ministerial, but are partly judicial and partly ministerial. He has to exercise a discretion in the admission or rejection of votes, and, where he has acted *bonâ fide*, is not responsible for an erroneous judgment.

A sheriff, when presiding in that character at an election of knights of the shire to serve for the county in parliament, may order a constable to take any one into custody who is obstructing the sheriff in the execution of his duty, and to carry him before a justice of the peace to be dealt with according to law (*g*).

The high sheriff—Duty in the election of a coroner.—The sheriff, in holding the county court for the election of a coroner, and taking the poll of valid electors, and determining which of the candidates is chosen, is exercising functions of a judicial character; and his declaration, therefore, of the election is final, so that the validity of the votes cannot be inquired into on a *quo warranto* (*h*).

The high sheriff—Duties and responsibilities in the execution of writs.—The law has always held the sheriff strictly, and with much jealousy, to the performance of his duty in the execution of writs, both from the danger there is of fraud and collusion with defendants, and also because it is a disgrace to the Crown and the administration of justice if the King's writ remain unexecuted, as appears by the statute of Westminster the 2nd, c. 39 (*i*). The principle on which an action is maintainable against a sheriff for a neglect of duty in not arresting or in not making a levy in obedience to the Queen's writ directed to him, or for permitting an escape, is not simply because the plaintiff has sued out a writ and delivered it to the sheriff and the sheriff has not obeyed it, but because in mesne process he has a cause of action, or in final process he has a judgment, against the defendant, which gives him an interest in the writ, and creates a duty in the sheriff towards him (*k*). There is no duty due from the sheriff to the person suing out a writ, unless he is entitled to do so. It is essential, therefore, in an action against a sheriff for disobeying a *fi. fa.*, or an order to arrest, that the party should show that he had a judgment in his favour, or was entitled to the due execution of an order to arrest under the 32 & 33 Vict. c. 62. If it appears that the plaintiff has sued out void process, or that the judgment on which the process is founded is a void judgment, the plaintiff has no cause of action against the sheriff for

(*f*) *Ante*, p. 652.
(*g*) *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146.
(*h*) *Reg.* v. *Diplock*, L. R., 4 Q. B. 549; 38 L. J., Q. B. 297.
(*i*) *Howden* v. *Standish*, 6 C. B. 520.
(*k*) *Jones* v. *Pope*, 1 Saund. 38 b.

685 neglecting to execute it; but, if the judgment is erroneous only, the sheriff cannot take advantage of the error (*l*).

There is no duty or obligation on the part of the judgment creditor to give the sheriff any information or assistance to enable him to execute the writ (*m*).

Arrest and imprisonment for debt have been abolished, with a few exceptions, by the 32 & 33 Vict. c. 62 (*n*). The second part of that Act, however, sects. 11 to 20, provides for the punishment of certain misdemeanours committed by bankrupts; and the 9th section provides that nothing in the first part of the Act (sects. 1 to 10) shall affect any right or power under the 32 & 33 Vict. c. 71 (the Bankruptcy Act, 1869), to arrest or imprison any person. And by the Bankruptcy Act, 1883, s. 25, power is given to arrest the bankrupt and seize his books, &c., under certain circumstances, and further provisions are made for the punishment of fraudulent debtors (*o*).

It is the duty of the sheriff, as soon as a writ of execution has been lodged in his hands, to make careful and diligent inquiry concerning the execution debtor or his property, and to execute the writ without any unnecessary delay. If he refuses to execute a writ when he has the opportunity, and is required to do it, and nothing occurs to prevent him, he will be responsible in damages to the execution creditor for his negligence (*p*).

Execution of process on Sundays.—The 29 Car. 2, c. 7, s. 6, prohibits the service or execution on Sunday of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, and breach of the peace (*q*); and the 24 & 25 Vict. c. 100, s. 36, makes it a misdemeanour to arrest any clergyman upon any civil process while he is or has been performing, or is going to perform, divine service (*r*).

Priority of writs of execution.—The sheriff, as between himself and different execution creditors, is bound to execute all the writs in his hands, giving priority to that writ which is first delivered to him to be executed, and is responsible to any creditor who has so **686** delivered his writ if he does not, unless the execution of the

(*l*) *Gold* v. *Strode*, Carth. 148. *Shirley* v. *Wright*, Cro. Jac. 775; Bull. N. P. 66. The usual mode of proving a judgment of a superior court is by an examined copy. The witness who produces the copy should prove that he examined it with the original record, and that the latter came from the proper custody. *Reid* v. *Margison*, 1 Camp. 469. If a writ which has been delivered to the sheriff to be executed has been returned, and has become matter of record, the writ and its delivery to the sheriff may be proved by an examined copy of the record, without the production of the writ itself. *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565. Proof that a person has acted as sheriff is *primâ facie* evidence of his being sheriff, without proof of his appointment. *Bunbury* v. *Mathews*, 1 C. & K. 380.

(*m*) *Dyke* v. *Duke*, 4 Bing. N. C. 203.

(*n*) See *Reg.* v. *Master*, L. R., 4 Q. B. 285; 38 L. J., M. C. 73.

(*o*) Sects. 163—167.

(*p*) *Mason* v. *Paynter*, 1 Q. B. 981. *Brown* v. *Jarvis*, 1 M. & W. 704.

(*q*) *Wells* v. *Gurney*, 8 B. & C. 769.

(*r*) *Goddard* v. *Harris*, 7 Bing. 320; 5 M. & P. 122.

writ is countermanded (*s*); in which case the writ, whilst the countermand continues, must be considered as not delivered at all to be executed, because the sheriff cannot act upon it. If, after the sheriff has been desired to suspend the execution of a writ, he receives an order to execute it, this order will not relate back, so as to give the execution of the writ any priority over writs which have been placed in the hands of the sheriff during the period of the suspended execution. The countermand of the execution of the writ is equivalent to its withdrawal; and it is not until the sheriff receives notice of withdrawal of the countermand, and an order to proceed, that the writ is considered to have been again delivered to him to be executed (*t*). Where goods have been seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is bound to seize and sell the goods under the subsequent execution (*u*).

No writ of *fi. fa.* can be executed in any of the palaces belonging to the Crown, which is either at that time the residence of the sovereign, or in which there is an intention, and present power, on the part of the Crown, to resume such residence; but, if, although in one sense a royal palace, it has, for many years, been put to uses practically inconsistent with the personal residence of the sovereign, the exemption will cease (*x*).

Writs of execution—Bankruptcy.—By the 46 & 47 Vict. c. 52, s. 45, "(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

By sect. 46, "(1.) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the

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(*s*) *Dennis* v. *Whetham*, L. R., 9 Q. B. 345; 43 L. J., Q. B. 129.
(*t*) *Hunt* v. *Cooper*, 12 M. & W. 672.
(*u*) *Imray* v. *Magnay*, 11 M. & W. 275. *Dennis* v. *Whetham*, *supra*.
(*x*) *Att.-Gen.* v. *Dakin*, L. R., 2 Ex. 290; 3 Ex. 288; 4 H. L. 338; 39 L. J., Ex. 113.

sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

"(2.) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

"(3.) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy."

The notice mentioned in sub-sect. 2 must be served on the sheriff or his then agent for the purpose of receiving such notice; it is not sufficient to serve it on a bailiff or man in possession (*y*).

When the bankruptcy happens after seizure but before sale, the sheriff is not entitled to poundage under the words "costs of execution" in sub-sect. (1) (*z*). Where a sheriff is in possession under several writs, some for more and some for less than 20*l.*, and proceeds to sell, the writs are payable in order of priority so long as there are funds to pay; but if he receives notice of bankruptcy within fourteen days after the sale, only those writs are entitled to be paid which are for less than 20*l.*, and which would have been paid had not bankruptcy intervened (*a*).

Mode of execution of legal process.—If a sheriff, by lifting the latch of the outer door of a dwelling-house, or opening the outer door in the way in which it is ordinarily opened by persons going into the house, enters the house of the execution debtor himself for the purpose of arresting him or taking his goods, he is justified, if he has reasonable ground to believe that he is there or that his goods are there; but, if he enters the house of a stranger to make

688 the arrest or the seizure, he is justified only in the event of his finding the execution debtor or his goods in the house (*b*). If it turns out that the latter is not in the house, or had no property

(*y*) *Ex parte Warren*, 15 Q. B. D. 48; 54 L. J., Q. B. 20. See sect. 168 as to who is a "sheriff."

(*z*) *In re Ludmore*, 13 Q. B. D. 415; 53 L. J., Q. B. 418.

(*a*) *In re Pearce*, 14 Q. B. D. 966; 54 L. J., Q. B. 16.

(*b*) *Morrish* v. *Murray*, 13 M. & W. 57.

there, the sheriff is a trespasser (*c*), unless the house was entered in hot pursuit after an escape (*d*). The house in which the execution debtor resides, *i. e.*, where he sleeps, may be considered to be his own house, although he is not the proprietor thereof, but only a lodger or visitor. "I see no difference," observes Lord Loughborough, "between a house of which the execution debtor is solely possessed, and a house in which he resides by the consent of another" (*e*).

Mode of execution—Breaking open the outer door.—In *Semayne's case* (*f*) it was resolved—"1. That the house of every man is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.

"2. That when any house is recovered by any real action, or by ejectment, the sheriff may break the house, and deliver the seisin or possession to the demandant or plaintiff; for the words of the writ are '*habere facias seisinam*,' or '*possessionem*;' and, after judgment, it is not the house in right and judgment of law of the tenant or defendant.

"3. That in all cases where the King is party, the sheriff, if the doors be not open, may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. But, before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.

"4. That in all cases where the door is open the sheriff may enter the house and do execution, at the suit of any subject, either of the body or the goods; but that it is not lawful for the sheriff (after request made to open the door and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject.

"5. That the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore, in such cases, after denial on request made, the sheriff may break the house" (*g*).

(*c*) *Ratcliffe* v. *Burton*, 3 B. & B. 229. *Johnson* v. *Leigh*, 6 Taunt. 245.

(*d*) *Post*, p. 689.

(*e*) *Sheers* v. *Brooks*, 2 H. Bl. 122.

(*f*) 5 Co. 91.

(*g*) *Semayne's case*, 1 Smith's L. C., 8th ed., p. 114. The rule is, that in all cases where the sheriff has only a civil process against an inmate of a dwelling-house, even though it is a *capias*, it is not lawful for him to force his way into the debtor's house to arrest him or any of his family. A man's dwelling-house is his castle: *Hooker* v. *Smith*, 19 Vt. 151; *Risley* v. *Nichols*, 12 Pick. (Mass.) 270; *Oystead* v. *Shedd*, 13 Mass. 520. Even the raising of a latch of an outer door is such force as will justify the use of force to prevent the sheriff from either levying upon goods or arresting the debtor: *Curtis* v. *Hubbard*, 1 Hill (N. Y.) 336.

689 The principle that every man's house is his castle does not extend to a barn or outhouse, not connected with a dwelling-house. Therefore the sheriff may break open the door of a barn in order to levy an execution (*h*). He may also break open the outer door of the house to execute a writ of attachment (*i*).

If the officer, after he has peaceably obtained entrance through the outer door, and before he can make an actual arrest, is forcibly expelled from the house, and the outer door fastened against him, he may then break open the outer door and make the arrest (*k*); and, when he has once lawfully got inside the house, he is justified in breaking open the outer door to get out again, if the door is locked, and there is no one within who will open the door (*l*). If the window of a house is open or a pane of glass broken, and the bailiff puts his hand in and touches one for whom he has a warrant, he is thereby his prisoner, and the bailiff may break open the door of the house to come at him (*m*), or break through the window (*n*); and, if, after the officer has effected an arrest, the debtor breaks loose and escapes into a house, the sheriff, or his officer, may break open the house to retake him, whether the house is the debtor's own house or the house of a stranger, provided he has given notice of the object of his coming, and has demanded and been refused admission (*o*).

If the sheriff, or his officer, opens the outer door of a house by lifting the latch, or drawing back a sliding bar, in the ordinary way in which persons going into the house open the door, this is not a breaking of the door. "As to the passage," observes Pollock, C. B., "in Comyns' Digest, 'EXECUTION,' that the sheriff may not open a latch, there is no reference to any authority in support of it. The cases do not support that proposition" (*p*). A window which is partly open may be further opened by the sheriff for the purpose of entering (*q*).

Mode of execution—Breaking open of inner doors.—If the sheriff, or his officer, gains peaceable entrance at the outer door of a dwelling-house, he may break open an inner door of the house, either to seize the person or the goods of the owner of the house, or of a lodger therein (*r*); and, having entered at the open outer door of the house, he need not demand to have the inner doors

(*h*) *Penton* v. *Browne*, 1 Sid. 186.
(*i*) *Harvey* v. *Harvey*, 26 Ch. D. 644.
(*k*) *Aga Kurboolie Mahomed*, 4 Moore, P. C. 239.
(*l*) *Pugh* v. *Griffith*, 7 Ad. & E. 827.
(*m*) *Anon.*, 7 Mod. 8. *Sandon* v. *Jervis*, El. Bl. & El. 935; 28 L. J., Ex. 156. See *ante*, p. 147.
(*n*) *Lloyd* v. *Sandilands*, 8 Taunt. 250; 2 Moore, 210.
(*o*) *Anon.*, Lofft, 390.
(*p*) *Ryan* v. *Shilcock*, 7 Exch. 77; 21 L. J., Ex. 58. In America it has been held that a sheriff may not lift the latch of a door which is shut. *Curtis* v. *Hubbard*, 1 Hill's Rep. (New York) 336.
(*q*) *Crabtree* v. *Robinson*, 15 Q. B. D. 312.
(*r*) *Lee* v. *Gansell*, 1 Cowp. 1; Lofft, 374.

690 opened to him before he breaks them, in order to take goods under a *fi. fa.* (*s*). Any resistance to the bailiff after he has once entered at the open outer door will be punishable, although the entry may have been obtained by fraud and deceit (*t*).

Mode of execution—Illegality of arrest or seizure through unlawful entry.—If the original entry into a dwelling-house by a sheriff or his officers was unlawful and an act of trespass, their continuance in the house is unlawful; and they cannot avail themselves of an entry or possession unlawfully gained to make an arrest (*u*). If the sheriff, in making his entry, "has been guilty either of a breach of a positive statute, or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal" (*x*); and, if advantage is taken of the unlawful entry to effect an arrest, the court will order the prisoner to be discharged (*y*).

To break and enter a man's house for the purpose of arresting him "is really," observes Parke, B., "not an abuse of the authority of the writ, but it is executing the authority where the sheriff has none; like going out of the jurisdiction to execute the writ. The door being open is a condition precedent to executing the writ in the dwelling-house" (*z*). As regards the seizure of goods, however, after an unlawful breaking into the house, a different doctrine has prevailed, on the authority of the following case in the Year Book (*a*):—"Catesby comes to the bar, and asks whether a sheriff and his officers breaking into a dwelling-house to execute a *fi. fa.* do a wrong or not. The judges answer that the defendants may bring trespass against them, notwithstanding the *fi. fa.*; for that will not excuse them for breaking the house, but '*del prisel des biens tantum.*'" "This case," observes Coleridge, J., "is cited in *Semayne's case* (*b*), as establishing that, if the sheriff breaks the dwelling-house by force of a *fi. fa.*, he is a trespasser by the breaking, and yet the execution which he then doth is good. But it may be doubted whether the judges meant anything more in the Year Book than to state generally what a *fi. fa.* authorized a sheriff to do; but assuming that they did, still the *dictum* there, and that in *Semayne's case*, are both purely extrajudicial" (*c*).

Mode of execution—Remaining on the premises an unreasonable time.—The writ of *fi. fa.* authorizes the sheriff, who has entered upon premises for the purpose of making a levy under it, to remain there for such time as is reasonably necessary for the

(*s*) *Hutchison* v. *Birch*, 4 Taunt. 618. *Lloyd* v. *Sandilands*, 8 Taunt. 250; 2 Moore, 210.
(*t*) *R.* v. *Backhouse*, Lofft, 61.
(*u*) *Hooper* v. *Lane*, 6 H. L. C. 535; 27 L. J., Q. B. 75,
(*x*) Tindal, C. J., *Newton* v. *Harland*, 1 M. & G. 658.
(*y*) *Hodgson* v. *Tourning*, 5 Dowl. 410.
(*z*) *Kerbey* v. *Denby*, 1 M. & W. 341.
(*a*) 18 Edw. 4, 4a.
(*b*) 5 Co. 92 a, 92 b.
(*c*) *Hooper* v. *Lane*, *supra*,

691 execution of the writ; but if he remains more than a reasonable time, he abuses the legal authority conferred upon him by the Queen's writ, and becomes a trespasser, and is in the position of a man who has walked into another person's house without any authority. The reasonableness of the time is a question of fact (*d*).

Mode of execution—Seizure of goods.—If the sheriff's officer enters a house with a writ of *fi. fa.* in his hand, and demands the debt and costs, together with the expenses of levying, and threatens to leave a man in possession, and the debtor voluntarily pays the money to prevent further proceedings, there is a sufficient levy, and the sheriff will be entitled to the fee for levying, and to the poundage (*e*). Even when the money is not paid at once, he need not actually seize anything. It is sufficient, if he states to the persons left in charge of the property that he seizes everything there, and that nothing must be removed (*f*). When he has thus taken possession of the goods, his officer should continue in possession, in order to sustain the seizure against others afterwards coming under legal authority to seize the same goods (*g*). If he gives up possession without a lawful excuse, he will be liable to an action (*h*).

Seizure of goods—Goods privileged from seizure.—By the 25 & 26 Vict. c. 89, s. 163, it is enacted that, where any company is being wound up by the court, or subject to the supervision of the court, any attachment, distress, or execution, &c., put in force against the estate and effects of the company after the commencement of the winding up, shall be void to all intents (*i*). The words "put in force" mean the taking of possession by, not the delivery of the writ to, the sheriff. Where, therefore, the execution creditor placed the writ in the hands of the sheriff three hours before a petition for winding up the company was presented, but possession was not taken till three hours afterwards, all further proceedings under the writ were stayed (*k*). Under particular circumstances, however, as, for instance, where the company have not acted fairly towards the judgment creditor, he will be allowed to complete his execution (*l*). Where the creditor takes possession *before* the winding up, the court will not, under the provisions of the 87th section, restrain him, as a general rule, from reaping the benefit of

(*d*) *Ash* v. *Dawnay*, 8 Exch. 243. *Playfair* v. *Musgrove*, 14 M. & W. 239.

(*e*) *Bissicks* v. *Bath Colliery Co.*, 2 Ex. D. 459; 3 Ex. D. 174; 47 L. J., Ex. 408; overruling *Nash* v. *Dickenson*, L. R., 2 C. P. 253; and *Mortimore* v. *Cragg*, 3 C. P. D. 216; 47 L. J., C. P. 348; overruling *Roe* v. *Hammond*, 2 C. P. D. 300.

(*f*) *Gladstone* v. *Padwick*, L. R., 6 Ex. 203; 40 L. J., Ex. 154.

(*g*) *Blades* v. *Arundel*, 1 M. & S. 711. *Ackland* v. *Paynter*, 8 Pr. 95. As to the withdrawal of the sheriff under an interpleader order, see *Darby* v. *Waterlow*, *infra*.

(*h*) *Darby* v. *Waterlow*, L. R., 3 C. P. 453; 37 L. J., C. P. 203.

(*i*) See *In re Progress Assurance Co.*, L. R., 9 Eq. 370; 39 L. J., Ch. 504.

(*k*) *In re London and Devon Biscuit Co.*, L. R., 12 Eq. 190; 40 L. J., Ch. 574.

(*l*) *In re Bastow & Co.*, L. R., 4 Eq. 681.

692 his diligence (*m*). The same rule applies if the creditor would have been in possession but for the fact of the judgment debtor having prevented him by force (*n*).

By the 30 & 31 Vict. c. 127, s. 4, made perpetual by the 38 & 39 Vict. c. 31, no execution can be levied on the rolling stock or plant of a railway company, if the line is open for public traffic (*o*). The 7th section of the first-mentioned Act provides that, after the filing of a scheme of arrangement between the company and its creditors, under sect. 6, the court may restrain any action against the company on such terms as it thinks fit; and the 9th section provides that, after publication of a notice in the London Gazette, that the scheme has been filed, no execution, attachment, or other process against the property of the company shall be available without the leave of the court. Under these sections the court has only an interim power, between the filing and the enrolment of a scheme of arrangement, to allow an execution; but after the enrolment any creditor bound by the scheme would, it seems, be prevented from issuing execution (*p*).

Seizure of privileged or protected goods.—An action is not maintainable against a sheriff who has seized privileged or protected goods, in obedience to the commands of a writ; but the person injured must apply to the court for an order upon the sheriff to restore the goods. Thus, if the sheriff seizes the property of a person, who has obtained an order, from a court of competent jurisdiction, of protection from process, the remedy is by application to the court for an order upon the sheriff to withdraw, and not by action (*q*).

Seizure of the goods of the wrong person.—A sheriff or his officer seizing goods under a writ of execution is responsible in damages if he takes the goods of the wrong person. "If he takes the goods of a stranger, though the plaintiff assures him they are the defendant's goods, he is a trespasser; for he is obliged at his peril to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property in the goods is vested (*r*), or compel rival claimants to interplead and establish their title" (*s*). Where, therefore, two persons, being father and son, both had the same name of baptism and surname, and both resided in the same house, and an action was brought against the

(*m*) *In re Great Ship Co.*, 10 Jur., N. S. 3. *In re Plas-yn-Mhowys Coal Co.*, L. R., 4 Eq. 689.

(*n*) *In re London Cotton Co.*, L. R., 2 Eq. 53.

(*o*) See *In re Cambrian Railways Company's Scheme*, L. R., 3 Ch. 278.

(*p*) *In re Potteries, Shrewsbury & North Wales Rail. Co.*, L. R., 5 Ch. 67; 39 L. J., Ch. 273. *Potteries, Shrewsbury & North Wales Rail. Co.* v. *Minor*, L. R., 6 Ch. 621; 40 L. J., Ch. 685.

(*q*) *Rideal* v. *Fort*, 11 Exch. 847.

(*r*) Bac. Abr. EXECUTION, N. 5. 2 Roll. Abr. 552. *Roberts* v. *Thomas*, 6 T. R. 88. *Saunderson* v. *Baker*, 3 Wils. 309.

(*s*) *Post*, p. 694.

693 son, who suffered judgment by default, and a writ of execution was issued against him, under which the sheriff, by mistake, took the goods of the father, it was held that the sheriff was responsible for the consequences of his mistake (*t*).

The sheriff has no right to seize the goods of a stranger in the possession of the execution debtor as the ostensible owner (*u*). If a woman, having furniture of her own, cohabits with the execution debtor, and assumes his name, and gives herself out as his wife, and permits him to appear to be the owner of her furniture, this does not give the sheriff any right to seize it under an execution against him (*x*); and, if the man and woman have actually gone through the form of marriage, and are supposed to be man and wife, and the goods have been seized and sold by the sheriff, as the goods of the husband, without any notice or objection, and it afterwards transpires that the marriage was void, and that the goods belonged to the supposed wife before the celebration of the void marriage, the sheriff will be responsible to her in damages for the unlawful seizure (*y*). The acquiescence of the woman was held to be of no moment, the execution being a proceeding *in invitum*, she having no power to resist, and not having discovered the error. But, where the woman takes an active part in misleading the sheriff, and asserts that she is the wife of the execution debtor, knowing the assertion to be untrue, she is then herself the cause of the injury of which she complains, and is estopped from disputing the accuracy of her representation (*z*); and, if the evidence shows that she had given the property to the man with whom she cohabited, and had made him the owner of it, the sheriff will then have a right to seize it (*a*).

As one man's goods cannot be seized by the sheriff to pay another man's debts, it follows that the goods of a testator in the hands of an executor cannot be seized under an execution against the executor to satisfy a judgment debt due from the executor himself in his own right (*b*); but, if a *devastavit* has been committed by the executor, and the goods have been converted to his own use, the executor cannot take advantage of his own wrong, and justify his own misconduct, by saying that the goods are not his, but his testator's (*c*).

(*t*) *Jarmain* v. *Hooper*, 6 M. & G. 847; 7 Sc. N. R. 679; 13 L. J., C. P. 63.

(*u*) *Dawson* v. *Wood*, 3 Taunt. 260. See *Hilliard* v. *Hanson*, 21 Ch. D.

(*x*) *Edwards* v. *Bridges*, 2 Stark. 396.

(*y*) *Glasspoole* v. *Young*, 9 B. & C. 701; 4 M. & R. 533.

(*z*) *Langford* v. *Foot*, 2 M. & Sc, 349.

(*a*) *Edwards* v. *Farebrother*, 2 M. & P. 293. As to the seizure of goods let to hire to the execution debtor, see *Tancred* v. *Allgood*, 4 H. & N. 444; 28 L. J., Ex. 362; *post*, p. 699.

(*b*) *Farr* v. *Newman*, 4 T. R. 621. *Gaskell* v. *Marshall*, 1 M. & Rob. 132. *Fenwick* v. *Laycock*, 2 Q. B. 110.

(*c*) *Quick* v. *Staines*, 1 B. & P. 295.

694 An illegal seizure of goods under void process does not prevent the sheriff from afterwards executing a legal warrant. The subsequent valid seizure is in nowise vitiated by the previous trespass (*d*).

Seizure of goods—Interpleader.—In the courts of common law the practice of interpleader was governed by the 1 & 2 Will. 4, c. 58, and the 23 & 24 Vict. c. 126. By Ord. LVII. of the Rules of the Supreme Court, 1883, the provisions of those statutes are practically re-enacted, with alterations and additions.

By that Order it is provided, rule 1, that "Relief by way of interpleader may be granted,—

"(a.) Where the person seeking relief (in this Order called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto (*e*);

(b.) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods (*f*) or chattels by any person other than the person against whom the process issued."

By rule 2, "The applicant must satisfy the court or a judge by affidavit or otherwise—

"(a.) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs (*g*); and

(b.) That the applicant does not collude (*h*) with any of the claimants; and

(c.) That the applicant is willing to pay or transfer the subject-matter into court, or to dispose of it as the court or a judge may direct."

By rule 3, "The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another."

(*d*) *Percival* v. *Stamp*, 9 Exch. 171. *Hooper* v. *Lane*, 6 H. L. C. 443; 27 L. J., Q. B. 75.

(*e*) At common law an action must have actually commenced. It is immaterial whether the claims are legal or equitable. *Rusden* v. *Pope*, L. R., 3 Ex. 269; 37 L. J., Ex. 137. *Duncan* v. *Cashin*, L. R., 10 C. P. 554.

(*f*) Money paid under protest is within this rule, *Smith* v. *Crichfield*, 14 Q. B. D. 873; 54 L. J., Q. B. 366.

(*g*) See *Attenborough* v. *St. Katherine Dock Co.*, 3 C. P. D. 466; 47 L. J., C. P. 763.

(*h*) *Thompson* v. *Wright*, 13 Q. B. D. 632; 54 L. J., Q. B. 32.

695 By rule 4, where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons.

By rule 5, the applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

By rule 6, if the application is made by a defendant in an action, the judge may stay all further proceedings in the action.

By rule 7, if the claimants appear in pursuance of the summons, the judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute, in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.

By rule 8, the judge may, with the consent of both claimants, or on the request of any claimant, if, having regard to the value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

By rule 9, where the question is a question of law, and the facts are not in dispute, the judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court. If a special case is stated, Order XXXIV. shall, as far as applicable, apply thereto.

By rule 10, if a claimant, having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

By rule 11, the judgment is final unless by special leave.

By rule 12, when goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

By rule 13, Orders XXXI. and XXXVI. are made to apply.

By rule 14, where it is necessary to make one order in several causes in several divisions, or before different judges, such an order

696 may be made by the judge before whom the interpleader proceeding may be taken.

And by rule 15, the judge may make all such orders as to costs and all other matters as may be reasonable.

The Judicature Act, 1884, gives power to transfer interpleader proceedings in which the matter in dispute does not exceed the sum of 500*l.* to a county court (*i*).

Protection is given to the sheriff, wherever by reason of claims to the property, he is in danger of actions by the execution creditor if he yields to the claim, or by the claimant if he executes the writ. But he is not protected where the resistance is to the writ itself, *i. e.*, where the party in the cause objects to any execution on his own goods; for there the process itself, properly executed, would be the sheriff's defence (*k*). Where there has been an unlawful breaking open of the outer door of a dwelling-house by the sheriff, in order to effect the seizure of the chattels, this is a wrong quite independent of any question of ownership of the goods seized, and the court or a judge has no authority to stay proceedings in an action brought in respect thereof. "It is quite clear," observes Maule, J., "that an action for unlawfully breaking and entering a house in the execution of process is no more within the contemplation of the Act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is charged as a wrong-doer; there is nothing to interplead about; nobody but himself is interested in the result, or liable for the consequences" (*l*).

But, when there has been no independent trespass, when the outer door of a dwelling has not been broken open, and the entry into the house would be lawful and protected by the process if the goods found therein should turn out to be the goods of the execution debtor, the entry into the house cannot be separated from the seizure of the goods, but the whole cause of action may be stayed until the ownership of the goods has been determined by interpleader (*m*). If that is determined in favour of the sheriff, all further proceedings against him will be stayed; if it is decided against him, the action may be proceeded with for the recovery of damages for the trespass in the house as well as for the seizure of the goods (*n*).

If the execution creditor has personally interfered in making

(*i*) 47 & 48 Vict. c. 61, s. 17; and see County Court Rules, 1886, Order XXXIII. rule 10.
(*k*) *Fenwick* v. *Laycock*, 2 Q. B. 110.
(*l*) *Hollier* v. *Laurie*, 3 C. B. 342.
(*m*) *Winter* v. *Bartholomew*, 11 Exch. 711.
(*n*) *Foster* v. *Pritchard*, 2 H. & N. 151; 26 L. J., Ex. 215.

697 the seizure, and directed the movements of the sheriff, so as to render himself liable to an action, the court or a judge has power to interfere for his protection, as well as for the protection of the sheriff, and to stay proceedings against him (*o*).

The court will not lend its assistance to the sheriff, where there have been delays, irregularities, or sinister dealings on the part of his officers charged with the execution of the process. If a sheriff delays to make application for relief at the request, and for the interest, of one of the rival claimants, he will not be protected (*p*); he should come promptly to the court, without exercising any discretion of his own upon the matters in controversy (*q*). But, if, after he has seized but before he has sold, he receives notice of an adjudication in bankruptcy, and subsequently an order of court is made directing him to make a return to the writ of *fi. fa.*, he may sell under the authority of such an order, and pay the money into court (*r*). There are some old cases in which protection was denied under circumstances in which it would now be conceded (*s*).

In an interpleader suit the execution creditor may claim property which the execution debtor has disabled himself from claiming; for an estoppel which would be binding against the execution debtor in a claim put forward by him, will not be binding upon the execution creditor or the sheriff, who are strangers to the acts of the execution debtor (*t*).

Seizure of goods—Claims of landlords for rent in arrear.—By the 8 Anne, c. 14, s. 1, it is enacted, that no goods and chattels upon lands or tenements leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises, pay to the landlord or his bailiff all such sums as shall be due for rent at the time of the taking, not exceeding one year's arrears of such rent (*u*). If the rent of the premises on which the levy is to be made is in arrear, there are no goods out of which the sheriff is bound to levy, until the arrears, not exceeding one year's rent, have been paid to the landlord. The sheriff is not called upon by law to advance the money to pay the rent, but such advance must be made by the execution creditor; and, if he neglects to make it after notice of the rent being due, the sheriff cannot be called upon to seize and sell the goods, let their value be what it may (*x*).

(*o*) *Carpenter* v. *Pearce*, 27 L. J., Ex. 143.
(*p*) *Mutton* v. *Young*, 4 C. B. 375.
(*q*) *Crump* v. *Day*, 4 C. B. 764. *Tufton* v. *Harding*, 29 L. J., Ch. 225.
(*r*) *Child* v. *Mann*, L. R., 3 Eq. 806.
(*s*) *Holt* v. *Frost*, 3 H. & N. 821; 28 L. J., Ex. 55.
(*t*) *Richards* v. *Johnston*, 4 H. & N. 664; 28 L. J., Ex. 322.
(*u*) *Foster* v. *Cookson*, 1 Q. B. 419.
(*x*) *Cocker* v. *Musgrove*, 9 Q. B. 234.

698 If a year's rent is in arrear, and the goods on the premises are not sufficient to satisfy a year's rent, the sheriff must withdraw (*y*); and he may be restrained by injunction from selling the landlord's fixtures (*z*). If the sheriff has given notice to the execution creditor of the claim of rent, and the latter assents to the proceedings of the sheriff in respect thereof, he cannot afterwards turn round and complain of what he has himself sanctioned, although both he and the sheriff may have been deceived, or have acted under a misapprehension, or taken some erroneous view of the matter (*a*).

If the landlord or his agent accepts an undertaking from the sheriff or his officer to pay the rent due, and consents to the removal of the goods, he waives the benefit of the statute, and cannot afterwards sue thereon. His remedy in such a case is upon the undertaking (*b*).

A trustee in whom the legal estate in reversion is vested may be the landlord within the meaning of the statute (*c*). To entitle the landlord to the year's rent, there must be an existing tenancy (*d*) at an ascertained rent at the time (*e*), and the execution must not be an execution put in by, or at the instance of, the landlord himself (*f*). The statute does not extend to a ground rent due to the superior landlord (*g*), nor to goods seized by the sheriff and conveyed by bill of sale to the execution creditor, but not removed from the demised premises, the landlord's right to distrain such goods not being taken away (*h*).

This right of the landlord to a year's rent is confined to executions upon judgments (*i*) and private extents, and does not extend to prerogative process, such as an extent in chief, or an extent in aid (*k*).

Seizure of goods—Sale.—It is the duty of the sheriff to sell goods seized under a *fi. fa.* within a reasonable time after the seizure; and, if he fails to do so, an action is maintainable against him by the judgment creditor (*l*). If he sells more than sufficient to satisfy the judgment debt and costs, he will be responsible in damages to the execution debtor (*m*). In selling

(*y*) *Foster* v. *Hilton*, 1 Dowl. 35.
(*z*) *Richardson* v. *Ardley*, 38 L. J., Ch. 508.
(*a*) *Stuart* v. *Whittaker*, Ry. & M. 310.
(*b*) *Rotherey* v. *Wood*, 3 Campb. 24.
(*c*) *Colyer* v. *Speer*, 2 B. & B. 67; 4 Moore, 473.
(*d*) *Cox* v. *Leigh*, L. R., 9 Q. B. 333; 43 L. J., Q. B. 123.
(*e*) *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.
(*f*) *Taylor* v. *Lanyon*, 6 Bing. 536; 4 M. & P 316. *Lee* v. *Lopes*, 15 East, 230.
(*g*) *Bennet's case*, 2 Str. 736.
(*h*) *Smallman* v. *Pollard*, 6 M. & G. 1001; 7 Sc. N. R. 911. *White* v. *Binstead*, 13 C. B. 304; 22 L. J., C. P. 115.
(*i*) *Brandling* v. *Barrington*, 9 D. & R. 617.
(*k*) *R.* v. *Southerby*, Bunb. 5.
(*l*) *Jacobs* v. *Humphrey*, 2 Cr. & M. 413. *Bates* v. *Wingfield*, 2 N. & M. 831.
(*m*) *Batchelor* v. *Vyse*, 4 M. & Sc. 552.

699 goods seized under a writ of execution, he can convey no better title to the goods than the execution debtor himself possessed at the time of the sale; and he does not, when he sells, profess to do more than that, and does not warrant the title to the purchaser (*n*). If the sheriff has sold goods which were in the possession of the execution debtor at the time of the sale as the ostensible owner, but which were in reality the goods of a plaintiff, who had let them to hire to such execution debtor, the sheriff is not liable to an action for the wrongful sale, unless it is proved that some actual damage has accrued therefrom to the plaintiff (*o*), and that he has been prevented by the act of the sheriff from recovering possession of his goods (*o*).

When goods have been seized under a writ of *fi. fa.*, and the execution creditor afterwards becomes disentitled to recover the amount of the judgment debt, the sheriff cannot, at least without instructions from the execution creditor, sell any portion of the goods seized in order to realize thereby the amount of his possession-money, fees, and expenses (*p*).

If the sheriff seizes the goods of a trader-debtor under a *fi. fa.* for more than 50*l.*, and offers them for sale, but, before a sale can take place, the debtor files a petition for liquidation, and the trustee obtains an injunction restraining the sale, the sheriff is entitled to be paid by the trustee the necessary expenses of possession and of preparing for sale (*q*).

It is the duty of the sheriff to sell the goods to the best advantage (*r*). If he sells goods for much less than they ought to have been sold for, or does not take due and proper care in selling to the best advantage, or if he seizes or sells goods of much greater value than would suffice to satisfy the execution, poundage, and expenses, he will be responsible in damages to the party damnified (*s*).

Seizure of goods—Executions levied on the property of bankrupt traders.—The 4th section of the Bankruptcy Act, 1883, provides that any execution levied by seizure and sale of the debtor's goods under process in an action in any court, or in any civil proceeding in the High Court, shall be an act of bankruptcy; and the 46th section provides that the sheriff shall in such cases retain the proceeds of the sale in his hands for a period of fourteen days, in trust to pay them over to the trustee in bankruptcy, if a notice

(*p*) *Chapman* v. *Speller*, 14 Q. B. 621; 19 L. J., Q. B. 239.
(*o*) *Tancred* v. *Allgood*, 4 H. & N. 444; 28 L. J., Ex. 362.
(*p*) *Sneary* v. *Abdy*, 1 Q. B. D. 299; 45 L. J., Q. B. 803.
(*q*) *Ex parte Browning*, 8 Ch. D. 596; 47 L. J., Bk. 96.
(*r*) *Pitcher* v. *King*, 5 Q. B. 767.
(*s*) *Gawler* v. *Chaplin*, 2 Exch. 506. *Mullet* v. *Challis*, 16 Q. B. 239.

700 of a bankruptcy petition is presented within that time (*t*). The effect of these two sections is that, although by the first section the seizure and sale are an act of bankruptcy, yet the sheriff is protected in selling and the purchaser in purchasing the goods seized; and, if notice of a petition is presented within fourteen days, the proceeds will belong to the trustee; but, if no petition is presented within that time, the proceeds will belong to the execution creditor (*u*). Where the creditors of the debtor preferred to accept a composition under sect. 126 of the former Act, the execution creditor was held entitled to the proceeds of the execution (*x*). If, notwithstanding notice of the presentation of a petition, the sheriff pays the proceeds to the execution creditor, he will be liable to pay them over again to the trustee. If the goods remain unsold in the hands of the sheriff at the time of the appointment of the trustee in bankruptcy, he is entitled to them as against the execution creditor (*y*). But a resolution to accept a composition has no retrospective effect; and, therefore, where an execution has been levied by seizure between the filing of the petition and the resolution, the creditor is entitled to proceed with the execution notwithstanding the passing of the resolution (*z*).

The 87th section of the old Act applied, if the levy was for a sum exceeding 50*l.*, although part of that sum might be the costs of the execution (*a*). But an execution creditor who had sued for a debt exceeding 50*l.* might abandon part of his claim, and sign judgment for a sum less than 50*l.*, so as to avoid the operation of the section (*b*); and, if he had signed judgment for more than 50*l.*, he might also avoid the operation of the section by issuing execution (*c*), or by selling (*d*), for less than that amount. The present Act makes the amount 20*l.* (*e*), and the sales are to be by public auction (*f*).

Arrest of a debtor (*g*).—The law requires the presence of th

(*t*) *Ex parte Key*, L. R., 10 Eq. 432; 39 L. J., Bk. 28. This section is a re-enactment of the 24 & 25 Vict. c. 134, s. 73. See *Woodhouse* v. *Murray*, L. R., 4 Q. B. 27; 38 L. J., Q. B. 23.

(*u*) *Ex parte Villars*, L. R., 9 Ch. 432; 43 L. J., Bk. 76. *Ex parte James*, L. R., 9 Ch. 609; 43 L. J., Bk. 107.

(*x*) *Ex parte Sheriff of Middlesex*, L. R., 12 Eq. 207.

(*y*) *Ex parte Rayner*, L. R., 7 Ch. 325; 41 L. J., Bk. 26.

(*z*) *Ex parte Jones*, L. R., 10 Ch. 663; 44 L. J., Bk. 124.

(*a*) *Ex parte Liverpool Loan Co.*, L. R., 7 Ch. 732; 42 L. J., Bk. 14. *Howes* v. *Young*, 1 Ex. D. 146; 45 L. J., Ex. 499. *In re Grubb*, 4 Ch. D. 521; 5 Ch. D. 375; 46 L. J., Bk. 103.

(*b*) *Ex parte Reya*, 6 Ch. D. 332; 46 L. J., Bk. 122.

(*c*) *Ex parte Berthier*, 7 Ch. D. 882; 47 L. J., Bk. 64.

(*d*) *Turner* v. *Bridgett*, 8 Q. B. D. 392; 51 L. J., Q. B. 377.

(*e*) Sect. 46.

(*f*) Sect. 145.

(*g*) Imprisonment for debt is, with few exceptions, abolished by the Debtors Act, 1869 (32 & 33 Vict. c. 62). The old cases are, however, retained in the text as a guide for the practice under orders of committal. After the commencement of the Bankruptcy Act, 1883, no person can be arrested upon mesne process in any action; but where a plaintiff can show he has a good cause of action above 50*l.*, and that the defen-

701 responsible officer to control the execution of the writ. Where an arrest was made under a *ca. sa.* by a bailiff to whom the warrant was not addressed, in the absence of the officer to whom it was addressed, it was held that the arrest was irregular, and that the defendant was entitled to be discharged out of custody, and to maintain an action for wrongful imprisonment against the bailiff and the sheriff, unless the court imposed upon him terms prohibiting him from bringing an action (*h*). Where a gentleman, who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead, and the gentleman was shot by the debtor whilst he was endeavouring to arrest him, it was held to be no murder, as the arrest was illegal, not having been effected by the officer named in the warrant (*i*).

Arrest of the wrong person.—If the sheriff's officer, by mistake or through false information arrested the wrong party, the sheriff was responsible for the mistake, unless the person arrested was himself instrumental in giving false information to the sheriff, or brought about his imprisonment by his own misrepresentation (*k*). If the plaintiff had represented himself to be the person against whom the process had been issued, and was arrested in consequence of that information, he was estopped, as regarded that imprisonment, from denying that he was the right person; but after he had given notice of the real state of facts to the officers, and given them a fair opportunity of inquiry, the further detention was unlawful (*l*). It was held that it did not lie in the sheriff's mouth to say that he arrested *A*, sued under the name of *B*, although *A* was in fact served with the writ of summons issued against *B*, upon which service the action had proceeded to judgment (*m*).

Arrest of the right person under a wrong name.—If there was no mistake as to the person of the debtor, if his identity was established, but there was a misnomer, either from the debtor's having himself given a wrong name, or from his having suffered judgment to be obtained against him in the wrong name, he was deemed to be known as well by his assumed name as by his real name, and he had no ground to object to the proceedings against him (*n*). If he

dant is about to quit England, a judge may order the defendant to be arrested and imprisoned until he gives security (sect. 6 of Debtors Act, 1869); or a debtor may be arrested where he is about to abscond or to remove his goods, or if he fails to attend his examination (sect. 25 of Bankruptcy Act, 1883).

(*h*) *Rhodes* v. *Hull*, 26 L. J., Ex. 265. *Gregory* v. *Cotterell*, 5 El. & Bl. 571; 25 L. J., Q. B. 38.

(*i*) Kenyon, C. J., *Housin* v. *Barrow*, 6 T. R. 123.

(*k*) *Davies* v. *Jenkins*, 11 M. & W. 755. *Dunston* v. *Paterson*, 2 C. B., N. S. 495; 26 L. J., C. P. 268.

(*l*) *Dunston* v. *Paterson*, 2 C. B., N. S. 495; 26 L. J., C. P. 268.

(*m*) *Kelly* v. *Lawrence*, 3 H. & C. 1; 33 L. J., Ex. 197.

(*n*) *Price* v. *Harwood*, 3 Campb. 108. *Walker* v. *Willoughby*, 6 Taunt. 530.

702 had been sued by a wrong name, and suffered judgment to go against him without attempting to rectify the mistake, he could not afterwards, when execution had been issued against him in the wrong name, contend that he was not the person whom the sheriff or his officer was directed to arrest (*o*).

Arrest under one of several writs—Incurability of a wrongful imprisonment.—Where an arrest had been made on a valid writ, the sheriff might detain the person arrested on any number of valid writs which he had at the time against such person, or which afterwards reached him; but, if the sheriff made the arrest on a forged or a feigned writ, or a writ which had never been sealed or stamped, and which was therefore invalid, this gave him no right to detain the party on any other valid writs which might be at that time in his hands; for the sheriff could not avail himself of a custody brought about by illegal means to execute the other writs; and, if the sheriff knew, or ought to have known, that the writ under which he arrested was void, and nevertheless made the arrest, and so deprived himself of the power of executing other valid writs in his hands, he was responsible for culpable negligence and breach of duty. If an arrest was made on a Sunday, or in a way not authorized by law, the sheriff could not afterwards make that valid by detaining the person under a legal writ, but must first have given him an opportunity of going at large, and then have executed the legal writ. But that was not the case with regard to an execution against the goods (*p*). If, therefore, a first arrest was a false imprisonment by reason of the wrongful act of the sheriff himself or his officer, no subsequent conduct or act of his could legalize the continuance by him of that imprisonment (*q*).

Arrest of privileged persons.—In all cases of privilege, whether on the ground of the person being a member of the legislature (*r*), or having a duty to perform about the person of the Queen, or from any other cause, it was always considered that the sheriff was justified if he obeyed the Queen's writ, and that the privileged person must apply to the court for his discharge (*s*). Now, by sect. 124 of the Bankruptcy Act, 1883, a person having privilege of parliament and committing an act of bankruptcy may be dealt with under that Act in like manner as if he had not such

(*o*) *Fisher* v. *Magnay*, 5 M. & G. 779; 6 Sc. N. R. 599. *Crawford* v. *Satchwel*, 2 Str. 1218.

(*p*) *Eggington's case*, 2 El. & Bl. 728; 23 L. J., M. C. 41. *Perceival* v. *Stamp*, 9 Exch. 171. *Hooper* v. *Lane*, 6 H. L. C. 497; 27 L. J., Q. B. 75.

(*q*) *Humphrey* v. *Mitchell*, 2 Bing. N. C. 619; 5 Sc. 51.

(*r*) See *Newcastle* (*Duke of*) v. *Morris*, L. R., 4 H. L. 661; 40 L. J., Bk. 4. *In re Anglo-French Co-op. Soc.*, 14 Ch. D. 533; 49 L. J., Ch. 388.

(*s*) Alderson, B., *Rideal* v. *Fort*, 11 Exch. 852.

703 privilege. The arrest by the sheriff under a writ from any of the Queen's courts, of a person privileged from arrest, by reason of his being in attendance as a witness under the process of another court, did not form the ground of any action against the sheriff or his officer, even if done maliciously, but was only the subject of an application to the court, under whose authority the party had been compelled to appear as a witness, to discharge him from custody (*t*). If a person who had obtained an order of protection from a court of competent jurisdiction, or who was attending or returning from the court (*u*), was, nevertheless, arrested, he was entitled to be discharged, and thus obtained the benefit of his protection, but he had no claim for damages (*x*). An attachment against a solicitor for disobedience to an order of court is process of a punitive character, and no privilege can be claimed (*y*).

Arrest—Payment of the debt.—Under a writ of *fi. fa.*, which directs the sheriff to make a certain specified sum out of the goods and chattels of the defendant, and have the money at the return of the writ, the sheriff or his officer may receive the money in discharge of the execution, and withdraw the levy and liberate the defendant's goods on payment of the money; but under the writ of *ca. sa.*, which commanded the sheriff to have the body of the debtor at the return of the writ to satisfy the plaintiff, and not the money to pay the debt, the sheriff had no right to receive the money and discharge the debtor, and substitute his own responsibility for that of the debtor, whose body the creditor had a right by law to keep until he had been paid the debt. If, therefore, a sheriff's officer, charged with the execution of a writ of *ca. sa.*, allowed the debtor whom he had arrested under it to go at large on paying to him the sum mentioned in the writ, the sheriff was responsible for an escape; for it was a neglect of duty on the part of the officer for which the sheriff was answerable (*z*).

Arrest—Payment of debt—Certificate.—Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), upon payment of the sum mentioned in the order of committal, including the sheriff's fees and the costs, the person committed is entitled to a certificate of payment signed by the solicitor in the action, or, if the creditor is suing in person, a certificate signed by him and attested by a solicitor or justice of the peace; and thereupon the prisoner will be entitled to be dis-

(*t*) *Magnay* v. *Burt*, 5 Q. B. 395. See *Gilpin* v. *Cohen*, L. R., 4 Ex. 131; 38 L. J., Ex. 50, as to the arrest of an accused person out on bail attending a police court.

(*u*) *Chauvin* v. *Alexander*, 2 B. & S. 47; 31 L. J., Q. B. 79. This applies even to a police court, see *In re Freston*, *infra*.

(*x*) *Yearsley* v. *Heane*, 14 M. & W. 334.

(*y*) *In re Freston*, 11 Q. B. D. 545; 52 L. J., Q. B. 545.

(*z*) *Woods* v. *Finnis*, 7 Exch. 372.

704 charged out of custody (*a*). Under the old practice the sheriff was not bound to discharge the prisoner immediately on receiving the certificate, but was entitled to a reasonable time to search his office, to ascertain whether there were any other writs lodged against him (*b*).

Arrest—Liability for an escape.—Under the old practice if a defendant, after having been taken in execution, was seen at large for ever so short a time, either before or after the return of the writ under which he had been arrested, the sheriff was responsible for an escape, as the writ commanded him to take the defendant, and him safely keep, so that he might have him ready to satisfy the plaintiff (*c*). It was the duty of the sheriff to carry his prisoner to the county gaol after he had been arrested under a *ca. sa.*; and, when once in gaol, the debtor must have been kept there, and could not be allowed to go out, though with a keeper or sheriff's officer. If, therefore, he was seen without the walls of the prison, the sheriff was responsible for an escape (*d*). If the sheriff, after he had arrested the debtor, received from the latter the amount of the debt and costs, he was responsible to the judgment creditor for an escape, if he set his prisoner at large contrary to the exigency of the writ, before the judgment creditor had been satisfied his demand; for the duty of the sheriff was to pursue the direction of the writ, and be ready at the day, not with the money, but with the body of the debtor, unless the person himself who sued out the writ interfered and agreed to the liberation of the prisoner upon receipt of the money which had been paid to the sheriff (*e*).

It was the duty of an officer going to make an arrest in the execution of legal process, to choose his opportunity, and go with a force sufficient to repel opposition, and enable him to execute the process entrusted to him. If he failed to make an arrest, or if, having got the debtor into his custody, he failed to keep him for want of sufficient force, he was responsible for a breach of duty (*f*). But, if the prison took fire, or was broken open by the King's enemies of another kingdom, and the prisoner escaped, this excused the sheriff; but it was otherwise, if the prison was broken open by traitors and rebels (*g*). If the escape had been brought about by misrepresentation or misconduct on the part of the plaintiff, the latter had no cause of complaint against the sheriff (*h*).

(*a*) Debtors Act, 1869, s. 5 and rules.
(*b*) *Samuel* v. *Buller*, 1 Exch. 440.
(*c*) *Hawkins* v. *Plomer*, 2 W. Bl. 1048. *Moore* v. *Moore*, 25 Beav. 8; 27 L. J., Ch. 387.
(*d*) *Williams* v. *Mostyn*, 4 M. & W. 152.
(*e*) *Slackford* v. *Austen*, 14 East, 473. *Woods* v. *Finnis*, 7 Exch. 372.
(*f*) *Nicholl* v. *Darley*, 2 Y. & J. 403.
(*g*) *Southcote's case*, 4 Co. 84 a.
(*h*) *Hiscocks* v. *Jones*, M. & M. 269.

705 By the 8 & 9 Will. 3, c. 27, s. 8, it was enacted that, if the keeper of any prison should, after one day's notice in writing given for that purpose, refuse to show any prisoner, committed in execution, to the creditor at whose suit he was committed, or to his attorney, every such refusal should be adjudged an escape in law.

Arrest of the person and seizure of the goods under void or irregular process.—In depriving a man of his liberty and seizing his goods, the sheriff and his officers act at their peril, so that, if the process is feigned, forged, or simulated, and is not the process or order of the court, it is a mere nullity, and the sheriff can derive no protection from the piece of waste paper (*i*). But, if the sheriff has acted under a genuine writ, issued from one of the superior courts, he and his officers acting under him are protected by it, although it may be on the face of it irregular, or void in form; for the officers ought not to examine the judicial act of the court, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it (*k*). But the persons who have issued the void or irregular process are responsible for all damage and injury done in the execution of it, after the process has been set aside by the court or a judge, unless it has been set aside for error (*l*), or on the terms that no action shall be brought (*m*); and they will be responsible, although the writ has not been set aside, if it has been issued in defiance of the express provisions of a statute (*n*).

Generally speaking, however, so long as the process has not been set aside, it is a protection to the solicitor who has issued it, and to the client by whose commands it was issued (*o*); and, though, when it has been set aside, it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers, who had no option but to obey it (*p*). A writ of execution, therefore, may, at the same time, be both a good writ and a bad writ; that is to say, a writ set aside for irregularity may be good as to the sheriff and all persons acting under him, and bad as to the persons who sued it out (*q*). Where, however, the sheriff or his bailiff sets up a claim against a plaintiff, to goods taken in execution under a writ against a third person, the sheriff must show a

(*i*) *Hooper* v. *Lane*, 10 Q. B. 561; 6 H. L. C. 443; 27 L. J., Q. B. 75.
(*k*) *Countess of Rutland's case*, 6 Rep. 54 a. *Cotes* v. *Michill*, 3 Lev. 20.
(*l*) *Williams* v. *Smith*, 14 C. B., N. S. 596.
(*m*) *Parsons* v. *Lloyd*, 3 Wils. 341.
(*n*) *Brooks* v. *Hodgkinson*, 4 H. & N. 712; 29 L. J., Ex. 93.
(*o*) *Riddell* v. *Pakeman*, 2 C. M. & R. 33. *Blanchenay* v. *Burton*, 4 Q. B. 707.
(*p*) *Andrews* v. *Marris*, 1 Q. B. 17. *Jones* v. *Williams*, 8 M. & W. 356; 9 Dowl. 710. Best, J., in *Woolley* v. *Clark*, 5 B. & Ald. 746. *Turner* v. *Felgate*, 1 Lev. 95.
(*q*) Parke, B., *Jones* v. *Williams*, 9 Dowl. 710; 8 M. & W. 356. *Doe* v. *Thorn*, 1 M. & S. 427.

706 judgment against such third person, and his production of the writ of execution alone is not sufficient (*r*); and the reason for this seems to be, because the party against whom the judgment was passed might have applied to set it aside if there were error attending it; and, if he omits to do so, it is presumed, from his acquiescence, that the judgment is right (*s*).

If the sheriff, by force of a *fi. fa.*, sells goods, and afterwards the judgment is reversed, the defendant shall not have restitution of his goods, but the value of them, for which they were sold; and there are two reasons for this:—1. If the sale of the sheriff, by force of a *fieri facias*, should be avoided by subsequent reversal of the judgment, there would be no buyer, and by consequence no execution done. 2. In the case of a *fieri facias*, the sheriff is compellable to make and levy the debt of the goods, &c., of the defendant, and therefore there is reason that it should stand (*t*).

Return of the writ.—The sheriff is bound to return the writ upon notice (*tt*). But, if the sheriff has interpleaded, and an issue has been directed, the sheriff will not be compelled to return the writ until the issue has been disposed of (*u*). After a return to a *fi. fa.* that the money is levied, the sheriff is liable to an action for money had and received without any demand of payment (*x*).

False returns to writs of execution.—If the sheriff makes a false return to a writ of execution, he is responsible in damages to the execution creditor, if any actual damage has resulted to him from the false return (*y*), but not otherwise; nor is he estopped by his false return from showing that there were in fact no goods of the execution debtor on which he could levy, and so that no damage was suffered by the execution creditor (*z*). A return of *nulla bona* to a writ of *fi. fa.* means, that there are no goods applicable to the execution of the plaintiff's writ, not that there are no goods at all belonging to the execution debtor. If, therefore, the payment of prior claims, such as rent due to the landlord, or sums leviable under prior writs of execution, has exhausted the fruits of the levy, the sheriff has no goods out of which the damages can be levied, and a return of *nulla bona* is a good return (*a*). If the

(*r*) *White* v. *Morris*, 11 C. B. 1015; 21 L. J., C. P. 185.

(*s*) Bayley, J., *Doe* v. *Murless*, 6 M. & S. 114.

(*t*) *Hoe's case*, 5 Co. 90 b.

(*tt*) Order LII., r. 11.

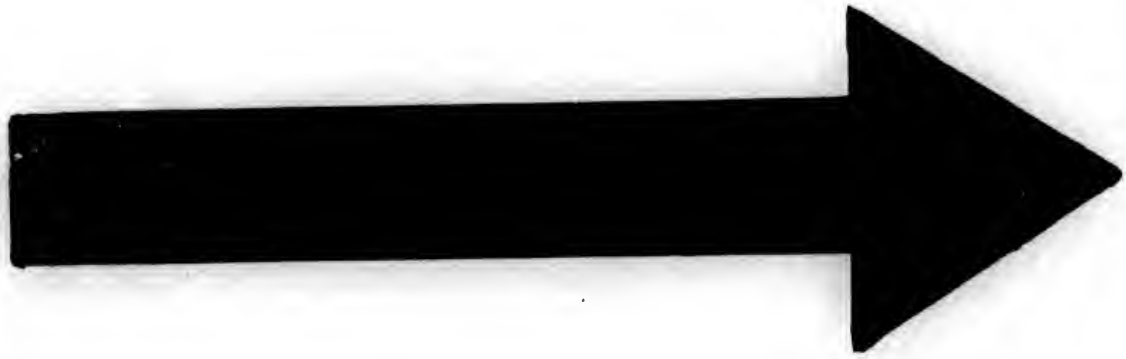
(*u*) *Angell* v. *Baddeley* (L. R., 3 Ex. D. 49; 47 L. J., Ex. 86), where there were three distinct claimants of different parts of the goods seized and three issues.

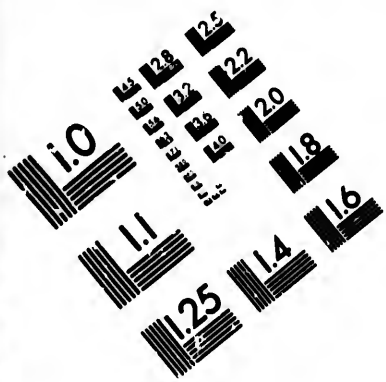
(*x*) *Dale* v. *Birch*, 3 Campb. 347. See *ante*, pp. 699 *et seq.*, as to the sheriff retaining in certain cases the proceeds of a levy for fourteen days.

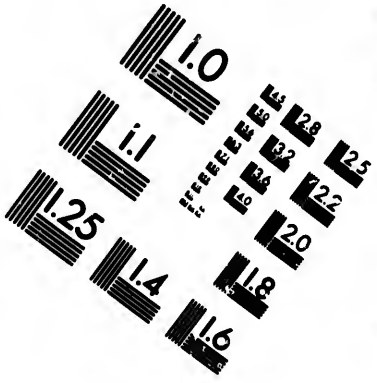
(*y*) *Wylie* v. *Birch*, 4 Q. B. 566.

(*z*) *Stimson* v. *Farnham*, L. R., 7 Q. B. 175; 41 L. J., Q. B. 52.

(*a*) *Shattock* v. *Carden*, 6 Exch. 725. *Wintle* v. *Freeman*, 11 Ad. & E. 547. *Heenan* v. *Evans*, 3 M. & G. 398; 4 Sc. N. R. 2.







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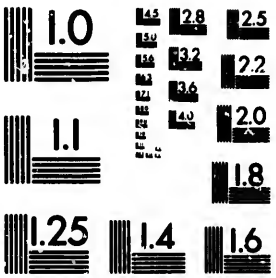

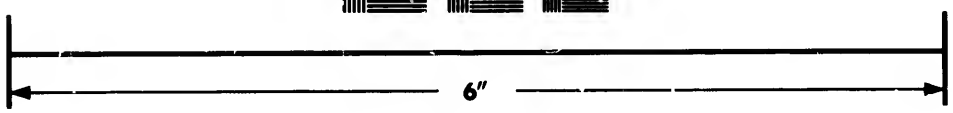

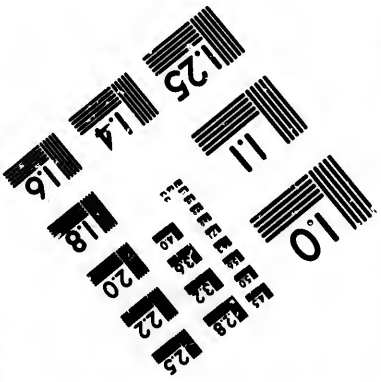

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707 sheriff returns that he has seized certain goods and chattels, he ought to specify their value, and not return that their value is to him unknown (*b*). A reasonable degree of certainty in the language of the return is sufficient.

The sheriff will not be allowed, in an action against him for a false return, to defend himself by putting a construction on his own return which, although making it true in fact, will make it bad in law, when it admits of another construction which will make it good (*c*).

Extortion.—By the 29 Eliz. c. 4, s. 1, it is enacted, that it shall not be lawful for any sheriff, under-sheriff, bailiff, &c., nor for any of their officers, deputies, &c., by reason or colour of their offices, to receive or take, for the serving or executing any extent or execution, more consideration or recompence than is by that Act limited and appointed, upon pain that every sheriff, under-sheriff, &c., their officers, &c., who shall directly or indirectly do the contrary, shall forfeit to the party grieved treble damages, and pay a penalty as therein mentioned; but the Act is not to extend to fees taken for executions within any city or town corporate. The 7 Will. 4 & 1 Vict. c. 55, further enacts, that it shall be lawful for sheriffs and their officers to receive such fees, and no more, as shall be allowed by the taxing officers of the courts of Westminster under the sanction of the judges, and that any sheriff or officer receiving any fee or gratuity greater than is allowed, shall be guilty of a contempt of court, and punishable accordingly. By the 5 & 6 Vict. c. 98, s. 31, it is enacted, that no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution (*d*); but there shall be payable to the sheriff, or other person having the return of writs, upon every such execution against the body, such fees only as shall be allowed to be taken under the 7 Will. 4 & 1 Vict. c. 55. The sheriff still continues entitled to his poundage under the statute of Elizabeth, on an execution against the goods of the debtor, and also to any additional fee that may be allowed by the judges under the 7 Will. 4 & 1 Vict., and to no more. If his officer takes more, the sheriff is guilty of extortion, and is liable to an action for treble damages (*e*).

Breach of duty—Damages recoverable.—Whenever it has been proved that the sheriff owed a duty to the plaintiff, and that there has been a breach of that duty, damages are recoverable in respect of any actual pecuniary damage sus-

(*b*) *Barton* v. *Gill*, 12 M. & W. 318.
(*c*) *Reynolds* v. *Barford*, 7 M. & G. 449; 8 Sc. N. R. 239.
(*d*) *Hayley* v. *Racket*, 5 M. & W. 620.
(*e*) *Wrightup* v. *Grenacre*, 10 Q. B. 12. *Pilkington* v. *Cooke*, 16 M. & W. 615. *Woodgate* v. *Knatchbull*, 2 T. R. 155.

708 tained by the plaintiff. But in cases of *fi. fa.*, although *primâ facie* the measure of damages is the value of the goods which might have been taken, yet it is for the jury to say under all the circumstances, whether, if the execution had been levied, the plaintiff would have derived any benefit from it; as, for instance, if the other creditors of the execution debtor were in a position to make him bankrupt (*f*). Nor will the plaintiff in such a case be entitled to nominal damages (*f*).

If the sheriff has improperly delayed the execution of a writ, and the plaintiff has been put to expense in trying to have the writ executed, he may be entitled to recover these expenses as part of the damages (*g*). In an action against a sheriff for not selling the execution debtor's share in chattels, in which he was jointly interested with another person, Lord Ellenborough said to the jury, "I cannot lay down any measure for your assessment of damages short of half the value. In giving any other you will take a leap in the dark. Some purchasers might think the value depreciated by the co-partnership, others might not regard the circumstance" (*h*).

In an action against a sheriff or his officer for the wrongful taking of goods, the plaintiff, if he recovers a verdict, is entitled to the full value of the goods. It is not competent for the sheriff to say as to part of it, "I have paid rent;" for, being a wrong-doer, he had no right to take upon himself to apply the proceeds of the wrongful sale (*i*). So, in an action against a sheriff for taking the plaintiff's goods under process upon a regular judgment, but in a place to which the process did not extend, the plaintiff is entitled to recover the whole value of the goods, and not merely the damage he has sustained by their being taken in a wrong place (*k*). Whenever a public officer has wrongfully seized and detained goods from the owner, the latter is entitled to recover all the loss resulting from the wrongful act, so that, if the property detained has fallen in value in the market, the plaintiff is entitled to add the amount of that to the other damage he has sustained (*l*). But, if a sheriff takes goods in execution after an act of bankruptcy, and sells them, the jury may, in an action by the trustee in bankruptcy for the unlawful taking, allow to the sheriff the expenses of the sale, if they think the trustee must have sold the goods if they had not been sold by the sheriff (*m*). If goods which have been let to hire to an execution debtor have

(*f*) *Hobson* v. *Thelluson*, L. R., 2 Q. B. 642; 36 L. J., Q. B. 302.
(*g*) *Mason* v. *Paynter*, 1 Q. B. 974.
(*h*) *Tyler* v. *Leeds* (*Duke of*), 2 Stark. 222.
(*i*) *White* v. *Binstead*, 13 C. B. 308; 22 L. J., C. P. 115.
(*k*) *Sowell* v. *Champion*, 6 Ad. & E. 407.
(*l*) *Barrow* v. *Arnaud*, 8 Q. B. 609.
(*m*) *Clark* v. *Nicholson*, 6 C. & P. 712; 1 C. M. & R. 724.

709 been seized and sold by the sheriff, under a writ of *fi. fa.* against the debtor, the sheriff cannot be sued by the owner of the goods, unless he has sustained some actual damage by the act of the sheriff (*n*).

If a sheriff or his officer threatens to make a levy on goods which belong to the plaintiff, and the latter, in order to prevent his goods from being seized and sold, pays a sum of money to such sheriff or officer, he is entitled to recover back the money on proving that the sheriff had no right to make the levy or seize the goods he threatened to seize (*o*).

In actions for unlawfully removing goods without paying rent due to the landlord, the damages recoverable by the latter are not limited to the amount realised by the sheriff on the sale of the goods, but the landlord may recover the actual damage sustained by him from the sheriff's neglect of duty, whatever that may be (*p*).

Breach of duty—Exemplary damages.—Where trespasses of a serious nature have been committed by officers of the law under colour of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process "is calculated to lead to dangerous conflicts; and, where it is proved to the satisfaction of a jury to have taken place, the proper amount of damages to be awarded must depend so much upon the general circumstances that it is very difficult to discover any standard by which to measure the amount" (*q*); and the court will not interfere, on behalf of the sheriff or his officers, with the constitutional functions of the jury in assessing the damages, although it may do so, if the defendant making the application, and who is jointly sued with the sheriff, was not implicated in the aggravations justifying the amount of damages as against the sheriff (*r*).

Breach of duty—Recovery of treble damages for extortion.—If the plaintiff, in an action against a sheriff for extortion, frames his declaration on the statute of Elizabeth (*s*), for the recovery of treble damages, the jury should be asked to assess the actual damage sustained, and the finding should be entered upon the record as the actual damage, so as to entitle the plaintiff to judgment for treble the amount found by the jury (*t*).

Responsibility for his officers.—The high sheriff may be respon-

(*n*) *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362.
(*o*) *Valpy* v. *Manley*, 1 C. B. 602.
(*p*) *Foster* v. *Hilton*, 1 Dowl. P. C. 38. *Calvert* v. *Joliffe*, 2 B. & Ad. 421.
(*q*) *Brunswick* (*Duke of*) v. *Slowman*, 8 C. B. 331.
(*r*) *Gregory* v. *Cotterell*, 1 El. & Bl. 369; 22 L. J., Q. B. 217.
(*s*) *Ante*, p. 707.
(*t*) *Ante*, p. 85. *Buckle* v. *Bewes*, 4 B. & C. 154.

710 sible for the acts of the under-sheriff in the execution of the duties of his office, as he is the general officer of the sheriff; but the bailiff is not the general officer of the sheriff. The bailiff gives a bond to the sheriff to execute such warrants as shall be directed to him; and, when a warrant is given to him, he becomes the special officer of the sheriff for the execution of the particular warrant; and the sheriff is responsible for what he does in the execution thereof; but he is not responsible when the act done by the officer is not done in the execution of a warrant (*u*), or is done in the execution of a warrant improperly issued by the under-sheriff without having received a writ upon which it purports to be founded (*x*). If the sheriff takes the fruits of an execution levied by the officer, and ratifies and adopts his acts, he recognizes him as his authorized agent in the particular transaction, and will be responsible accordingly (*y*).

The liability of the sheriff, in case of mistake or misconduct on the part of his officer, is confined to cases where there is a misdoing of something which the sheriff commands him to do.

(*u*) Littledale, J., *Crowder* v. *Long*, 8 B. & C. 605. *Drake* v. *Sykes*, 7 T. R. 116. The officer should be subpœnaed to produce the original warrant under which he acted; and, if it is improperly withheld after notice to produce it, secondary evidence may be given of its contents. *Drake* v. *Sykes*, 7 T. R. 113. *Minshull* v. *Lloyd*, 2 M. & W. 458. If the warrant has been returned by the officer to the under-sheriff, notice should be given to the latter, or to the solicitor of the sheriff, to produce it, if the sheriff is still in office. *Taplin* v. *Atty*, 3 Bing. 166. If the defendant has gone out of office, and the warrant has been sent to the persons who acted as his London agents whilst he was in office, and who are also his solicitors on the record, notice to them to produce the warrant is sufficient to entitle the plaintiff to give secondary evidence of its contents. *Suter* v. *Burrell*, 2 H. & N. 867. If it is proved that by the ordinary course of business in the under-sheriff's office the name of the officer who is to execute the writ is indorsed on the process, and the writ so indorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed upon it, and proves that the indorsement was made at the under-sheriff's office, or was made before it got there, and was afterwards adopted there, it will be *primâ facie* evidence that the person named in the indorsement was the person authorized by the sheriff to execute the writ; for, if the warrant was granted to a different officer, the sheriff has the means of proving it. *Scott* v. *Marshall*, 2 Cr. & Jerv. 242. *Tealby* v. *Gascoigne*, 2 Stark. 202. But the mere production of the writ and indorsement, without proof that the indorsement was made in the sheriff's office, or adopted by the sheriff, will not be sufficient to implicate the sheriff. *Hill* v. *Sheriff of Middlesex*, 7 Taunt. 8. The statements and declarations of an under-sheriff are no evidence to charge the sheriff, unless they accompany some official act, or unless they tend to charge himself, he being in truth the real party in the cause. *Snowball* v. *Goodricke*, 4 B. & Ad. 543. What a bailiff says in a general conversation with any indifferent person, certainly is not evidence against the sheriff; but declarations made by him in the course of the execution of a writ to parties interested in making the inquiry, are evidence against the sheriff in the particular matter to which they relate. *North* v. *Miles*, 1 Campb. 390. *Jacobs* v. *Humphrey*, 2 Cr. & M. 414. If the plaintiff, in order to prove his case against the sheriff, puts in evidence the warrant from the sheriff to his officer, he does not thereby make the recital of the writ in the warrant to the sheriff evidence for the latter of the writ, and dispense with the necessity of proof of it by the sheriff. *White* v. *Morris* (11 C. B. 1033; 21 L. J., C. P. 185), overruling *Bessey* v. *Windham*, 6 Q. B. 166.

(*x*) *Gibbins* v. *Phillips*, 7 B. & C. 535, note. The *onus* of establishing this defence is on the sheriff. *Ibid.*

(*y*) *Martin* v. *Bell*, 1 Stark. 416. *Jones* v. *Wood*, 3 Campb. 228. *Woodgate* v. *Knatchbull*, 2 T. R. 155.

711 If the sheriff is sued for a misfeasance of the officer, it is no answer for him to say that his command was not obeyed: he is still liable, provided the thing done is something which, by the command or under the authority of the sheriff, the officer was bound to do (*z*). If a sheriff, acting under a *fi. fa.*, issues his warrant to his officer, directing him to levy a certain sum on the goods and chattels of the debtor in the usual form, and the officer arrests the debtor instead of levying on the goods, the sheriff will be responsible in damages for the mistake, although the sheriff never directed or authorized him to make the arrest (*a*), the case of a sheriff differing in this respect from the liability of an ordinary principal for the acts of an agent who does not pursue the authority committed to him.

But, if the officer derives his authority for what he does from some third party, and not from the sheriff (*b*), or if he is not acting in the execution of any process directed to him by the sheriff to be executed, the sheriff is no party to his acts, and is not responsible for what he does. Thus, where an execution debtor arrested under a *ca. sa.*, paid the debt and costs to the sheriff's officer to obtain his discharge, and the sheriff's officer failed to pay over the money to the execution creditor, in consequence whereof the debtor was a second time arrested under a fresh writ upon the same judgment, it was held that the sheriff was not liable to the debtor for the default of his officer in not paying over the money, as it was no part of the duty of the sheriff or his officer to receive the money. Such a transaction is in the nature of a private arrangement between the debtor and the officer; and the debtor must resort to the officer, who is responsible to him for the non-payment of the money, like any other person who has received a sum of money to be paid to another, and has made default in so doing (*c*).

Responsibility for his officers—Execution of writs by special bailiffs.—If the sheriff, at the request of the person suing out the writ or his solicitor, appoints a special bailiff for the execution of it, the sheriff is not then liable for the acts of the officer so appointed (*d*). When, however, the execution of the writ is not expressly taken out of the hands of the sheriff, if there is a mere request that a particular officer may be employed in the execution of it, this does not constitute that officer a special bailiff of the person making the request (*e*). So, if the debtor interferes with

(*z*) *Smith* v. *Pritchard*, 8 C. B. 588.
(*a*) *Smart* v. *Hutton*, 8 Ad. & E. 568, n. *Raphael* v. *Goodman*, *ib.* 565. *Gregory* v. *Cotterell*, 5 El. & Bl. 586; 25 L. J., Q. B. 38.
(*b*) *Cook* v. *Palmer*, 6 B. & C. 742.
(*c*) *Woods* v. *Finnis*, 7 Exch. 372.
(*d*) *Ford* v. *Leche*, 6 Ad. & E. 706. *Doe* v. *Trye*, 5 Bing. N. C. 573; 7 Sc. 704.
(*e*) *Alderson* v. *Davenport*, 13 M. & W. 42. *Corbet* v. *Brown*, 6 Dowl. 794.

712 the officer, although he will thus relieve the sheriff from responsibility as to those matters in which he has interfered, the sheriff will not thereby be relieved from responsibility as to matters in which the debtor has not interfered (*f*).

Responsibility of the execution creditor for the acts of the sheriff and his officers.—If the sheriff, by inadvertence or mistake, enters the house and seizes the goods of the wrong person, in the execution of legal process, all persons, whether plaintiffs, solicitors in the action, or strangers, who interfere in any way, by giving directions or assistance are liable; for every person who procures or directs the commission of an act of trespass is as much responsible for the injury as the person who actually commits it; but a simple intimation or direction to the officer that he is not to be prevented by an adverse claim from seizing the goods found in the dwelling-house of the execution debtor, will not render the person interfering to such an extent only, responsible for a wrongful seizure by the bailiff (*g*). Sheriffs' officers making an arrest are not the agents or bailiffs of the plaintiff for whose benefit the writ is issued; and, if they arrest the wrong person, the plaintiff in the action is not responsible for their misconduct, unless he has personally interfered, and has superintended or directed the movements of the sheriff or his officers (*h*). If the plaintiff in an action does no more than set the court in motion, he is no trespasser, notwithstanding that such court should, on his motion, do an act of trespass by its officers (*i*); and a solicitor who merely delivers a writ of execution to the sheriff, and does not take upon himself to give wrong directions, and does not, by word or act, induce the officer to seize the wrong person, is not responsible for the mistakes of the officer and for a trespass committed by the latter in seizing the goods of such person, or seizing beyond the limits of his bailiwick, although he believes that the officer is about to go wrong and to exceed his duty (*k*). If the solicitor, by the indorsement on the writ, gives wrong directions to the sheriff or his officers, and thereby causes them to seize the goods of the wrong person, the client is responsible for the act of the solicitor (*l*). But the client is not responsible for wrong directions given by his solicitor to the sheriff otherwise than by indorsement on the writ (*m*). If acts of

(*f*) *Wright* v. *Child*, L. R., 1 Ex. 358; 35 L. J., Ex. 209.

(*g*) *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 L. J., Ex. 277.

(*h*) *Wilson* v. *Tummon*, 6 M. & G. 244; 6 Sc. N. R. 906. *Walley* v. *M'Connell*, 13 Q. B. 911. *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513. *Whitmore* v. *Greene*, 13 M. & W. 104.

(*i*) *Kinning* v. *Buchanan*, 8 C. B. 291. *Abley* v. *Dale*, 10 C. B. 62. *Painter* v. *Liverpool Gas Co.*, 3 Ad. & E. 433.

(*k*) *Sowell* v. *Champion*, 6 Ad. & E. 417.

(*l*) *Jarmain* v. *Hooper*, 6 M. & G. 850; 7 Sc. N. R. 681. *Collett* v. *Foster*, 2 H. & N. 361. *Brooks* v. *Hodgkinson*, 4 H. & N. 712; 29 L. J., Ex. 93. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362.

(*m*) *Smith* v. *Keal*, 9 Q. B. D. 340; 51 L. J., Q. B. 487.

713 trespass have been committed under colour of legal process, which has been set aside as irregular, both the client who commands the solicitor and the solicitor who sues out the process are responsible as principals in the commission of the acts of trespass done by their procurement and commandment (*n*). They are in the same situation after the process has been set aside as if they had themselves, orally or by writing, desired the sheriff or his officer to make the seizure (*o*); but it is otherwise, if the issue of the process is a judicial act, and the process is afterwards set aside, not for irregularity, but for error (*p*).

The costs of setting aside a judgment for irregularity cannot be made the subject of special damage, in an action against the plaintiff or his solicitor for seizing the plaintiff's goods under colour of the irregular judgment, if such costs have been applied for, and refused by the court on motion (*q*).

High bailiff—Duties and responsibilities of the high bailiff, bailiffs, and registrars, of the county court.—By the 9 & 10 Vict. c. 95, s. 33, the high bailiff of the county court is made responsible for all the acts and defaults of himself, and the bailiffs appointed to assist him, in like manner as the sheriff in any county in England is responsible for the acts and defaults of himself and his officers. His liability is co-extensive with that of the sheriff (*r*); but he is not responsible for acts done by his bailiffs under colour of some special power or authority supposed to be given to them under the County Courts Act, and not done under the authority or in execution of a warrant (*s*). The 29 & 30 Vict. c. 14, s. 11, provides for the appointment of the registrars of county courts to succeed to the duties and liabilities of high bailiffs, as vacancies shall occur.

By the 19 & 20 Vict. c. 108, s. 60, it is enacted that no officer of a county court, in executing a warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it; but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings; also (sect. 55), that any warrant to a

(*n*) *Codrington* v. *Lloyd*, 8 Ad. & E. 449. *Barker* v. *Braham*, 3 Wils. 376. *Bates* v. *Pilling*, 6 B. & C. 39.

(*o*) Tindal, C. J., *Wilson* v. *Tummon*, 6 M. & G. 236; 6 Sc. N. R. 905. *Green* v. *Elgie*, 5 Q. B. 114.

(*p*) *Williams* v. *Smith*, 14 C. B., N. S. 596.

(*q*) *Loton* v. *Devereux*, 3 B. & Ad. 345.

(*r*) *Burton* v. *Le Gros*, 34 L. J., Q. B. 91.

(*s*) *Smith* v. *Pritchard*, 8 C. B. 588.

714 high bailiff, to give possession of a tenement under that statute, shall justify the bailiff named in the warrant, in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession; but the entry must be made between the hours of nine in the morning and four in the afternoon, and the warrant must be executed within three months from the day it bears date (sect. 56).

Duty of bailiffs of the county court to satisfy the landlord's claim for rent.—By the 19 & 20 Vict. c. 108, s. 75, it is enacted, that the 8 Anne, c. 14 (*t*), shall not apply to goods taken in execution under the warrant of a county court; but the landlord may, within five days of the taking, or before the removal of the goods, make a claim in writing for rent, signed by himself or his agent, stating the amount of the rent in arrear, and the time for which it is due; and, if such claim is made, the officer making the levy is to distrain for the rent so claimed and the costs of the distress, but he is not to sell within five days, unless the goods are of a perishable nature, or upon the request in writing of the person whose goods have been taken. After the five days the bailiff is to sell such of the goods as will satisfy, first, the costs of the sale, next, the claim of the landlord, not exceeding the rent for four weeks where the tenement is let by the week, the rent for two terms of payment where the tenement is let for any other term less than a year, and the rent for one year in any other case, and, lastly, the amount for which the warrant issued. If any replevin is made, the bailiff is, notwithstanding, to sell such portion of the things taken as will satisfy the costs of the sale under the execution, and the amount for which the warrant issued. Any overplus of the sale or residue of the goods is to be returned to the defendant.

The county court bailiff cannot, under this statute, distrain the goods of a stranger on the demised premises for the purpose of satisfying the landlord's rent (*u*).

Breach of duty—Remedy by action (*x*)*—Notice of action.*—By the County Courts Act, 9 & 10 Vict. c. 95, s. 138, notice of action is required to be given to all persons acting in execution of that Act. If the bailiff of a county court, under a warrant against the goods of *A*, by mistake takes those of *B*, this is an act done in

(*t*) *Ante*, p. 697.

(*u*) *Beard* v. *Knight*, 8 El. & Bl. 865; 27 L. J., Q. B. 359. *Foulger* v. *Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154.

(*x*) By the 19 & 20 Vict. c. 108, s. 24, if the action is brought in the county court, the summons may issue in the district of which the defendant is an officer, or in an adjoining district, although in a different county (*Partridge* v. *Elkington*, L. R., 6 Q. B. 82; 40 L. J., Q. B. 89), the judge of which is not the judge of a court of which the defendant is an officer; and it has been held that this section, by virtue of the operation of the 28 & 29 Vict. c. 99, s. 21, extends to suits in equity. *Linford* v. *Gudgeon*, L. R., 6 Ch. 359; 40 L. J., Ch. 514.

715 pursuance of the County Courts Act, which entitles the bailiff to notice of action (*y*).

Breach of duty—Action—Demand of warrant.—By the 13 & 14 Vict. c. 61, s. 19, it is enacted that no action shall be brought against any high bailiff or bailiff, or any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand of the clerk of the county court and the seal of the said court, until demand hath been made or left at the office of such high bailiff, by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of the warrant, and the same hath been refused or neglected for the space of six days after the demand; and in case, after demand and compliance therewith, by showing the warrant, and permitting a copy to be taken, any action shall be brought against the high bailiff, bailiff, or other person acting in his aid, for any such cause as aforesaid, without making the clerk of the court who signed or sealed the warrant defendant, then, on producing or proving the warrant at the trial of the action, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the warrant; and, if the action be brought jointly against the clerk and high bailiff, or bailiff, or person acting in his aid, then, on proof of the warrant, the jury shall find for the high bailiff, or bailiff, or person so acting as aforesaid, notwithstanding such defect or irregularity.

Breach of duty—Action—Staying proceedings.—The 30 & 31 Vict. c. 142, s. 31, enacts that, if any claim shall be made to goods or chattels taken in execution under the process of a county court, or to the proceeds or value thereof, by any person, it shall be lawful for the registrar of the court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons, calling before the court as well the party issuing the process as the party making the claim, and thereupon any action which may have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed; and the judge of the county court is to adjudicate upon the claim, and make such order in respect thereof and of the costs as to him shall seem fit. He is also to adjudicate between the parties or either of them and the high bailiff with respect to "any damage arising or capable of arising out of the execution of such process," and the costs of the pro-

(*y*) *Burling* v. *Harley*, 3 H. & N. 271; 27 L. J., Ex. 258. As to parties interfering in the execution of the process, see *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 L. J., Ex. 277.

716 ceedings: which order is to be enforced like any other order of the county court, and is to be final and conclusive between such parties and the high bailiff, unless the decision of the court is appealed from.

The above section is in substitution of the 118th section of the 9 & 10 Vict. c. 95, which is repealed, and under which it was held that, if the county court judge decided in favour of the bailiff, the superior court in which an action had been brought against him would stay all further proceedings against him in the action, unless there was some substantive cause of complaint beyond that of entering the house to make the seizure (*z*), but that, if it was decided against the bailiff, and it was found that he had entered the house and seized the goods of the wrong person, and had committed a trespass by entering the house as well as by seizing the goods, damages might in such a case be recovered against him for the unlawful entry into the house, as well as for the seizure of the goods (*a*). It was further held under that section that, if the action was brought for an unlawful breaking and entering of the outer door of a dwelling-house, as well as for an unlawful seizure of the goods, the judge had no power to stay the proceedings, as no damages could have been awarded to the plaintiff for the trespass to the house on the hearing of the interpleader summons as to the goods before the county court (*b*). The first-mentioned section, however, now provides that the county court judge "shall" adjudicate on *any* claim "*capable of arising* out of the execution of the process." The claimaint, therefore, cannot subsequently sue in a superior court, for any special damages arising out of the execution, although he omitted to claim them in the county court (*c*).

Constables—Exemption of constables, officers, and their assistants from liability for acts done by them in obedience to a warrant of justices. —By the 24 Geo. 2, c. 44, s. 6, it is enacted, that no action shall be brought against any constable or other officer, or against any person acting by his order or in his aid, for anything done in obedience to any warrant under the hand and seal of any justice, until demand has been made or left at his usual place of abode by the party intending to bring the action, or his attorney or agent in writing, signed by the party demanding the same (*d*), of the

(*z*) *Jessop* v. *Crawley*, 15 Q. B. 212.
(*a*) *Foster* v. *Pritchard*, 2 H. & N. 151; 26 L. J., Ex. 215.
(*b*) *Cater* v. *Chignell*, 15 Q. B. 219. *Hollier* v. *Laurie*, 3 C. B. 339.
(*c*) *Death* v. *Harrison*, L. R., 6 Ex. 15; 40 L. J., Ex. 26.
(*d*) *Clark* v. *Woods*, 2 Exch. 405. If a plaintiff's solicitor, previous to bringing an action against a constable or officer for an imprisonment or seizure of goods by a constable, makes out two papers in writing precisely similar, purporting to be demands of the perusal and copy of the warrant, and signs both for his client, and then delivers one to the defendant, they are both duplicate originals; and the one retained by the

717 perusal and copy of such warrant and the same hath been refused or neglected for the space of six days after demand. In case after demand and compliance therewith any action shall be brought against such constable, officer, or person acting in his aid, without making the justice a defendant, the jury shall, on production and proof of the warrant at the trial (*e*), give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and, if the action is brought jointly against the justice and constable, or officer, &c., then, on proof of the warrant, the jury shall find for such constable, officer, &c., notwithstanding such defect of jurisdiction.

This section is obviously intended to protect the officer in those cases only where the justice remains liable. It is necessary, in order to bring the officer within it, that he should act most strictly in obedience to the warrant; and, if he does so, the statute gives him absolute protection at whatever time the suit may be brought against him (*f*). Where the warrant under which the constable acted was lodged in the hands of the gaoler at the time the plaintiff was taken to prison, and the constable proved that, when the demand for the perusal of the warrant was made, he produced a correct copy of it, telling the person making the demand that the original was in the hands of the gaoler, and no objection was made to the non-production of the original, it was held that there had been a substantial compliance with the requirements of the statute by the officer, so as to entitle him to the benefit of the statutory protection. "The conduct of the agent of the plaintiff," observes Lord Denman, C. J., "was such as to lead to the belief that the delivery of a copy of the warrant, under the circumstances, was all that was required. But for this, steps might have been taken to procure the original; and the plaintiff cannot therefore rely on its non-production to oust the constable of the protection of the statute" (*g*).

Every person to whom a statute requires a warrant to be

solicitor may be given in evidence at the trial, without proving any notice to produce the one left in the hands of the defendant. "Unless I am mistaken," observes Lord Eldon, C. J., "it is the usual course in actions of this sort to produce a duplicate original; and the same thing is done with respect to notices to quit. The practice of allowing duplicates of this kind to be given in evidence seems to be sanctioned by this principle, that the original delivered being in the hands of the defendant, it is in his power to contradict the duplicate original by producing the other if they vary." *Jory* v. *Orchard*, 2 B. & P. 41.

(*e*) Where the high constable of a borough, who had been served with a *subpœna duces tecum*, to produce a warrant under which he had made a levy, stated that he had no doubt he had deposited the warrant in his office, that he had searched for it and could not find it, and did not know what had become of it, and that the town-clerk had access to his office, and might have taken it away, it was held that secondary evidence might be given of the contents of the warrant. *Fernley* v. *Worthington*, 1 M. & G. 491.

(*f*) Abbott, C. J., *Parton* v. *Williams*, 3 B. & Ald. 332.

(*g*) *Atkins* v. *Kilby*, 11 Ad. & E. 785.

718 directed, and who is required to execute the same, may be considered an officer of the law, coming within the principle of the protection afforded by this statute (*h*), and has the period of six days after the demand of his authority for the production of it; within which time, if he complies with the demand, he secures his indemnity. But, if he delays after that time, he subjects himself to be sued as any other person. If, however, after the six days have expired, but before the issue of a writ, he complies with the demand, he is still entitled to the protection of the statute (*i*). This statute is confined to actions of tort (*k*); and the officer, in order to be entitled to the protection, must show that in doing what he did he acted in obedience to the warrant; for, if he exceeds his authority, or acts without a warrant, or arrests a person not named in the warrant, he is not entitled to the benefit of the statute (*l*).

If the warrant is directed to be executed within the limits of a particular county, and the officer by mistake executes it beyond the prescribed limits, he has not acted in obedience to the warrant, and is not entitled to the statutory protection (*m*). Neither can he claim the benefit of the statute in cases where, when acting under a search-warrant, he has seized and carried away articles not mentioned in the warrant, and not in anywise connected therewith (*n*); nor where, under a warrant to apprehend *A*, or to seize the goods of *A*, he apprehends *B*, or takes the goods of *B* (*o*); nor if he exceeds the authority given him by the warrant and commits any excess, such as remaining longer in a dwelling-house than he was legally authorized to remain, or breaking open doors and windows which he was not authorized to break open (*p*). But, whenever the officer has acted in obedience to the warrant, he secures his indemnity by complying with the requirements of the statute, although the warrant may be illegal or improper, or may have been granted by a magistrate who had no jurisdiction or power to grant it (*q*). If the officer loses the protection of the statute, he must justify under the justice's warrant (*r*).

(*h*) *Pedley* v. *Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 374.
(*i*) *Jones* v. *Vaughan*, 5 East, 447.
(*k*) *Irving* v. *Wilson*, 4 T. R. 485.
(*l*) *Bell* v. *Oakley*, 2 M. & S. 259. *Postlethwaite* v. *Gibson*, 3 Esp. 226. *Galliard* v. *Laxton*, 2 B. & S. 363; 31 L. J., M. C. 123.
(*m*) *Milton* v. *Green*, 5 East, 238.
(*n*) *Crozier* v. *Cundey*, 6 B. & C. 232; 9 D. & R. 224.
(*o*) *Money* v. *Leach*, 3 Burr. 1768. *Kay* v. *Grover*, 7 Bing. 312; 5 M. & P. 195. *Hoye* v. *Bush*, 1 M. & G. 775; 2 Sc. N. R. 92.
(*p*) *Peppercorn* v. *Hofman*, 9 M. & W. 628. *Bell* v. *Oakley*, 2 M. & S. 259. See Sir Michael Foster's *Discourse of Homicide*, p. 319.
(*q*) *Atkins* v. *Kilby*, 11 Ad. & E. 781. *Price* v. *Messenger*, 2 B. & P. 158. *Reg.* v. *Davis*, L. & C. 64; 30 L. J., M. C. 159.
(*r*) *Read* v. *Coker*, 13 C. B 859; 22 L. J., C. P. 205.

719 By the 11 & 12 Vict. c. 43, s. 19, constables are authorized to execute warrants out of their districts, provided they are executed within the jurisdiction of the justice granting or backing the same. But the constable is not bound to execute a warrant out of his own district (*s*). A warrant of distress for rates directed to two persons for execution, may be executed by one of them alone (*t*).

Excess of authority.—If a constable abuses the legal authority conferred upon him by detaining a prisoner an unreasonable time without taking him before a magistrate, or by unnecessarily handcuffing him, he cannot protect himself under the warrant. A constable or peace-officer has no right to handcuff an unconvicted prisoner, unless he has attempted to escape, or except it is necessary in order to prevent his escaping. "Such a degree of violence and restraint upon the person," observes Bayley, J., "cannot be justified, even by a constable, unless he makes it appear that there are good special reasons for his resorting to it" (*u*). If a constable armed with a search-warrant searches the wrong house, or stays an unreasonable and unnecessary time in a house he is authorized to search, or uses any unnecessary violence in the execution of the warrant, or seizes things not specified in the warrant, and which are not likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, or to support a charge of felony, he becomes a trespasser, and is liable to an action for damages (*x*).

Statutory protection to constables from vexatious actions.—By the 7 Jac. 1, c. 5, and the 21 Jac. 1, c. 12, s. 5, it is enacted that, if any action upon the case, trespass, battery, or false imprisonment, shall be brought against constables, their deputies or assistants, for or concerning any matter by them done by virtue of their offices, the said action shall be laid within the county where the trespass or fact shall be done or committed, and not elsewhere; and that it shall be lawful for such constables, &c., to plead the general issue, not guilty, and to give any special matter discharging them from liability in evidence to the jury; and that, if upon the trial of any such action the plaintiff shall not prove to the jury that the trespass, battery, imprisonment, or other fact or cause of action, was committed or done within the county wherein the action shall be laid, the jury shall find the defendant not guilty, without regard to any evidence on the merits.

(*s*) *Gimbert* v. *Coyney*, M'Clel. & Y. 469.

(*t*) *Lee* v. *Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271.

(*u*) *Wright* v. *Court*, 4 B. & C. 696; 6 D. & R. 625. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134.

(*x*) *Crozier* v. *Cundey*, 6 B. & C. 232; 9 D. & R. 224. Burn's Justice, SEARCH-WARRANT.

720 By the 1 & 2 Will. 4, c. 41, providing for the appointment of special constables, it is enacted (sect. 19), for the protection of persons acting in execution of the Act, that all actions and prosecutions to be commenced against any person for anything done in pursuance of the Act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give the Act and the special matter in evidence at the trial; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before action brought, or if a sufficient sum of money shall have been paid into court after action by or on behalf of the defendant (*y*).

The duties, powers, and liabilities of borough constables are defined by the Municipal Corporations Act, 1882, sects. 191, 193, 194, and of special constables by sect. 196; and by sect. 226, no proceedings can be taken against any person acting in pursuance of the Act, &c., unless commenced within six months, and tender of amends may be made.

By the 2 & 3 Vict. c. 93, for the establishment of county and district constables, it is provided (sect. 8), that the chief constable, and other constables appointed under that Act, shall have all the powers, privileges, and duties throughout the county, and in all liberties, franchises, and detached parts of counties locally situate within the county, and also in any adjoining county, which any constable has within his constablewick, by virtue of the common law, or any statute made or to be made (*z*): and every protective provision of the 1 & 2 Will. 4, c. 41, is to be deemed to extend to the constables appointed under that Act (*a*).

(*y*) But this section only extends to things done in pursuance of this Act, and was held not to apply to a constable acting under the Contagious Diseases (Animals) Act, 1878. *Bryson* v. *Russell*, 14 Q. B. D. 721; 54 L. J., Q. B. 144.

(*z*) See *Mellor* v. *Leather*, 1 El. & Bl. 623.

(*a*) This last-mentioned statute is amended by the 2 & 3 Vict. c. 93, which provides for the consolidation of county and borough police establishments, and of their mutual powers, privileges, and duties throughout counties and boroughs; and the 19 & 20 Vict. c. 69, for rendering more effectual the police in counties and boroughs, makes (s. 15) further provision for the consolidation of county and borough police, their powers, privileges, duties and responsibilities; and by the 20 Vict. c. 2, s. 4, the statutes 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69, are to be construed together as one Act. By the 2 & 3 Vict. c. 71, for regulating the police courts of the metropolis, it is enacted (s. 53), that no action, suit, information, or other proceeding, shall be brought against any person for anything done, or omitted to be done, in pursuance of the Act, or in the execution of the powers thereof, unless twenty days' previous notice in writing shall be given, nor unless the action shall be commenced within three calendar months next after the act committed, or, in case of continuing damage, within three

721 Where a constable is acting *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the time in obedience to the warrant of a magistrate, he is entitled to the statutory protection, although he is altogether mistaken in the proceedings he has adopted, and had in truth no warrant or authority for what he has done. If, for example, an officer, meaning *bonâ fide* to act under a warrant, by mistake arrests the wrong person, or seizes the goods of the wrong party, and so does an act which the warrant did not order him to do, and for which he had, consequently, no authority, he is, nevertheless, if he acted *bonâ fide*, entitled to the benefit of the protecting clause, limiting the time for the bringing of an action against him for the trespass (*b*).

Gaolers—Liabilities of gaolers.—A gaoler who receives a prisoner under a warrant is not responsible in damages, if the warrant has been irregularly issued; but, if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for his detention. Where the plaintiff had been delivered into the custody of the gaoler of a liberty under a good warrant for arrest, though the execution of it was illegal, inasmuch as the plaintiff, under a warrant to the bailiff of the liberty, had been arrested without the liberty, and afterwards carried into the liberty and delivered to the gaoler, it was held that an action could not be maintained against the gaoler, who was not bound to inquire whether the original arrest was tortious or not; and it was said by the court that, if he had been informed of the tortious taking (without being of the covin or practising therein), he ought, nevertheless, to detain the prisoner, he being delivered to him with a good warrant of arrest, though the execution of it was illegal; for, if such information had been false, and the gaoler had set the prisoner at large, he had been liable for an escape; and the plaintiff was not without remedy, for he had a good action against the wrong-doers (*c*). But, if a sheriff's officer arrests the wrong man, and hands him over to a gaoler, in that case, as the arrest is altogether unjustifiable, and the warrant no protection, the gaoler who receives and detains the wrong man is responsible for the wrongful imprisonment, and cannot justify under the warrant, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not, consistently with his duty, have refused to receive and detain him (*d*). A prisoner who has been sentenced to imprisonment for

calendar months next after such damage has ceased, nor unless the action, &c., shall be brought in the county of Middlesex. And see s. 52.

(*b*) *Parton* v. *Williams*, 3 B. & Ald. 330. *Smith* v. *Wiltshire*, 2 B. & B. 619; 5 Moore, 322.

(*c*) *Olliet* v. *Bessey*, T. Jones, 214.

(*d*) *Aaron* v. *Alexander*, 3 Campb. 34. *Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134. Bro. Abr. TRESPASS, pl. 133, 256, 265.

722 the space of one calendar month is entitled to be discharged out of custody on the day in the succeeding month immediately preceding the day corresponding to that from which his sentence took effect (*e*).

Court of bankruptcy—Liability of the messenger.—By the 46 & 47 Vict. c. 52, s. 119, a search warrant for the discovery of any property of a debtor may be executed in manner prescribed, or in the same manner, and subject to the same privileges, in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

General government officers.—An officer representing his sovereign in all functions, civil and military, may be made to answer for an abuse of his authority, and for the exercise of arbitrary power above and beyond the law. An act of authority, lawful in itself if rightly done, may become wholly unlawful and unjustifiable by the harsh, oppressive, and cruel manner in which it is executed; for, where the law authorizes an act to be done, it does not protect unnecessary violence or cruelty in the doing of it (*f*).

Governors of colonies.—Every governor of a colony is responsible in damages for unlawfully spoiling, plundering, or imprisoning her Majesty's subjects (*g*). The governor of a colony (in ordinary cases) cannot be regarded as a viceroy, nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and is limited to the powers thereby expressly or impliedly entrusted to him; and he is responsible for acts which are wholly beyond the authority confided to him. Such acts, though the governor may assume to do them as governor, cannot be considered as done on behalf of the Crown, or to be in any proper sense acts of state (*h*). Where a carpenter, who followed a train of artillery, but who was not subject to martial law, brought an action against the governor of Gibraltar for an assault and battery, and showed that he had been tried by court-martial, and sentenced to be whipped, and that the governor confirmed the sentence, which was then carried into effect, it was held that the action was maintainable against the governor, by reason of his participation in the unlawful whipping, and the plaintiff recovered 700*l.* damages (*i*). But whatever is a justification in the place where the thing is done, is a justification in the place where the cause of action is tried (*k*); and, if the colonial legislature passes an act of indemnity which is assented to by the Crown before any

(*e*) *Migotti* v. *Colvill*, 4 C. P. D. 233.
(*f*) *Sutherland* v. *Murray*, 1 T. R. 538.
(*g*) *Hill* v. *Bigge*, 3 Moo. P. C. 465.
(*h*) *Musgrave* v. *Pulido*, L. R., 5 App. Cas. 102; 49 L. J., P. C. 20.
(*i*) ——— v. *Sabine*, cited Cowp. 175.
(*k*) *Mostyn* v. *Fabrigas*, Cowp. 161.

723 action is commenced in this country, such act of indemnity is a bar to an action in the courts here, although the governor was a necessary party to the passing of the Act and was himself interested in it (*l*).

Military and naval officers.—A military or naval officer is not responsible for acts done by him in obedience to the commands of his superior officer, or of the government he serves, unless the commands are manifestly illegal; and the justification of an officer sued for acts of force and violence may be made to rest upon a subsequent ratification of his acts by his government, as well as upon a precedent authority (*m*).

Where two vessels were chartered by the government for a naval expedition, and the captains of the vessels were to pay implicit obedience to the orders of the officers commanding the expedition, and one of the vessels sustained damage from the other whilst acting in obedience to orders, it was held that the owner of the vessel doing damage could not be made responsible to the owner of the vessel to which the damage was done, if the damage was the natural result of the execution of the orders given, and was not caused by negligence or want of nautical skill in the execution of the orders (*n*).

Military and naval officers are not responsible for arrests made by them in the exercise and discharge of their military and naval authority (*o*); but, if they exceed their authority, and make arrests for offences which are not military or naval offences, and over which they have no jurisdiction or authority, they will be responsible in damages for their unlawful acts (*p*).

An action is not maintainable by a subordinate officer against his superior officer for an act done in the course of discipline, and under powers incident to his position (*q*); for a court of law will not take cognizance of matters of military discipline between military men (*r*).

Revenue officers.—Revenue-officers, acting under an authority given them by statute to examine goods and merchandise, in order to ascertain the amount of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority on the part of the officers. If fairly and honestly believing that goods are liable to

(*l*) *Phillips* v. *Eyre*, L. R., 4 Q. B. 225; 6 *Il.* 1; 38 L. J., Q. B. 113.
(*m*) *Buron* v. *Denman*, 2 Exch. 167.
(*n*) *Hodgkinson* v. *Fernie*, 2 C. B., N. S. 436; 26 L. J., C. P. 219.
(*o*) *Bradley* v. *Arthur*, 4 B. & C. 305.
(*p*) *Warden* v. *Bailey*, 5 Taunt. 67.
(*q*) *Johnstone* v. *Sutton*, 1 T. R. 544.
(*r*) Willes, J., *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806.

724 seizure, they take and detain them, and the decision of the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and passed (*s*). And by the 39 & 40 Vict. c. 36, s. 267, "Where in any information or suit relating to any seizure, a verdict or judgment shall be found for the claimant, if it shall appear to the judge or justice before whom the same was heard that there was reasonable or probable cause of seizure, and such judge or justice shall so certify on the record or information, such certificate may be pleaded as a bar to any action, indictment, or other proceeding against the seizor."

Revenue officers are entitled to notice of action (*t*).

Liability for the acts of their subordinates.—Public officers employed in the public departments in the conduct and management of the public business of the country, are not responsible for the negligence and misconduct of those who act under them, although such subordinate officers have been appointed by them. Thus the Lords Commissioners of the Treasury, the Commissioners of Customs and Excise, the auditors of the Exchequer, &c., have never been held liable in damages for the negligence or misconduct of the inferior officers in their several departments. A Queen's officer stationed on board ship to do his duty there, is not responsible for the negligent acts of his subordinate officers (*u*); nor is the Postmaster-General responsible for the negligence or misconduct of clerks and letter-sorters employed and appointed by him for the execution of certain public duties in the Post-office; but these public functionaries are responsible to every individual who sustains damage by reason of their own personal neglect or misconduct (*x*).

Local government officers—Duties and responsibilities of trustees and commissioners of public works.—Trustees and commissioners of public works having certain public duties to perform under the authority of a statute, incur no personal responsibility for their acts, if they act within the strict line of their duty; but, if they order a thing to be done which is not within the scope of their authority, or are guilty of negligence or misconduct in doing that which they are empowered to do, they render themselves liable to an action (*y*). If the act done is in itself lawful, it can only

(*s*) *Jacobsohn* v. *Blake*, 6 M. & G. 919; 7 Sc. N. R. 784; 13 L. J., C. P. 89. As to detention for freight, see the 39 & 40 Vict. c. 36, s. 73.
(*t*) *Post*, p. 779.
(*u*) *Ante*, p. 631.
(*x*) *Lane* v. *Cotton*, 1 Ld. Raym. 646; 1 Salk. 17.
(*y*) *Jones* v. *Bird*, 5 B. & A. 837. *Clothier* v. *Webster*, 12 C. B., N. S. 790; 31 L. J., C. P. 317.

725 become unlawful in consequence of the negligent and improper manner in which it is executed (*z*).

Where an action was brought against one of several trustees, who had joined in an order made by the trustees for cutting a drain through certain lands, whereby considerable damage had been done to the plaintiff's estate, and it appeared that the trustees had acted in the execution of statutory powers, in the best mode they could, under competent advice, and in the faithful execution of the duties imposed upon them by the Legislature, it was held that they were not personally responsible for the damage done (*a*); but, where the trustees of a public road covered over an open drain by the roadside, and thereby caused an accumulation of water in the road, which flooded the adjoining land, and ran into and swamped the plaintiff's colliery, it was held that they were responsible in damages for the injury (*b*). So, where an action was brought against certain commissioners of pavements for so raising a pavement as to obstruct the plaintiff's doors and windows, and it appeared that the commissioners were acting in the exercise of statutory powers, but that proper advice had not been taken, and the works were improperly executed, and the injury done to the plaintiff might have been readily avoided by laying down the pavement in a proper manner, it was held that the commissioners were personally responsible in damages for the nuisance they had unnecessarily created (*c*).

Public commissioners and trustees who continue in the actual occupation of public works constructed and maintained for the use of the public, and in receipt of the tolls levied for the use thereof, are bound to maintain and manage their property so that it may not become a source of danger to those who are invited to use it (*d*). And even where toll is not taken they are bound to show reasonable care (*e*). Navigation commissioners, therefore, are liable for accidents occurring from non-repair of the towing-path, if they have power under their statutes to take or hire it from the owner, and they do so, although by parol only, and charge a toll for the use of it (*f*). But, if they have demised the property to a lessee, who is in the actual use and occupation of it, and in receipt of the tolls, it is not then the duty of the commissioners or trustees to

(*z*) *Boulton* v. *Crowther*, 2 B. & C. 709. *Governor, &c. of Cast Plate Co.* v. *Meredith*, 4 T. R. 794.

(*a*) *Sutton* v. *Clarke*, 6 Taunt. 29. *Grocers' Co.* v. *Donne*, 3 Bing. N. C. 34; 3 Sc. 357. *Herring* v. *Metropolitan Board of Works*, 19 C. B., N. S. 510; 34 L. J., M. C. 224. *Harris* v. *Baker*, 4 M. & S. 29.

(*b*) *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305.

(*c*) *Leader* v. *Moxon*, 2 W. Bl. 924; 3 Wils. 461.

(*d*) *The Mersey Docks Trustees* v. *Gibbs*, L. R., 1 H. L. 93; 35 L. J., Ex. 225.

(*e*) *Reg.* v. *Williams*, 9 App. Cas. 418; 53 L. J., P. C. 64.

(*f*) *Winch* v. *Thames Conservators*, L. R., 7 C. P. 458; 9 C. P. 378; 41 L. J., C. P. 241; 43 L. J., C. P. 167.

726 maintain the works in a safe and secure state, unless the particular statute under which they act imposes that duty upon them (*h*). Whenever an Act of Parliament imposes upon commissioners, or upon any public body, the duty of maintaining or repairing any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body (*i*), unless there are provisions in the statutes creating them for limiting their liability, or the duty of repairing is not absolute (*k*); the rule being that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things (*l*); and this, whether they have or have not funds at their disposal for effecting the repairs; though, if there are no funds, there may be a difficulty in the way of the plaintiff's getting his damages (*m*).

Whenever injury is sustained from the non-repair of water-pipes, fire-plugs, drains, or works erected for the use or accommodation of the public, the liability to make compensation for the injury arising from such neglect rests with the parties upon whom the duty of repairing is imposed (*n*). But local boards in whom the highways have been vested by the Public Health Acts are not liable for mere misfeasance in omitting to repair, simply as surveyors (*o*). Local boards of health discharging the duties of surveyors of highways are, however, liable for the negligence of themselves or their servants in leaving heaps of stones, &c., unlighted at night (*p*). Generally speaking, where local boards are authorized and required to execute drainage works in a particular district, and to make compensation to parties sustaining injury therefrom, they have no power to collect together the sewage and pour it into streams which were previously pure, so as to create a nuisance and deteriorate the value of the adjoining land. A power

(*h*) *Walker* v. *Goe*, 3 H. & N. 395; 27 L. J., Ex. 427.

(*i*) *The Mersey Docks Trustees* v. *Gibbs*, L. R., 1 H. L. 93; 35 L. J., Ex. 225. *Coe* v. *Wise*, 5 B. & S. 440; 33 L. J., Q. B. 281; L. R, 1 Q. B. 711; 37 L. J., Q. B. 262.

(*k*) *Young* v. *Davis*, 2 H. & C. 197; 31 L. J., Ex. 256. *Wilson* v. *Mayor of Halifax*, L. R., 3 Ex. 114; 37 L. J., Ex. 44. *Parsons* v. *St. Matthew, Bethnal Green*, L. R., 3 C. P. 56; 37 L. J., C. P. 62.

(*l*) Per Blackburn, J., *Mersey Dock Trustees* v. *Gibbs*, L. R., 1 H. L. 110; 35 L. J., Ex. 225.

(*m*) *Hartnall* v. *Ryde Improvement Commissioners*, 4 B. & S. 361; 33 L. J., Q. B. 39. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743; 33 L. J., Q. B. 296. If they are in possession of land, it may be taken under a writ of elegit. *Worral Waterworks Co.* v. *Lloyd*, L. R., 1 C. P. 719.

(*n*) *Bayley* v. *Wolverhampton Waterworks Co.*, 6 H. & N. 241; 30 L. J., Ex. 57.

(*o*) *Gibson* v. *Mayor of Preston*, L. R., 5 Q. B. 218; 39 L. J., Q. B. 131.

(*p*) *Foreman* v. *Mayor, &c. of Canterbury*, L. R., 6 Q. B. 214; 40 L. J., Q. B. 138.

727 to take possession of streams, and to cover over open water-courses for drainage purposes, and to give compensation therefor, gives to the board no power by implication to pollute water which was previously substantially pure (*q*). Although the inhabitants of a town may have a right to open their sewers into a river in the natural course of drainage, this does not entitle them to foul the water with the contents of water-closets, and convert a sweet and limpid stream into a stinking sewer. The ordinary right of sending house-drainage into streams and natural watercourses, is like the right of drainage which exists in the case of adjoining mines upon different levels (*r*).

By the 10 & 11 Vict. c. 34, s. 24, power is given to commissioners and public bodies intrusted with the execution of the powers of the Act, to construct sewers for the drainage of towns, and to carry such sewers through inclosed and other land, making full compensation to the owners and occupiers thereof, and to cause such sewers to empty themselves into the sea or any public river, or to cause the refuse from such sewers to be conveyed to a convenient site for sale, for agricultural or other purposes, but *so that the same shall in no case become a nuisance;* and by sect. 107 it is further enacted "that nothing in the Act contained shall be construed to render lawful any act or omission on the part of any person which is, and but for the Act would be deemed to be, a nuisance at common law" (*s*). If, therefore, commissioners, trustees, or any body corporate, intrusted with the exercise of the powers of this statute, create a nuisance by their system of drainage, they may be restrained by injunction from continuing the nuisance (*t*).

Breach of duty—Remedy by action—Exemption from personal liability.—In most statutes relating to public works provisions are to be found exonerating the board, commissioners or trustees, and their subordinate officers, from personal liability in respect of any matter or thing done *bonâ fide* for the purpose of executing the Act, and, in some cases, the saving clause is added, "unless the action, suit, damages, costs, and charges have arisen in consequence of wilful neglect or default on the part of the commissioners, or person incurring the same."

The effect of clauses of this sort is not to leave a complaining

(*q*) *Cator* v. *Lewisham Board of Works*, 5 B. & S. 115; 34 L. J., Q. B. 75.

(*r*) *Ante*, p. 369.

(*s*) See also as to constructing sewers under the Public Health Act, 1875, s. 13 *et seq.*, and s. 264 as to notice of action; and generally as to entry, &c., upon lands for the purposes of the Act, ss. 305—308.

(*t*) *Att.-Gen.* v. *Borough of Birmingham*, 4 Kay & J. 543. *Att.-Gen.* v. *Corporation of Leeds*, L. R., 5 Ch. 583; 39 L. J., Ch. 711. *Att.-Gen.* v. *Gas Light & Coke Co.*, 7 Ch. D. 217; 47 L. J., Ch. 534.

728 party remediless, but to oblige him to bring his action against the public board, or against the commissioners as a body, in the name of their clerk, in which case the liability will not be personal; and any damages that may be recovered will be payable out of the funds at their disposal under the provisions for the payment of damages and costs, recovered in any such action against the clerk (*u*). Thus, where certain commissioners for the improvement of a town, acting under the powers of the Public Health Act, made a new sewer communicating with the plaintiff's drain, and neglected to take proper precautions to prevent the plaintiff's premises from being flooded by storm waters, and by inundations from an adjoining river which communicated with the new sewer, it was held that the plaintiff was entitled to maintain an action against the clerk of the commissioners, for the recovery of all the damage he had sustained by reason of the negligence of the commissioners, and that these damages were to be paid out of the rates levied under the Act (*x*). So, where certain contractors, acting under the directions of the Metropolitan Commissioners of Sewers, altered a sewer communicating with the plaintiff's drain, and thereby caused a nuisance to the plaintiff, for which he brought an action against the contractors, and the jury, in answer to a question left to them by the judge, found that the contractors had, in making the sewer, acted *bonâ fide* under the orders and directions of the commissioners, it was held that, as there was no evidence of any negligence on the part of the contractors, the sewer having been properly constructed by them under the orders of the commissioners, and the nuisance to the plaintiff being the natural and necessary result of the making of the sewer, the contractors were absolved from all personal liability for the nuisance (*y*).

But protecting clauses of this sort do not exempt contractors and workmen from personal liability in respect of the negligent performance of work intrusted to them to execute. Where there is no negligence, a person doing the act in obedience to the commissioners or the board will be properly absolved, and the board will have to make compensation; but, if he has been guilty of negligence in doing the act, and damage ensues, he is personally liable for the consequences, notwithstanding the statute, for he

(*u*) *Ward* v. *Lee*, 7 El. & Bl. 430; 26 L. J., Q. B. 142. *Southampton and Itchin Bridge Co.* v. *Southampton Local Board, &c.*, 8 El. & Bl. 801, 812; 28 L. J., Q. B. 41. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J., Ex. 17. *Wormwell* v. *Hailstone*, 6 Bing. 676.

(*x*) *Ruck* v. *Williams*, 3 H. & N. 308; 27 L. J., Ex. 357. *Allen* v. *Hayward*, 7 Q. B. 960; 15 L. J., Q. B. 99; *ante*, p. 106. *Great Western Rail. Co. of Canada* v. *Braid*, 1 Moo. P. C., N. S. 101.

(*y*) *Ward* v. *Lee*, 7 El. & Bl. 430; 26 L. J., Q. B. 142.

729 cannot pretend that negligence was ordered or directed by the commissioners or board (*z*).

Where Acts for the authorization of public works to be effected through the medium of trustees, or commissioners, or a board, enact that the trustees, or the commissioners, or the board, shall and may sue and be sued in the name of their clerk, it is generally meant that they must so sue and be sued; so that an action for a wrong done in the execution of the Act cannot be brought against individual commissioners or trustees, or individual members of the board. In some cases these statutes require the action to be brought against the clerk, in others they require the action to be brought against the board in its statutory name, as a quasi-corporate body.

When it is provided by statute that commissioners or trustees appointed for the execution of public works shall be sued by their clerk, or treasurer, or public officer, an action is not maintainable against such officer, except where it could have been supported against the commissioners or trustees themselves (*a*); but, whenever there has been a breach of duty on the part of the commissioners or trustees causing a private injury to another, an action is maintainable against their clerk or public officer to recover compensation for such breach of duty (*b*).

Breach of duty—Remedy by injunction.—The court will by injunction restrain public boards and commissioners from doing acts in excess of the statutory powers intrusted to them (*c*), and from carrying out what they may be pleased to call the spirit of the Act in an arbitrary manner (*d*). In deciding on the right of a single proprietor to an injunction, the court cannot take into consideration the circumstance that a vast population will suffer by reason of its interference. "There are cases at law," observes Sir W. P. Wood, V.-C., "in which it has been held that, where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience of the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights, and seeking to have those rights protected, the question simply is, whether he has those rights, and not whether a large population will be inconvenienced by measures taken for their protection" (*e*).

(*z*) *Arthy* v. *Coleman*, 6 W. R. 35; 30 L. T. 101. *Newton* v. *Ellis*, 5 El. & Bl. 115; 24 L. J., Q. B. 337.

(*a*) *Hall* v. *Smith*, 2 Bing. 158.

(*b*) *Cane* v. *Chapman*, 5 Ad. & E. 647.

(*c*) *Holt* v. *Corporation of Rochdale*, L. R., 10 Eq. 354; 39 L. J., Ch. 761; 27 L. J., Ch. 343. *Auckland* (*Lord*) v. *Westminster Local Board*, L. R., 7 Ch. 597; 41 L. J., Ch. 723.

(*d*) *Tinkler* v. *Wandsworth Board of Works*, 1 Giff. 417; 2 De G. & J. 261; 27 L. J., Ch. 342.

(*e*) *Att.-Gen.* v. *Borough of Birmingham*, 4 Kay & J. 543. *Raphael* v. *Thames Valley Rail. Co.*, L. R., 2 Ch. 147.

730 *Liability for the acts of contractors.*—Where commissioners intrust the execution of public works to contractors, who select their own workmen for the execution of the work, the commissioners are not personally liable for the mistakes or negligence of the contractors or their workmen, unless they personally interfere in the management of the works, or unless the thing complained of is a nuisance existing on land of which they are in possession (*f*).

Liability of the contractor.—If an action is brought against contractors and workmen who are personally engaged in the execution of public works under the order or authority of trustees, or a board of public works, and the damage of which the plaintiff complains is the inevitable result of the execution of a public work under statutory authority, the action will fail; but, if the damage arises from the negligent execution of the work, and might have been avoided by the exercise of proper skill and care, the contractors and workmen will be personally answerable for the damage done (*g*).

Indemnity of trustees.—Wherever a duty is imposed by statute upon public officers, and costs incidentally arise in questioning the propriety of acts done in the fulfilment of that duty, the commissioners and public officers have a right to defray those expenses out of the funds they are authorized to administer, and may, in general, levy a rate to defray such expenses (*h*); and, wherever necessary expenses are incurred in the execution of a trust, or in the performance of duties thrown on any persons, and arising out of the situation in which they are placed, such persons are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust (*i*). "It is said," observes Lord Campbell, "that it is a great hardship on the ratepayers to be made to pay for the blunders or negligence of the board. That objection, however, seems to be met by the consideration that the members of the board are elected by the ratepayers, and, are, therefore, their representatives; and there would be greater injustice, perhaps, if it were held that the persons injured by the negligence or wrongful acts of the board had no remedy" (*k*). But the expenses must be such as have been legitimately and properly incurred by the persons intrusted with the administration

(*f*) *Humfreys* v. *Mears*, 1 M. & Ry. 187. *Duncan* v. *Findlater*, 6 Cl. & Fin. 894.

(*g*) *Jones* v. *Bird*, 5 B. & Ald. 837; 1 D. & R. 503. *Clothier* v. *Webster*, 12 C. B., N. S. 790; 31 L. J., C. P. 317.

(*h*) *R.* v. *Commissioners, &c. for Tower Hamlets*, 1 B. & Ad. 232. *R.* v. *Essex*, 4 T. R. 591.

(*i*) *Att.-Gen.* v. *Mayor of Norwich*, 2 Myl. & Cr. 425. *Lewis* v. *Mayor, &c. of Rochester*, 9 C. B., N. S. 401; 30 L. J., C. P. 169.

(*k*) *Southampton and Itchin Bridge Co.* v. *Southampton Local Board*, 8 El. & Bl. 812; 28 L. J., Q. B. 41.

731 of the fund in the *bonâ fide* and necessary discharge of the duties imposed upon them (*l*). If they are guilty of any wilful personal misconduct in incurring the expenses they have incurred, they cannot charge them on the public funds at their disposal (*m*).

Surveyors of highways and county bridges are not responsible in damages to travellers who have sustained injury from the highway or bridge being out of repair (*n*); nor are corporate bodies to whom the duties and liabilities of surveyor have been transferred (*o*). But a surveyor of highways is responsible, like any other person, for any negligent act of his own, creating a nuisance, and causing injury to another; and, where a surveyor was directed by the vestry to get the level of a road raised, and he contracted with a contractor for the labour only, but not for having the work properly fenced and lighted, it was held that he was responsible for an injury to a person driving along the road, which arose from its being insufficiently lighted and fenced (*p*).

Notwithstanding that by the 25 & 26 Vict. c. 61, s. 16, the surveyor of a highway board is bound to obey the orders of the board, in the execution of his duties, he is not protected, if, in obeying their orders, he does an unlawful act (*q*).

Where the defendant, who was a surveyor of highways, dug into the plaintiff's soil, threw down fences, and erected a wall, and the Highway Act, 13 Geo. 3, c. 78, s. 81, required the action to be brought "within three months after the fact committed, and not afterwards," and no action was brought within the three months, and, after that period had expired, the surveyor raised the wall and finished it, it was held that the raising of the wall was not a fresh fact committed within the meaning of the statute, and would not extend the period of limitation beyond the three months (*r*).

(*l*) *Reg.* v. *Mayor of Sheffield*, L. R., 6 Q. B. 652; 40 L. J., Q. B. 247.

(*m*) *Heriot's Hospital Feoffees* v. *Ross*, 12 Cl. & Fin. 513.

(*n*) *Young* v. *Davis*, 2 H. & C. 197; 31 L. J., Ex. 250. *M'Kinnon* v. *Penson*, 9 Exch. 609; 23 L. J., M. C. 97. Powers and duties of surveyors are vested in urban authorities by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144.

(*o*) *Parsons* v. *St. Matthew, Bethnal Green*, L. R., 3 C. P. 56; 37 L. J., C. P. 62.

(*p*) *Pendlebury* v. *Greenhalgh*, 1 Q. B. D. 36; 45 L. J., Q. B. 3.

(*q*) *Mill* v. *Hawker*, L. R., 10 Ex. 92; 44 L. J., Ex. 49.

(*r*) *Wordsworth* v. *Harley*, 1 B. & Ad. 391.

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CHAPTER XII.

OF FRAUD.

Fraud.—The right of action in case of fraud is ultimately grounded upon the general moral duty to hurt no one by word; but it is more immediately founded upon the general principle of expediency, that one who intentionally excites expectations of advantage in the mind of another, and thereby influences his conduct, should be compelled to make those expectations good, if they have been excited by a promise of something to be done in the future, or by a culpably false representation of the present existence of some fact. The right of action, therefore, in a case of fraud is remotely connected with other torts arising from words used by the wrong-doer, but more nearly resembles the right of action arising from a breach of contract.

Requisites of fraud—False representation or concealment.—Fraud may consist in the affirmance of something not true within the knowledge of the affirmant, or in the suppression of something which is true, and which it was his duty not to conceal (*a*).

Requisites of fraud—Representations amounting merely to expressions of opinion and belief.—When the representation is made concerning something which is mere matter of opinion, which every man can exercise his own judgment upon and inquire about, it is the plaintiff's own fault, if he suffers himself to be deceived (*b*).

(*a*) *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L. J., Ex. 322. See *Lee* v. *Jones*, 17 C. B., N. S. 482; 34 L. J., C. P. 131. Fraud may consist in the artful and purposed concealment of facts exclusively within the knowledge of one party, and known by him to be material, when the other party has not equal means of knowledge: *Prentiss* v. *Ross*, 16 Me. 30; *Durrell* v. *Haley*, 1 Paige (N. Y.) 492; *McLanahan* v. *Universal Ins. Co.*, 1 Pet. (U. S.) 185; *Jackson* v. *Wilcox*, 2 Ill. 344; *Peffley* v. *Noland*, 80 Ind. 164; *Am. Ex. Co.* v. *Smith*, 57 Iowa, 242. But, to operate as a fraud, the facts suppressed must be such as the party is under some legal or moral obligation to communicate to the other, and which the other has a right to know: *Dickenson* v. *Davies*, 2 Leigh (Va.) 401; *Van Arsdale* v. *Howard*, 5 Ala. 596; *McAdams* v. *Cotes*, 24 Mo. 223; *Artsen* v. *Ridgeway*, 18 Ill. 23.

(*b*) *Baily* v. *Merrell*, 3 Bulstr. 95.

If the person giving his opinion, or expressing his belief, does not possess any exclusive means of knowledge, and merely says that which he thinks to be true, there is no fraud, however erroneous may be the statement he has made. If a sheriff, about to seize the goods of a debtor under a writ of execution, makes inquiry of another as to whether certain goods do or do not belong to the debtor, and the person applied to for information does no more than represent what he believes to be true, he is not responsible in an action for deceit, if the information he gives turns out to be false, and the sheriff who has acted upon it believing it to be true
733 has been damnified. If, however, a person officiously interferes and gives directions to the sheriff, he may become liable to make good any damages which the sheriff has been obliged to pay in consequence of his having obeyed such directions (*c*); but it has been held that a mere indication of the defendant's place of residence, indorsed on the back of a writ of *fi. fa.* by the solicitor of the plaintiff, for the purpose of affording the sheriff information, is not a direction to execute a writ against the person pointed out, so as to render the solicitor responsible if the indorsement should turn out to be incorrect, and to relieve the sheriff from the responsibility of making inquiry, and acting in the matter upon his own responsibility (*d*).

Requisites of fraud—Knowledge of the falsehood.—Apart from any question of contract, no action is maintainable for a mere statement, although untrue, and although intended to be acted upon, and although it has been acted upon to the damage of the person to whom it is made, where the statement is made honestly and in the belief that it is true. But it is not necessary in all cases to show that the defendant actually knew the representation to be untrue. A representation is fraudulent, if it is made for a fraudulent purpose without believing it to be true (*e*).

(*c*) *Collins* v. *Evans*, 5 Q. B. 830.

(*d*) *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129. *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 L. J., Ex. 277.

(*e*) *Taylor* v. *Ashton*, 11 M. & W. 415. Whether a party, misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if a party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party: *Smith* v. *Richards*, 13 Pet. 26; *Smith* v. *Babcock*, 2 Woodb. & M. 246; *Foster* v. *Kennedy*, 38 Ala. 359; *Terhune* v. *Dever*, 36 Ga. 648; *Harding* v. *Randall*, 15 Me. 332; *Howard* v. *Irwin*, 18 Pick. (Mass.) 95; *Bennett* v. *Judson*, 21 N. Y. 238; *Hubbard* v. *Briggs*, 31 N. Y. 518, 540; *People* v. *Sully*, 5 Park. (N. Y.) Cr. 142; *Craig* v. *Ward*, 36 Barb. (N. Y.) 377; *Sharp* v. *New York*, 40 *id.* 256. The literal speaking of the truth, if intended to accomplish a fraud, may be as fraudulent as a falsehood: *Mulligan* v. *Bailey*, 28 Ga. 507; *Buford* v. *Caldwell*, 3 Mo. 477; *Denney* v. *Gilman*, 26 Me. 149.

Requisites of fraud—Constructive fraud.—If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and turns out to be false, and the person who has acted upon it has been deceived and damnified, he is entitled to maintain an action for compensation. Whoever pretends to positive knowledge of the existence of a particular fact, when in truth he knows nothing at all about it, does in reality make a wilful representation, which he knows to be false; and, if the representation is made in order that another may rely upon it and act upon it, and it is acted upon, and damage flows from the false representation, the person making it is, in principle, guilty of wilful deception and fraud (*f*). Lord Mansfield lays it down generally that, in a representation made to induce a person to enter into a contract, it is equally actionable for a man to undertake to assert that of which he knows nothing, as to affirm that to be true which he knows to be false (*g*); and Lord Kenyon says,

734 "If a man affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud. The fraud consists in asserting positively his knowledge of that which he did not know" (*h*). So, according to Maule, J., "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and, if it is done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud; for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made" (*i*).

Where a trustee was asked as to the incumbrances on certain property, and he answered that the owner had not incumbered, when in fact he had, but the trustee had forgotten it, it was held that he was liable to make good his representation (*j*).

Requisites of fraud—Unintentional deception.—A person who has reason to believe, and actually believes, a particular fact to be

(*f*) *Smout* v. *Ilbery*, 10 M. & W. 10. Cresswell, J., and Wilde, C. J., *Jarrett* v. *Kennedy*, 6 C. B. 322. Erle, J., *Jenkins* v. *Hutchinson*, 13 Q. B. 748. *Randell* v. *Trimen*, 18 C. B. 766; 25 L. J., C. P. 307.

(*g*) *Pawson* v. *Watson*, Cowp. 788. *Pulsford* v. *Richards*, 17 Beav. 94.

(*h*) *Haycraft* v. *Creasy*, 2 East, 103.

(*i*) *Evans* v. *Edmonds*, 13 C. B. 786. *Milne* v. *Marwood*, 15 C. B. 778; 24 L. J., C. P. 37.

(*j*) *Burrows* v. *Lock*, 10 Ves. 470. See also *Slim* v. *Croucher*, 1 De G., F. & J. 518.

true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistaken, and that his representation was unintentionally false (*k*); for, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbour for any mode of communicating erroneous information, such (for example) as having a conspicuous clock too slow, whereby the plaintiff was induced to neglect some important duty (*l*). Where a true statement is made by *A* to *B*, to be transmitted to *C*, and in the course of transmission *B* carelessly alters the statement, so that, as delivered to *C*, it is false, *C* has no right of action against *B*. No action, therefore, will lie against a telegraph company at the suit of the receiver for the misdelivery of a telegram, unless there is either a contract between him and the company, or fraud on their part in the transmission of it (*m*).

Requisites of fraud—Fraudulent intention.—An action cannot be supported for the telling a bare, naked lie, *i. e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without any

735 intention that another should rely upon the false statement and act upon it (*n*). "It is settled law," observes Parke, B., "that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the strength of it, and to alter his position to his damage" (*o*). But, if a falsehood is knowingly told, with an intention that another person should believe it to be true, and act upon it. and that person does act upon it, and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong and loss, entitling the injured person to compensation (*p*). Where a gun had been delivered by the

(*k*) *Collins* v. *Evans*, 5 Q. B. 826. *Ormrod* v. *Huth*, 14 M. & W. 664. *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129. The rule is, that in order to constitute a fraud it is not only necessary that the representation should be untrue, but also that the party making it should know it to be so: *McDonald* v. *Trofton*, 15 Me. 225; *Hooper* v. *Sisk*, 1 Ind. 176; *Campbell* v. *Hillman*, 15 B. Mon. (Ky.) 508; *Stone* v. *Denney*, 4 Met. (Mass.) 151. If the person to whom false representations were made knew them to be false, they do not amount to a fraud: *Anderson* v. *Burnett*, 6 Miss. 165.

(*l*) *Bailey* v. *Walford*, 9 Q. B. 208.

(*m*) *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R., 4 Q. B. 706; 38 L. J., Q. B. 249. *Dickson* v. *Reuter's Telegraph Co.*, L. R., 2 C. P. D. 62; 46 L. J., C. P. 197.

(*n*) *Rawlings* v. *Bell*, 1 C. B. 951. *Ormrod* v. *Huth*, 14 M. & W. 651. *Behn* v. *Kemble*, 7 C. B., N. S. 260. In this class of actions the *scienter* is material: *Serrill* v. *Bennett*, 18 Ga. 404; *Pettignen* v. *Chilles*, 41 N. H. 95; *Young* v. *Covell*, 8 John (N. Y.) 23; *Holmes* v. *Clark*, 10 Iowa, 423; *Taylor* v. *Frost*, 49 Migs. 328.

(*o*) *Thom* v. *Bigland*, 8 Exch. 731. *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129.

(*p*) Com. Dig. Action upon the case, DECEIPT, A. 9, A. 10. *Pasley* v. *Free-*

defendant to the plaintiff for the purpose of being used by him, with an accompanying representation that he might safely use it, and that representation was false to the defendant's knowledge, and the plaintiff, acting upon the faith of its being true, used the gun, and received damage thereby, it was held that he was entitled to recover compensation for the injury from the defendant (*q*). If a defendant has made a false representation knowing it to be false, with intent to induce, and has thereby induced, the plaintiff to enter into a contract, into which, but for that misrepresentation, he would not have entered, and the plaintiff has been damnified by the falsehood, a case of fraud is made out, and an action for damages is maintainable (*r*).

Requisites of fraud—Motive of the defendant.—In order to maintain an action for deceit, or for a false and fraudulent representation, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it is enough if a representation is made which the person making it knows to be untrue, and which is intended or calculated to induce another to act on the faith of it in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a fraud (*s*). Whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial (*t*).

736 *Representations made to third persons.*—Whether the representation is made to the plaintiff, or to a third party, is immaterial, if it is false to the knowledge of the defendant, and has been made for the

man, 3 T. R. 51, 65. *Gerhard* v. *Bates*, 2 El. & Bl. 489. Parke, B., *Watson* v. *Poulson*, 15 Jur. 1112. "*Dolus malus est omnis machinatio, calliditas, fallacia, ad circumveniendum, fallendum, decipiendum aliquem adhibita.*"—Dig. lib. 4, tit. 3, lex. 1, s. 2.

(*q*) *Langridge* v. *Levy*, 2 M. & W. 530; 4 M. & W. 337. *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 L. J., C. P. 139. *Barry* v. *Croskey*, 2 Johns. & H. 21. *George* v. *Skivington*, L. R., 5 Ex. 1.

(*r*) *Canham* v. *Barry*, 15 C. B. 620.

(*s*) Lord Tenterden, C. J., *Polhill* v. *Walter*, 3 B. & Ad. 123. *Milne* v. *Marwood*, 15 C. B. 778; 24 L. J., C. P. 36. An action upon the case, for deceit, will lie for false representations made by the defendant, by words and actions, with intent to deceive the plaintiff, whereby the plaintiff sustained damage; and this, though the defendant had no interest in making such representations. *Hart* v. *Tallmadge*, 2 Day (Conn.) 382; *S. P.*, *Ives* v. *Carter*, 24 Conn. 392; *Green* v. *Bryant*, 2 Ga. 66; *Weatherford* v. *Fishback*, 4 Ill. (3 Scam.) 170; *Eames* v. *Morgan*, 37 Ill. 260; *Shaeffer* v. *Sleade*, 7 Blackf. (Ind.) 178; *State Bank* v. *Hamilton*, 2 Ind. 457; *Oldham* v. *Bentley*, 6 B. Mon. (Ky.) 428; *Nowlan* v. *Cain*, 3 Allen, (Mass.) 261; *Fleming* v. *Slocum*, 18 Johns. (N. Y.) 403; *Benton* v. *Pratt*, 2 Wend. (N. Y.) 385; *Hubbard* v. *Briggs*, 31 N. Y. 518; *McAleer* v. *McMurray*, 58 Pa. St. 126. To hold one for false representations of the credit of another, the representations must have been made, directly or indirectly, by the defendant to the plaintiff, and the credit given on the strength of them. *Harrison* v. *Savage*, 19 Ga. 310.

(*t*) *Pasley* v. *Freeman*, 3 T. R. 60, 62.

purpose of being communicated to the plaintiff (*u*), or to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff, as one of the public or of such class, acts on it, and suffers damage thereby (*x*). Where the father of the plaintiff told the defendant that he wanted to purchase a gun for the use of the plaintiff, and the defendant, in order to effect the sale, warranted the gun to have been made by Nock, and that it was a safe and secure gun, and the father then purchased the gun and delivered it to the plaintiff, who, on the faith of the warranty, and believing it to be true, used the gun, and was injured by its bursting in his hand, it was held that the plaintiff was entitled to sue the defendant for damages, as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but from one contemplated by the defendant at the time as one of its results. "We decide," observes the court, "that the defendant is responsible in this case for the consequences of his fraud whilst the gun was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew the gun was purchased" (*y*). So, if the vendor of a lamp represents the lamp to be fit and proper to be used, knowing that it is not, and intending it to be used by the plaintiff's wife, or any particular individual, the wife, joining her husband for conformity, or that individual, will be entitled to an action for the deceit, upon the principle that, if anyone knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit (*z*). So, where a director of a company puts forth transferable shares into the market, and publishes and circulates false statements and representations for the purpose of selling the shares, the false representation is deemed in law to be made to all persons who read the public announcements, and become purchasers of shares on the faith of the statements contained in them (*a*).

Cheating by forgery.—If a forgery has been committed, the
737 party injured may maintain an action for the recovery of the money of which he has been defrauded. Where, the plaintiff's

(*u*) *Langridge* v. *Levy*, 2 M. & W. 530; 4 M. & W. 337.

(*x*) *Swift* v. *Winterbottom*, L. R., 8 Q. B. 244, 253; 42 L. J., Q. B. 111. *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301; 43 L. J., Q. B. 56. *Richardson* v. *Silvester*, L. R., 9 Q. B. 34; 43 L. J., Q. B. 1.

(*y*) *Langridge* v. *Levy*, 2 M. & W. 532; 4 *ib.* 337. *Blakemore* v. *Bristol and Exeter Rail. Co.*, 8 El. & Bl. 1052; 27 L. J., Q. B. 167. *Farrant* v. *Barnes*, 11 C. B., N. S. 553; 31 L. J., C. P. 139.

(*z*) *Longmeid* v. *Holliday*, 6 Exch. 766. See *George* v. *Skivington*, L. R., 5 Ex. 1.

(*a*) *Scott* v. *Dixon*, 29 L. J., Ex. 62, n. Ld. Campbell, *Wilde* v. *Gibson*, 1 H. L. C. 623. *Barry* v. *Croskey*, 2 Johns. & H. 21. *Peek* v. *Gurney*, L. R., 6 H. L. 377; 43 L. J., Chanc. 19.

servant having 65*l.* of the plaintiff's money in his custody, the defendant, in order to defraud the plaintiff of the money, procured a letter to be written in the name of the plaintiff, directed to his said servant, requiring the latter to pay the money to the defendant, and counterfeited the signature of the plaintiff to the letter, and also the plaintiff's seal, and caused the said counterfeit letter to be delivered to the plaintiff's servant, as being the plaintiff's letter, and thereby obtained possession of the plaintiff's money, and converted it to his own use, it was held that there was a good cause of action (*b*). "If a man forge a bond in my name, I can have no action, unless I am sued upon the bond; but then I may for the wrong and damage, though I can avoid the bond by plea. But, if it were a recognizance or a fine, I should have a writ of deceit presently" (*c*).

False representations to bring about a marriage—Actions for bigamy.—Where the plaintiff declared that she was a virgin, and sought for in marriage, and that the defendant, pretending to be a single person, made love to her and married her, when in truth he was married to another woman, the court held that the action lay (*d*).

False representations by relations to bring about a marriage.—False representations by relations as to the fortune, circumstances or prospects of a person about to be married afford a ground of action. Where a mother, who was the absolute owner of certain property, heard her son declare to his proposed wife and her guardians, that she (the mother) was only tenant for life of the property, and that the remainder was limited to him after her death, and the mother was privy to the execution of a deed, purporting to be a settlement by the son of the property, on her death, upon the issue of the marriage, and made no objection to the arrangement, and it afterwards appeared that the mother was not tenant for life, but the absolute owner of the property, and that at the time of the execution of the deed there was no limitation of it to the son after her decease, the court ordered her to make good the settlement, and execute a conveyance of the property, and clothe the son with the interest which she permitted him to represent that he had at the time of the conclusion of the marriage (*e*). If, therefore, the relations and friends of persons proposing to be married pretend to settle estates upon them, or to make a provision for them and the children of the marriage, and the nuptials are celebrated upon the **738** faith of such settlements or provision, and under the belief that

(*b*) *Tracy* v. *Veal*, Cro. Jac. 223.
(*c*) 43 Ed. 3, 20. *Waterer* v. *Freeman*, Hob. 266.
(*d*) *Anon.*, Skin. 119.
(*e*) *Hunsden* v. *Cheyney*, 2 Vern. 150.

they have been duly made, and the transaction afterwards turns out to be a cheat, the court will compel the parties who have been guilty of the fraud to make good that which they pretended to do (*f*). But a representation concerning the fortune, circumstances, or prospects of a person about to be married, made by a relation, will not bind him to make it good, if he does not know at the time that his statement is untrue, and does not make it fraudulently with intent to deceive (*g*).

False representations as to the credit of third persons.—The credit to which a man is entitled in the commercial world, is a matter which does not lie exclusively within the knowledge of any one person. It is to a great extent matter of judgment and opinion, on which different men will form different opinions; and, if a man in answer to inquiries respecting the solvency or credit of a particular individual, or of a partnership, or joint-stock company, does no more than state his own honest opinion, believing what he says to be true, he is not responsible for the correctness of the opinion, and does not warrant the fact to be as represented by him (*h*). But, where the defendant's son, being about to open a shop, applied to the plaintiffs for a supply of goods upon credit, stating that he had a capital of 300*l.* to begin with, and referred them to his father, the defendant, for a corroboration of his statement, and the plaintiffs wrote to the father inquiring whether the son had, as he asserted, 300*l.* capital, his own property, and the defendant wrote in reply that he had, whereas the defendant knew that his son had nothing but borrowed capital, it was held that this was a fraudulent misrepresentation, for which the defendant was liable in damages to the plaintiffs in an action for deceit (*i*).

By the 9 Geo. 4, c. 14, s. 6, it is enacted, that no action shall be brought to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith. A representation, to be within the Act, must be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, with intent that he may obtain personal credit on the faith of such representation (*k*). Any representation

(*f*) *Beverley* v. *Beverley*, 2 Vern. 133. *Prole* v. *Soady*, 29 L. J., Ch. 721.
(*g*) *Merewether* v. *Shaw*, 2 Cox, 124. *Evans* v. *Wyatt*, 31 Beav. 217.
(*h*) *Haycraft* v. *Creasy*, 2 East, 105.
(*i*) *Corbett* v. *Brown*, 8 Bing. 33.
(*k*) As to representations of the ability of parties, see *Lyde* v. *Barnard*, 1 M. & W. 101, and *Hamar* v. *Alexander*, 2 B. & P., N. R. 241, decided before the passing of the statute.

739 that a person may be trusted, constitutes a representation as to his credit and ability (*l*). If the representation is in writing, and signed by the defendant pursuant to the statute, and the defendant at the time he makes the representation knows that it is untrue, he will be responsible in damages in an action for deceit, if the plaintiff has been induced to give credit on the faith of it (*m*), although he has not relied altogether on the writing, but has trusted partly to the writing and partly to subsequent oral representations (*n*). The false representation must be signed by the person making it, and a signature by an agent (*o*), or by a partner (*p*), will not be sufficient.

Representations concerning the character, credit, trade, or dealings of co-partnerships and joint-stock companies.—A representation by one of several partners as to the trustworthiness of the firm, is a representation as to the credit of another person within the statute. It is not the less a representation of the solvency of the other partners that it includes himself (*q*). The word "person" is of extensive signification, and is applicable to a corporation sole or aggregate, as well as to a private individual (*r*); so that representations by one member of a company as to the circumstances, credit, and condition of the company, in order to induce another to lend his money, or subscribe, or take shares in the undertaking, must be authenticated by a signed writing, in order to be made the foundation of an action for deceit (*s*).

Misrepresentation by directors and officers of public companies—Publication of deceitful prospectuses and reports.—Where a defendant, knowing that a joint-stock company, of which he was a promoter and director, was a bubble company, and that no *bonâ fide* dividend could be paid upon the shares, fraudulently pretended by a signed writing to guarantee the bearers of shares a minimum annual dividend of 33 per cent., to induce persons to purchase shares, and delivered the writing to the plaintiff, who, by reason of this representation, purchased shares, and lost his money, it was held that the defendant was responsible in damages to the plaintiff in an action for deceit (*t*). So, where the defendant, a

(*l*) *Swann* v. *Phillips*, 8 Ad. & E. 461.
(*m*) *Pasley* v. *Freeman*, 3 T. R. 51. *Foster* v. *Charles*, 6 Bing. 400; 7 Bing. 107.
(*n*) *Wade* v. *Tatton*, 18 C. B. 371; 25 L. J., C. P. 242.
(*o*) *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301; 43 L. J., Q. B. 56.
(*p*) *Williams* v. *Mason*, 28 L. T., N. S. 232.
(*q*) *Deraux* v. *Steinkeller*, 6 Bing. N. C. 99.
(*r*) *Boyd* v. *Croydon Rail. Co.*, 4 Bing. N. C. 669.
(*s*) As to the recovery of money paid on the strength of fraudulent representations of the condition of trading companies, see *Wontner* v. *Shairp*, 4 C. B. 439. *Watson* v. *Earl Charlemont*, 12 Q. B. 856.
(*t*) *Gerhard* v. *Bates*, 2 El. & Bl. 490.

740 director of a joint-stock bank, sanctioned the publication of a report, with his signature attached thereto, professing to set forth the state and condition of the bank, and representing that a particular dividend had been fairly earned, and was properly payable out of profits, and the report was publicly sold, and the plaintiff purchased a copy of it, and read it, and bought shares in the bank, relying on its correctness, and the bank was proved to be insolvent to the knowledge of the defendant, at the time he sanctioned the publication of the report, and the plaintiff lost his money, and incurred serious liabilities, it was held that he was entitled to maintain an action against the defendant for damages (*u*).

If, therefore, directors of public companies authorize the publication and circulation of prospectuses and advertisements concerning the transactions and monetary affairs of the company, containing statements which are false to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true (*x*), or statements of such a nature that the withholding of something which is not stated makes that which is stated absolutely false, they will be personally responsible to parties whom they have led to take shares, and invest money in the company, on the faith of those prospectuses, and who have sustained damage in consequence thereof (*y*). But the person defrauded will not, it seems, in such a case, be entitled to retain his shares and sue the company for the deceit (*z*). So, if the officers of the company knowingly and fraudulently aid in the concoction of false and deceitful reports, to induce persons to invest in the company, and investments are made and losses sustained by persons who have acted on the faith of such reports, the officers so acting will be responsible to the parties they have defrauded (*a*).

To support the action, there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it (*b*); and the plaintiff must prove that he acted on the faith of the representation, and

(*u*) *Scott* v. *Dixon*, 29 L. J., Ex. 62, n. *Peek* v. *Gurney*, L. R., 6 H. L. 377; 43 L. J., Ch. 19. *Stainback* v. *Fernley*, 9 Sim. 566.

(*x*) *Taylor* v. *Ashton*, 11 M. & W. 415. *New Brunswick, &c. Rail. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J., Ch. 297. *The Same* v. *Muggeridge*, 1 Dr. & Sm. 363; 30 L. J., Ch. 242. *Smith's case*, L. R., 2 Ch. 604.

(*y*) *Clarke* v. *Dixon*, 6 C. B., N. S. 453; 28 L. J., C P. 225. *Hill* v. *Lane*, L. R., 11 Eq. 215; 40 L. J., Ch. 41. *Peek* v. *Gurney*, *supra*.

(*z*) *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. 158, 166, 167. *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

(*a*) *Cullen* v. *Thompson*, 4 Macq. H. L. C. 441; 6 L. T., N. S. 870. See Wood's Railway Law, 110—120.

(*b*) *Peek* v. *Gurney*, L. R., 6 H. L. 377; 43 L. J., Ch. 19. A director who has not expressly or tacitly authorized the fraud will not be liable for the fraud of co-directors. *Cargill* v. *Bower*, 10 Ch. D. 502; 47 L. J., Ch. 649.

741 sustained actual pecuniary damage in consequence thereof (*c*), and that the statements were false, not highly coloured merely (*d*). But it is no answer that the plaintiff might have ascertained the truth by proper inquiry (*e*), or that the statements were in a sense literally true, if calculated and intended to mislead, *e. g.*, that so many shares had been already subscribed for, when in fact all that had been obtained was a contract to place so many (*f*), or that all that is stated is true, if material facts have been omitted (*g*). The plaintiff is, however, it seems, bound to make himself acquainted with the provisions of the articles of association (*h*), if they are in existence at the time of the contract (*i*), or within a reasonable time, which, it would seem, means the earliest practicable time, after they are in existence (*k*); and a misrepresentation of law, *e. g.*, that a company is legally competent to issue securities in a certain form, made to an intending lender, but which turns out to be incorrect, will not entitle the lender to relief on the ground of misrepresentation (*l*). Where a plaintiff has been induced both by his own mistake and by a material misstatement by the defendant to do an act by which he receives injury, the defendant may be made liable in an action for deceit (*m*).

By the 30 & 31 Vict. c. 131, s. 38, it is enacted, that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of the parties to any contract entered into by the company, or by the promoters, directors, or trustees thereof, before the issue of the prospectus, whether subject to adoption by the directors or company or not, and that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, or officers knowingly issuing the same, as regards any person taking shares in the company on the faith of the prospectus, unless he has had notice of the contract.

Considerable discussion has taken place since this enactment

(*c*) *Eastwood* v. *Bain*, 3 H. & N. 738; 28 L. J., Ex. 74. *Smith* v. *Chadwick*, 9 App. Cas. at p. 195.

(*d*) See *Denton* v. *Macneil*, L. R., 2 Eq. 352. *Bellairs* v. *Tucker*, 13 Q. B. D. 562.

(*e*) *Venezuela Rail. Co.* v. *Kisch*, L. R., 2 H. L. 99, in which case it was held that the statement of the capital of the company as 500,000*l.*, omitting the fact that 50,000*l.* would have to be paid for the concession, was fraudulent; and that the terms "available capital of the company" meant capital, exclusive of any borrowing powers. See, also, *Ross* v. *Estates Investment Co.*, L. R., 3 Eq. 122.

(*f*) *Ross* v. *Estates Investment Co.*, *supra*.

(*g*) *Heymann* v. *European Central Rail. Co.*, L. R., 7 Eq. 154.

(*h*) *Oakes* v. *Turquand*, L. R., 2 H. L. 326. *Ex parte Briggs*, L. R., 1 Eq. 483.

(*i*) *Stewart's case*, L. R., 1 Ch. 574. *Hallows* v. *Fernie*, L. R., 3 Eq. 520; 3 Ch. 467.

(*k*) *In re Cachar Company*, L. R., 2 Ch. 412. *In re Madrid Bank*, *ib.* 536. *Peel's case*, *ib.* 674; 36 L. J., Ch. 757.

(*l*) *Rashdall* v. *Ford*, L. R., 2 Eq. 750; 35 L. J., Ch. 769. See *Hallows* v. *Fernie*, *supra*. As to when time is a bar, see *Smallcombe's case*, L. R., 3 Eq. 769.

(*m*) *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

742 was passed with reference to its meaning and effect, and particularly with reference to the kind of contract therein referred to; and the opinions of the judges have been far from unanimous on the subject. In *Cornell* v. *Hay* (*n*), Keating, J., expressed an opinion that the section extended to any contract whose subject matter was such that a shareholder might reasonably be entitled to be made acquainted with it, while Honyman, J., was of opinion that the section was not confined to contracts made, or intended to be made, on behalf of the company. In *Gover's Case* (*o*) the Court of Appeal was equally divided as to whether a promoter of a company was bound to specify an agreement, made by him before he became such promoter, to buy a patent, to carry on which the company was afterwards formed. On the one side it was held that the promoter was not bound to disclose a contract made by him before he became a promoter, on the ground that such a contract could not be the contract of the company or the contract of a promoter, trustee, or director of the company, seeing that there was then no company, promoter, trustee, or director. On the other hand, it was held that this would be too narrow a construction; and, while Mellish, L. J., was of opinion that the section ought to be held to extend to every contract made with a person who afterwards becomes a promoter or director, provided the company have become entitled to the benefit of the contract, or have become liable to perform the provisions of the contract before the prospectus was issued, Brett, J., held that it included every contract made before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares, in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director or trustee before or after he became such, and whether or not such contract was made on behalf of, or so as, if adopted, to impose a liability on, the company. In *Twycross* v. *Grant* the Common Pleas Divison held (*p*) that the contracts to be disclosed must in some way affect the internal or external affairs of the company, including in that expression its property and prospects, the management of its affairs, and dealings with its shares, and were not limited to such as were entered into by the company or by its promoters, directors, or trustees as such. On appeal the court was divided. Bramwell, L. J., held (*q*) that those contracts are meant which affect the company, which put some obligation on it, whether with or without some benefit attached,

(*n*) L. R., 8 C. P. 328; 42 L. J., C. P. 136.
(*o*) 1 Ch. D. 182; 45 L. J., Ch. 83.
(*p*) 2 C. P. D. 469; 46 L. J., C. P. 636.
(*q*) 2 C. P. D. 491.

743 and that the section does not extend to every contract which would assist a person in determining whether he would be a shareholder. Kelly, C. B., was of opinion that a contract to be within the provision must have been made with the company, if it has been formed, and, if not, with the promoters, or the directors, or the trustees, representing, or purporting to act on behalf of the future company, and with the intent that the company when formed shall execute a corresponding contract, and so in effect ratify the act done by the promoters or other body of persons mentioned before its formation; also that it must be such as to impose or to be intended to impose a burden, or obligation, or a loss, or a liability upon the company which would affect the value of the shares in the hands of a purchaser. Cockburn, C. J., adopted, and Brett, L. J., adhered to, the view expressed by the latter judge in *Gover's Case*. In *Sullivan* v. *Mitcalfe* (*r*), Baggallay and Thesiger, L.JJ., adopted the wider view of the meaning of the section, while Bramwell, L. J., adhered to the opinion he had expressed in *Twycross* v. *Grant*.

The enactment is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others, for breach of which an action on the statute will lie (*s*).

A promoter who intentionally issues a prospectus without inserting the contracts required to be specified is guilty of "knowingly issuing" within the meaning of the section, although he omits them under the *bonâ fide* belief that it is unnecessary to specify them (*t*).

The remedy given by the statute is a remedy by action against the person making the omission. The shareholder is not entitled to have his name removed from the list of shareholders (*u*).

Fraud—Money obtained.—If one man has obtained money from another through the medium of imposition or deceit, such money is, in contemplation of law, not the money of the wrongdoer, but of the injured person, whose title to it cannot be destroyed by the fraudulent dispossession (*x*).

Thus money may be recovered back which has been paid under the following circumstances: where a married man, pretending to be single, marries a lady, and, under colour of such pretended marriage, gets possession of her estates and receives the rents (*y*);

(*r*) 5 C. P. D. 455; 49 L. J., C. P. 815.
(*s*) *Cornell* v. *Hay*, L. R., 8 C. P. 328; 42 L. J., C. P. 136.
(*t*) *Twycross* v. *Grant*, 2 C. P. D. 469; 46 L. J., C. P. 626.
(*u*) *Gover's case*, 1 Ch. D. 182; 45 L. J., Ch. 83, *dissentiente*, Brett, L. J.
(*x*) *Neate* v. *Harding*, 6 Exch. 349; 20 L. J., Ex. 250. *Chowne* v. *Baylis*, 31 Beav. 351; 31 L. J., Ch. 757.
(*y*) *Hasser* v. *Wallis*, Salk. 28.

744 and where a man claims and receives rents or money under a false or pretended authority (*z*).

Fraud—Remedies—Action for damages.—If special damages have been sustained by reason of the misrepresentation and deceit, they may be recovered (*a*).

If a seller makes a fraudulent representation to a buyer to induce him to buy, and the buyer acts upon it as if it were true, the seller must compensate him for all the direct injurious consequences that naturally follow from his acting on the representation. Thus, where a cattle-dealer sold to the plaintiff a cow, and fraudulently represented that it was free from infectious disease, when he knew that it was not, and the plaintiff placed the cow with five others which caught the disease and died, it was held that the plaintiff was entitled to recover as damages the value of all the cows (*a*).

Where a person has been induced, by false accounts of the transactions and profits of a joint-stock company, to buy shares therein, and give for them a sum far beyond their real value, the measure of damages is the difference between the actual value of the shares at the time of the purchase, and the fictitious value imparted to them by the false representation (*b*). The plaintiff is entitled to recover the amount he paid for the shares, if they are in fact worthless, although at some time or other after he purchased them they may have had a factitious value, from which, however, he derived no benefit (*c*).

Remedies—Specific performance.—Where a false representation is made by one man to induce another to enter into a contract, and the person making the representation is no party to the contract, the court will compel the latter to make good his assertion as far as possible. The principle of equity that, where a person by misrepresentation draws another into a contract, such person shall be compelled, if possible, to make good the representation, applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements, false in fact, were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatives the representation (*d*). The principle is this, that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will, in

(*z*) *Robson* v. *Eaton*, 1 T. R. 62. *Dupen* v. *Keeling*, 4 C. & P. 102.

(*a*) *Mullett* v. *Mason*, L. R., 1 C. P. 559; 35 L. J., C. P. 299.

(*b*) *Davidson* v. *Tulloch*, 3 Macq. H. L. C. 703.

(*c*) *Twycross* v. *Grant*, 2 C. P. D. 469; 46 L. J., C. P. 626.

(*d*) *Pulsford* v. *Richards*, 17 Beav. 94.

745 general, be sufficient to entitle him to the assistance of the court for the purpose of realizing such representation (*e*).

Remedies—Estoppel.—Where one person by his words or conduct wilfully induces another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*f*). "By the term 'wilfully,'" observes Parke, B., "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and, if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth" (*g*). Where an action was brought for the conversion of a policy of insurance, and the plaintiff proved that he had given instructions to the defendant to effect a policy for him, and gave in evidence a letter from the defendant to the plaintiff stating that he had effected the policy, Lord Mansfield refused to allow the defendant to contradict his own representation, and show that no policy had been effected, and held him liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected (*h*).

Whenever, also, a man has led others into the belief of a certain state of facts by conduct of culpable neglect, calculated to have that result, and they have acted on that belief to their prejudice, he will not be heard afterwards, as against such persons, to show that that state of facts did not exist. In short, a man is not permitted, or at liberty, to charge the consequences of his own fault on others, and complain of that which he has himself brought about (*i*); but the neglect must be in the transaction itself, and be the proximate cause of the injury sustained, and must not be the neglect of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy (*k*); and the party who claims the benefit of this doctrine of estoppel, must show

(*e*) Per Lord Cottenham, *Hammersley* v. *De Biel*, 12 Cl. & F. 62, n. *Thomson* v. *Simpson*, L. R., 9 Eq. 506.

(*f*) *Pickard* v. *Sears*, 6 Ad. & E. 474. *Piggott* v. *Stratton*, 1 De G., F. & G. 33; 29 L. J., Ch. 9. *M'Cance* v. *London and North Western Rail. Co.*, 3 H. & C. 343; 34 L. J., Ex. 39.

(*g*) *Freeman* v. *Cooke*, Exch. 633. *Haines* v. *East India Co.*, 11 Moore, P. C. 57.

(*h*) *Harding* v. *Carter*, Park on Insurance, 5.

(*i*) *Swan* v. *North British Australian Co.*, 7 H. & N. 603; 2 H. & C. 175; 31 L. J., Ex. 436; 32 L. J., Ex. 273.

(*k*) Blackburn, J., *Swan* v. *North British Australian Co.*, 2 H. & C. 175; 32 L. J., Ex. 273.

746 that he has acted in the transaction in which he was deceived with ordinary caution (*l*). A company, by entering the name of a shareholder on their register under a forged or invalid transfer, represent that the person so entered is entitled to transfer the shares to a third person, and are estopped from denying it; and, if the real holder's name is restored to the register, such third person is entitled to sue the company, and to recover the value of the shares at the time they first refused to recognise him as a shareholder, with interest (*m*).

Liability of the principal for the fraud of his agent.—The principal is, of course, responsible for any fraud of the agent which he has expressly authorized. He is also responsible when he has adopted and taken the benefit of the fraudulent act with knowledge of the fraud (*n*). "Where fraud has been committed, and a third person is concerned who was ignorant of the fraud, such third person is innocent of the fraud only so long as he does not insist upon deriving any benefit from it; but, when once he takes the benefit, he becomes a party to the fraud" (*o*). The principal is also liable to third persons for the frauds, deceits, concealments, and misrepresentations of his agent committed in the course of his employment and for the principal's benefit, though no express command or privity by the principal be proved (*p*). Thus, a trustee who employs a solicitor to invest the money of the *cestui que trust*, is responsible, if the solicitor fraudulently fabricates a surrender of copyholds by which the *cestui que trust* incurs loss (*q*). But, as a general rule, the principal is not liable for the personal fraud of the agent not in any way participated in by the principal and from which he has derived no benefit; for such fraud can hardly be within the scope of the agent's employment (*r*). Where a banking co-partnership, under the 7 Geo. 4, c. 46, were in the habit of receiving deposits of money from their customers, and allowing interest on the deposit, and the manager of the bank received a deposit of money from a

(*l*) Erle, C. J., *Ex parte Swan*, 7 C. B., N. S. 490; 30 L. J., C. P. 118.

(*m*) *In re Bahia and San Francisco Rail. Co.*, L. R., 3 Q. B. 584; 37 L. J., Q. B. 176. *Hart* v. *Frontino and Bolivia Gold Mining Co.*, L. R., 5 Ex. 111; 39 L. J., Ex. 93. See *In re London and Provincial Telegraph Co.*, L. R., 9 Eq. 653; 39 L. J., Ch. 419.

(*n*) *Udell* v. *Atherton*, 7 H. & N. 181; 30 L. J., Ex. 337. *Barry* v. *Croskey*, 2 Johns. & H. 21. *New Brunswick and Canada Rail. Co.* v. *Conybeare*, 9 H. L. C. 711; 31 L. J., Ch. 297. *Swire* v. *Francis*, 3 App. Cas. 106; 47 L. J., P. C. 18.

(*o*) Wood, V.-C., *Scholefield* v. *Templer*, 1 Johns. 163; 28 L. J., Ch. 452.

(*p*) *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex. 259; 36 L. J., Ex. 147. *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J., P. C. 31. *Weir* v. *Bell*, L. R., 3 Ex. D. 238; 47 L. J., Ex. 704.

(*q*) *Bostock* v. *Floyer*, L. R., 1 Eq. 26. *Sutton* v. *Wilders*, L. R., 12 Eq. 373.

(*r*) *Swift* v. *Jewsbury*, L. R., 9 Q. B. 301; 43 L. J., Q. B. 56. *Weir* v. *Bell*, 3 Ex. D. 238; 47 L. J., Ex. 704.

747 lady, and gave her a deposit receipt, and at a subsequent period represented to her that a higher rate of interest might be obtained for her money if she purchased some houses on which the bank had a mortgage, and paid off the mortgage, and the lady accordingly brought her deposit receipts to the bank, and drew out her money, and handed it over to the manager to be applied in the way indicated by him, but the latter absconded with the money, it was held that the bank was responsible for the loss, as the manager had all along been intrusted with the money as their agent (*s*). But where one of several partners in a bank induced a customer to draw her money out of the bank and lend it to his own son, on the security of the son's note of hand and his (the partner's) own guarantee, and the partner and his son both became insolvent, and the securities were worthless, it was held that the banking firm was not responsible for the money, as the investment was a private transaction between the customer and the individual partner, who was avowedly acting in the matter on his own private account, and not on behalf of the bank (*t*). So, also, a shipowner is not responsible for the fraud of the captain in signing bills of lading without having received any goods on board (*u*); nor a wharfinger for a false receipt given by his agent, representing that goods have been received at the wharf, when no such goods have been received (*x*).

Responsibility—Joint-stock companies.—The shareholders of a joint-stock company cannot be made individually responsible in damages in an action for deceit, for adopting and authorizing the publication of a false and fraudulent report respecting the pecuniary state and condition of the company, unless it is proved that the report has been signed by them, and was false to their knowledge at the time they attached their signatures to it (*y*). Where directors have signed false and fraudulent reports of the state and circumstances of a joint-stock company, such directors, and not the company, are the proper parties to be sued for the damages resulting from the misrepresentation. No body of shareholders can authorize directors to put forward fraudulent representations and false accounts of the transactions of the company, so as to render the company at large responsible for the fraud. That is a course which no body of shareholders could sanction against a single dissentient, or against a single absent shareholder (*z*).

(*s*) *Thompson* v. *Bell*, 10 Exch. 10; 23 L. J., Ex. 321.
(*t*) *Bishop* v. *Countess of Jersey*, 2 Drew. 143; 23 L. J., Ch. 483.
(*u*) *Grant* v. *Norway*, 10 C. B. 688.
(*x*) *Coleman* v *Riches*, 16 C. B. 104; 24 L. J., C. P. 125.
(*y*) *Barry* v. *Croskey*, 2 Johns. & H. 27.
(*z*) *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. 158. *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 312. See however *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; 43 L. J., P. C. 31.

748 *Liability of the agent.*—If an agent obtains money in the name of his principal by fraud or deceit, he cannot shelter himself from responsibility on the ground that he is an agent, and has paid the money over to his principal. If an agent sells goods with full knowledge that he has no right to sell, and conceals that fact from the buyer, he is liable to the latter for the deceit, although before action brought he has paid over the price (*a*). So, where a solicitor brought an action, and recovered a sum of money on the retainer of a man who professed to act under a power of attorney from the party really entitled, but which power of attorney was forged, and an action was brought against the solicitor for the recovery of the money, it was held that the fact of his having paid it over to his false employer constituted no answer to the action (*b*).

Fraud by infants.—An infant is not liable to an action for a fraudulent representation or a breach of warranty (*c*), where a contract made by means of the misrepresentation, or a sale effected through the false warranty, is substantially the cause of action. Thus, he is not responsible for falsely affirming goods to be his own goods, and that he had a right to sell them, and thereby inducing the plaintiff to purchase them (*d*). Nor is he responsible for a false and fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him; for, if such an action were maintainable, all the pleas of infancy would be taken away, as such affirmations are in every contract (*e*).

Fraud by married women.—No action was maintainable against a married woman or her husband for a false and fraudulent representation by the married woman that she was a *feme sole*, whereby she induced the plaintiff to make a contract with her which he could not enforce by reason of her being married (*f*): or that the signature to a bill of exchange was her husband's signature, whereby the plaintiff was induced to advance money on the bill (*g*); because the tort was connected with the contract, and a married woman could not bind herself or her husband by contract; but now by sect. 1, sub-sect. 3, of the Married Women's Property Act, 1882, she can bind her separate estate by contract, and as she can make a binding contract she is liable for a false representation inducing the contract.

(*a*) *Peto* v. *Blades*, 5 Taunt. 657.
(*b*) *Robson* v. *Eaton*, 1 T. R. 62.
(*c*) *Howlett* v. *Haswell*, 4 Camp. 118. *Green* v. *Greenbank*, 2 Marsh. 485.
(*d*) *Grove* v. *Nevill*, 1 Keb. 778.
(*e*) *Johnson* v. *Pye*, 1 Sid. 258; 1 Lev. 169; 1 Keb. 913. *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 430. *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L. J., Q. B. 57. *Price* v. *Hewett*, 8 Exch. 146. *Stikeman* v. *Dawson*, 1 De G. & Sm. 113.
(*f*) *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 429; 23 L. J., Ex. 164.
(*g*) *Wright* v. *Leonard*, 11 C. B., N. S. 258; 30 L. J., C. P. 365.

749 A married woman's separate estate may be liable for frauds relating to the separate estate, such as dealing with the separate estate by way of fraudulent representation (*h*); but in the case of a fraud with respect to the separate estate it appears that there is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint upon anticipation appears from the instrument in respect of which relief is sought (*i*).

(*h*) *Wainford* v. *Heyl*, L. R., 20 Eq. 321; 44 L. J., Ch. 567.

(*i*) *Arnold* v. *Woodhams*, L. R., 16 Eq. 29; 42 L. J., Ch. 578. *Stanley* v. *Stanley*, 7 Ch. D. 539; 47 L. J., Ch. 256.

750 CHAPTER XIII.

OF STATUTORY COMPENSATION.

Recovery of compensation for land taken or injuriously affected under statutory authority.—The 8 & 9 Vict. c. 18, commonly called the Lands Clauses Consolidation Act, 1845, consolidates into one Act certain provisions to be thereafter incorporated into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made to the owners or occupiers of, or parties interested in, such lands, for any damage that may be sustained by them by reason of the execution of the works authorized by statute. The general compensation clause (sect. 68) provides that, if any party shall be entitled to compensation in respect of any lands, or of any interest therein (*a*), which shall have been taken (*b*) for, or injuriously affected by (*c*), the execution of the works, and for which satisfaction has not been made, and the compensation claimed exceeds 50*l.* (*d*), such party may have the same settled by arbitration or the verdict of a jury, as he shall think fit. The fact that the works cannot be executed without the consent of some third person, who owns the land on which the works are to be made, does not render the consent of such third person, when given, equivalent to an agreement to give up his land voluntarily, but such third person will still be entitled to claim as for lands compulsorily taken (*e*).

751 By another statute, the 8 & 9 Vict. c. 20, commonly called the Railways Clauses Consolidation Act, consolidating into one Act

(*a*) This does not extend to an agreement for sporting (*Bird* v. *Great Eastern Rail. Co.*, 19 C. B., N. S. 268; 34 L. J., C. P. 366); unless, perhaps, it be by deed. *Ibid.* Easements come within sect. 85 of the Act, where there is express power to take them. *Hill* v. *Midland Rail. Co.*, 21 Ch. D. 143; 51 L. J., Ch. 774; *G. W. Rail. Co.* v. *Swindon Rail. Co.*, 9 Ap. Cas. 787.

(*b*) As to lands "injuriously affected," see *post*, p. 752. Where the entire Act is incorporated in a special Act, no other enactment is required, beyond this section, to confer the right to compensation for lands injuriously affected by the works under the special Act. *Reg.* v. *St. Luke's*, L. R., 6 Q. B. 572; 7 Q. B. 148; 41 L. J., Q. B. 81.

(*c*) As to the different meanings of the word "take" throughout the Act, see *Spencer* v. *Met. Board of Works*, 22 Ch. D. 142; 52 L. J., Ch. 249, per Bowen, L. J., *Charlton* v. *Rolleston*, 28 Ch. D. 237; 54 L. J., Ch. 233.

(*d*) If the claim for compensation is under 50*l.*, it is to be settled by two justices (sect. 22).

(*e*) *Thames Conservators* v. *Victoria Station Rail. Co.*, L. R., 4 C. P. 59; 38 L. J., C. P. 4. See Wood on Railway Law, Chaps. XIII. and XIV.

sundry provisions to be introduced into Acts of Parliament thereafter passed, authorizing the construction of railways, it is provided (sect. 6), that in exercising the power given to the company to construct a railway, the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of a railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise as regards such lands of the powers vested in the company, the amount of compensation to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act. In cases to which the Lands Clauses Act does not apply, as, for instance, where the lessee of lands taken by a company is entitled to a right of renewal, the Chancery Division of the High Court has jurisdiction to decide between the claimant and the company (*f*). If the claimant or the railway company prefer it, they may, at any time before the issue of the writ to the sheriff, apply to a judge of a superior court of common law for the trial of the question between them, by directing an issue in such form, and to be tried at such place, &c., as he shall direct; and the proceedings in respect of such issue will be subject to the jurisdiction of the court; but the jury, nevertheless, must, where the issue relates to land purchased and injury done to other land held therewith, deliver their verdict separately, as provided by the 49th section of the Lands Clauses Act (*g*).

Similar provisions are contained in other Acts passed for facilitating the acquisition of, or interference with, interests in land for public purposes (*h*).

The statutory remedy provided by these Acts of Parliament is substituted in lieu of the ordinary remedy by way of action, so that parties aggrieved by anything done in the exercise of the powers granted by the statute must follow the statutory remedy, and cannot resort to an action for damages (*i*). But, if the powers of the Act have been exceeded, or the thing authorized to be done has been negligently or carelessly done, and the damage

(*f*) *Bogg* v. *Midland Rail. Co.*, L. R., 4 Eq. 310. *Shepherd* v. *Hills*, 11 Exch. 67. In this country provision is made for compensation for all lands taken for public purposes. Indeed, the constitution of the United States expressly provides for such compensation, and the States have no power to confer authority to take the lands of individuals for public purposes without making provision for proper compensation therefor. See Wood on Railway Law, Chap. XIII.

(*g*) 31 & 32 Vict. c. 119, ss. 41—43.

(*h*) Such as the Waterworks Clauses Act (10 & 11 Vict. c. 17, s. 6), and the Metropolis Local Management Act (18 & 19 Vict. c. 120, s. 86).

(*i*) *Watkins* v. *Great Northern Rail. Co.*, 16 Q. B. 968. *Jolly* v. *Wimbledon, &c. Rail. Co.*, 1 B. & S. 807; 31 L. J., Q. B. 96. *Chamberlain* v. *West End, &c. Rail. Co.*, 2 B. & S. 605; 32 L. J., Q. B. 173. *Boyfield* v. *Porter*, 13 East, 208. *Mayor, &c. of Blackburn* v. *Parkinson*, 1 El. & El. 71; 28 L. J., M. C. 7.

752 is the result of negligence, an action for damages must be brought, and the matter is not within the cognizance of the statutory tribunal appointed for settling the amount of statutory compensation (*k*).

Injuries establishing a right to statutory compensation—Compulsory purchase of land—Land "injuriously affected."—Where land has been taken under the provisions of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), the claimant, the land-owner, is entitled to compensation not only for the land actually taken, but also in respect of the residue of his land being "injuriously affected" (see sects. 63, 68) by the execution of the works, although the injury may be of such a nature that an action for damages would not have been maintainable in respect of it; for it has been said, that where the owner is turned out of his property by a company under compulsory powers of purchase, the company is bound to compensate him for *all* the loss occasioned by the expulsion, as in trespass for expulsion (*l*), but this doctrine is not to be extended; and at all events, where the portion of land taken is separated from that alleged to be "affected" by land belonging to another person than the claimant, there is no right to compensation (*m*). A railway company authorized to construct a line of railway under a public street is not bound to give notice to treat or pay compensation to the owner of the land adjoining the street in respect of any part of the soil of such public street; and a *cul de sac* dedicated to the public is for this purpose in the same position as a public street (*n*).

Injuries giving a right to statutory compensation—Compulsory purchase of buildings.—The 92nd section of the Lands Clauses Act, 8 & 9 Vict. c. 18, provides that no person shall be required to sell to the promoters "a part only of any house or other building or manufactory," if such person is willing to sell the whole (*o*). All fixtures, whether they are tenant's or landlord's fixtures, form part of the premises which the company may be required to value and take (*p*). Where a manufactory was partly worked by water-power supplied by a reservoir, which in its turn was supplied by a

(*k*) *Clothier* v. *Webster*, 12 C. B., N. S. 790; 31 L. J., C. P. 316. *Whitehouse* v. *Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305. *Stainton* v. *Woolrych*, 23 Beav. 233; 26 L. J., Ch. 300. *Coats* v. *Clarence Rail. Co.*, 1 Russ. & M. 181.

(*l*) *Jubb* v. *Hull Dock Co.*, 9 Q. B. 457. *In re Stockport, &c. Rail. Co.*, 33 L. J., Q. B. 251. *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R., 3 Ex. 307; 5 Ex. 221; 5 H. L. 418; 41 L. J., Ex. 137. *Holt* v. *Gas Light & Coke Co.*, L. R., 7 Q. B. 728; 41 L. J., Q. B. 351. *Ripley* v. *Great Northern Rail. Co.*, L. R., 10 Ch. 435.

(*m*) *Reg.* v. *Essex*, 17 Q. B. D. 447; 55 L. J., Q. B. 313.

(*n*) *Souch* v. *East London Rail. Co.*, L. R., 16 Eq. 108; 42 L. J., Ch. 477.

(*o*) *Giles* v. *London, Chatham, &c. Rail. Co.*, 1 Drew. & S. 406; 30 L. J., Ch. 603. *Richards* v. *Swansea Tramways Co.*, 9 Ch. D. 425. In this country a company is not required to take more lands than are required for its purposes; but in the estimation of the damages, not only the value of the land taken, but also the injury to that not taken, is included. Wood on Railway Law, Chap. XIII.

(*p*) *Gibson* v. *Hammersmith Rail. Co.*, 2 Drew. & S. 603; 32 L. J., Ch. 337.

goit, into which water was turned from a natural stream at some
753 distance from the manufactory, and at the point where the goit commenced there was a weir, with shuttles to regulate the supply of water to the goit, and a mill-house for the residence of a man to see to the shuttles, and the railway company proposed to take the weir, shuttles, mill-house, and part of the goit, it was held that they must take the manufactory also (*q*). So a vacant piece of land in front of a public-house, not separated by any fence from the street, which has been always treated as passing to the lessee of the public-house under a demise thereof, and forms the only means of approach for vehicles coming to the house, is part of the "house" within the meaning of the section (*r*). And where there was a paddock which opened by a door in one corner into an enclosure of house and garden, it was held that the paddock was part of the house (*s*). But, although the company may be compelled to take whatever is thus necessary for the convenient or profitable occupation of the house or manufactory, they cannot be compelled to take what is necessary only for the personal use or convenience of the owner for the time being. Where, therefore, the plaintiff, the proprietor of a house and six acres of land on one side of a road, bought several acres of land on the other side, upon which he kept cows and horses requisite for his family and establishment, which was a large one, and built, or found built thereon, a cottage, which he used for the residence of his grooms, it was held that the last-named land was not part of the "house" within the meaning of the section (*t*). It makes no difference that the grounds are used partly for ornament and partly for business purposes, *e.g.*, growing plants, &c., for sale, if the company propose to take part of that which is used for ornament and can fairly be considered as part of the house as a residence (*u*).

Injuries giving a right to statutory compensation—Compulsory purchase of mines.—It is provided by the Railways Clauses Consolidation Act that a railway company is not to be entitled to the mines under land which it purchases, but that those mines are to be treated as excepted out of the conveyance to the railway company, unless they are specifically and expressly included. If, however, the owner, lessee, or occupier of any mines lying under the railway is desirous of working them, he must give the directors notice thirty days before commencing to do so. On the receipt of

(*q*) *Furniss* v. *Midland Rail. Co.*, L. R., 6 Eq. 473.

(*r*) *Marson* v. *London, Chatham, &c. Rail. Co.*, L. R., 6 Eq. 101; 37 L. J., Ch. 483.

(*s*) *Barnes* v. *Southsea Rail. Co.*, 27 Ch. D. 536.

(*t*) *Steele* v. *Midland Rail. Co.*, L. R., 1 Ch. 275.

(*u*) *Salter* v. *Metropolitan District Rail. Co.*, L. R., 9 Eq. 432; 39 L. J., Ch. 567.

754 the notice the directors may cause the mines to be inspected; and, if it appears to them that the working of the mines is likely to damage the works of the railway, and if the company are willing to make compensation for the mines to the owner, lessee, or occupier, he cannot work the mines. If the company and the owner, lessee, or occupier cannot agree as to the amount of the compensation, it must be settled as in other cases of disputed compensation (*x*). The word "mines" in sect. 77 of the Act includes minerals got by open workings, and, therefore, a bed of clay may be dug and worked by the landowner after conveyance of the land to the company, unless the company are willing to make compensation (*y*). A railway company having already acquired surface lands may subsequently purchase, either compulsorily or by agreement, the mines under those lands, notwithstanding sect. 77 and the following sections of the Act (*z*).

The railway company are not bound to any fixed period, after receiving notice from the mine owner, within which they must give a counter notice. They can stop the working of the mine at any time thereafter that they fear danger to the line, by a notice of their willingness to pay compensation for the minerals which they desire to be left standing (*a*). If a railway company has purchased the surface without the minerals, the owner has the right to work the mine, even to the letting down of the surface, provided the working is according to the usual way in the district (*b*).

The railway company is under no obligation to compensate any person until there is some one who has a right to work, and who is prepared to work, the mines. When that person gives the notice of his intention to work the mines, the directors are to come to an agreement or settlement with that person, according to what his rights may be. If his rights are to take away the coal and exhaust it entirely, and if he has a tenure the length of which will enable him to take it away and exhaust it entirely, the directors are bound to compensate him to an extent equal to the whole value of the minerals. But, if he cannot take away the whole, or if the extent of his tenure is not such as would enable him to take away the whole, the directors will have to compensate him to the extent of his interest. In the last case the reversioner will also be entitled to compensation in respect of his interest, but only on the footing that the compensation to be paid to the

(*x*) 8 & 9 Vict. c. 20, s. 78.
(*y*) *Midland Rail. Co.* v. *Haunchwood Brick Co.*, 20 Ch. D. 552; 51 L. J., Ch. 778.
(*z*) *Errington* v. *Metropolitan District Rail. Co.*, 19 Ch. D. 559; 51 L. J., Ch. 305.
(*a*) *Dixon* v. *Caledonian and Glasgow and S. W. Rail. Cos.*, 5 App. Cas. 820.
(*b*) *Pountney* v. *Clayton*, 11 Q. B. D. 820; 52 L. J., Ch. 56.

755 lessee and reversioner together is not to exceed the whole value of the minerals; and, if the lessee has given the notice and received his share of the total compensation payable by the railway company, the reversioner cannot give a notice and claim to work the coal, but will only be entitled to his share of such total compensation (*c*).

Injuries giving a right to statutory compensation—Property injured—Where no land has been taken.—Where no land has been compulsorily taken from the plaintiff under statutory powers, but the injury complained of has arisen from something done on land which has not been taken from the claimant, in order to found a claim for compensation, there must be an injury and damage, not temporary but permanent, peculiarly affecting the house or land itself, in which the person claiming compensation has an interest (*d*). Where, by the construction of works, there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value (*d*). Compensation, therefore, must be paid for the loss of any natural right or easement belonging to land, such as the right to the flow of a stream, a right of way, or the right to light.

In cases of railway compensations, it has been held that the occupier of a house and shop adjoining a railway is entitled to the statutory compensation for damage sustained by him in consequence of the dust and dirt from the railway works having penetrated his shop and damaged his goods (*e*).

Injuries giving a right to statutory compensation—Interference with easements.—A railway company cannot, under sect. 16 of the Railway Clauses Act, permanently divert the course of a private river, unless it be necessary for the construction of the line: a mere saving of expense to the company is no justification (*f*). Where the company have power to divert a portion of a brook only, compensation cannot be claimed for the loss of the stream, but

(*c*) *Smith* v. *Great Western Rail. Co.*, 3 App. Cas. 165; 47 L. J., Ch. 97.

(*d*) *Metropolitan Board of Works* v. *M'Carthy*, L. R., 7 H. L 243; 43 L. J., C. P. 385. In this country there can be no recovery for damages resulting from the construction of a railway, unless some portion of the plaintiff's land was actually taken for the construction of the road. 2 Wood's Railway Law, Chap. XIV.

(*e*) *Knock* v. *Metropolitan Rail. Co.*, L. R., 4 C. P. 131; 38 L. J., C. P. 78. *East & West India Docks* v. *Gattke*, 3 Mac. & G. 155; 20 L. J., Ch. 17.

(*f*) *Pugh* v. *Golden Valley Rail. Co.*, 15 Ch. D. 330; 49 L. J., Ch. 721.

only so far as the diversion of the quantity taken injuriously affects
756 the plaintiff's land (*g*). But, where the company have power to divert the whole stream, and have given notice of their intention so to do, they must make compensation at once for the whole value of the interest of the claimant in the stream, and are not entitled merely to compensate him from time to time according to the quantity actually taken (*h*). So, if a private way of the landowner has been obstructed, or his enjoyment of it rendered less convenient by reason of its being crossed by a railroad (*i*), or the light coming to his house has been impeded (*k*), a case for the statutory compensation is made out. A house was divided into a front and a back block. The tenants of the back block had to pass through a hall and up some stairs. A railway company in the exercise of their powers took down the front block, and removed the hall, and thereby lessened the value of the back block: it was held that the access through the hall was not a way of necessity, but was a continuous and apparent easement which passed under the demise of the back block, and that an interference with this easement gave rise to a valid claim for compensation (*l*).

Injuries giving a right to statutory compensation—Interference with public rights.—The landowner will also be entitled to compensation where his property has been depreciated in value for all purposes, and not merely for some special purpose only, by the interference of the company with some public right, as, for instance, if the means of access to his house or land from the highway has been rendered less convenient from the highway being raised or lowered (*m*); or if the house has been permanently depreciated in value from the highway being narrowed (*n*), or diverted (*o*), or stopped up (*p*). Where a local board of health gave notice to the owner of a house abutting on a street to level and pave it, and, in default of the owner, they did the work themselves, and, by the alteration so caused in the level of the street, the access to the house was rendered difficult and dangerous, it was

(*g*) *Bush* v. *Trowbridge Waterworks Co.*, L. R., 19 Eq. 291; 10 Ch. 459; 44 L. J., Ch. 645.

(*h*) *Stone* v. *Mayor, &c., of Yeovil*, 2 C. P. D. 99; 47 L. J., C. P. 137. Before an entire stream can be taken, the company must proceed to have the amount of compensation assessed, and paid or deposited, or security given, in the mode prescribed by the statute: and the court will by injunction restrain them from diverting the stream, unless they have complied with the statutory requirements (*Ferrand* v. *Mayor, &c., of Bradford*, 21 Beav. 412).

(*i*) *Glover* v. *North Staffordshire Rail. Co.*, 16 Q. B. 912. *Moore* v. *Great South & Western Rail. Co.*, 10 Ir. C. L. Rep. 46.

(*k*) *Eagle* v. *Charing Cross Rail. Co.*, L. R., 2 C. P. 638; 36 L. J., C. P. 297.

(*l*) *Ford* v. *Metropolitan Rail. Co.*, 17 Q. B. D. 12; 55 L. J., Q. B. 296.

(*m*) *Chamberlain* v. *West-End of London, &c., Rail. Co.*, 2 B. & S. 605, 617; 32 L. J., Q. B. 173. *Reg.* v. *St. Luke's*, L. R., 6 Q. B. 572; 7 Q. B. 148; 41 L. J., Q. B. 81.

(*n*) *Beckett* v. *Midland Rail. Co.*, L. R., 3 C. P. 82; 37 L. J., C. P. 11.

(*o*) *Caledonian Rail. Co.* v. *Walker's Trustees*, 7 App. Cas 259.

(*p*) *Wadham* v. *N. E. Rail. Co.*, 14 Q. B. D. 747; 16 Q. B. D. 227.

757 held that the owner was entitled to compensation (*q*). Where the plaintiff was the lessee of a house in close proximity to a public draw-dock, which opened into the Thames, and of which, by reason of his proximity, his use for the purposes of his business was very constant, and, by reason of the destruction of the dock, which was required for a public undertaking, the plaintiff's premises were permanently diminished in value, it was held that the plaintiff was entitled to compensation (*r*).

When statutory compensation cannot be claimed—Silence of statute.—Where no compensation is given by the statute, that affords a reason, though not a conclusive one, for thinking that the intention of the legislature was that the thing complained of should only be done if it could be done without injury to others, and not that it should be done at all events (*s*).

When statutory compensation cannot be claimed—Injury not actionable at common law.—Where the injury would not have formed a ground of action against an ordinary proprietor, if done by him, such injury cannot be made a ground for compensation under the statute (*t*). Where, therefore, the New River Company, in the exercise of its statutory powers, constructed some underground works on their own land which drew off the water from the plaintiff's well, it was held that the plaintiff was not entitled to compensation under the statute, as the company, in drawing off the water from the well, had not infringed any right of the plaintiff, or done anything which would have rendered them liable to an action at common law, independently of the statute (*u*). A similar decision has been made under the Public Health Act (11 & 12 Vict. c. 63), where the local board of health constructed a sewer, which caused the plaintiff's houses, which, though erected on old foundations, had within twenty years been built of a much more substantial character, to crack (*x*). So, where the tenant of a public-house claimed compensation for the loss of profits he had incurred by reason of a railway company having, under statutory powers, purchased and pulled down the adjoining houses, it was held that he was not entitled to compensation; for, if any private person had purchased and pulled down the adjoining property, no

(*q*) *Reg.* v. *Wallasey Local Board*, L. R., 4 Q. B. 351; 38 L. J., Q. B. 217.

(*r*) *Metropolitan Board of Works* v. *M'Carthy*, L. R., 7 H. L. 243; 43 L. J., C. P. 385.

(*s*) *Hammersmith Rail. Co.* v. *Brand*, L. R., 4 H. L. C. 171. *Metropolitan Asylum District* v. *Hill*, 6 App. Cas. 193; 50 L. J., Q. B. 353.

(*t*) *Ricket* v. *Metropolitan Rail. Co.*, L. R., 2 H. L. 175; 36 L. J., Q. B. 205. *City of Glasgow Union Rail. Co.* v. *Hunter*, L. R., 2 Sc. App. 78. See *ante*, pp. 11, 35.

(*u*) *New River Co.* v. *Johnson*, 2 El. & El. 435; 29 L. J., M. C. 93. *Reg.* v. *Metropolitan Board, &c.*, 3 B. & S. 710; 32 L. J., Q. B. 105.

(*x*) *Hall* v. *Mayor of Bristol*, L. R., 2 C. P. 322; 36 L. J., C. P. 110.

758 action would have lain against him (*y*); and, where a public turnpike road is crossed by a railway, and no special damage has been sustained thereby, and no injury or inconvenience, different in kind, although it may be greater in degree, has been suffered by a complaining party than that which is common to all the Queen's subjects passing along such public highway, there is no ground for statutory compensation, for no action for damages would be maintainable (*z*).

When statutory compensation cannot be claimed—Lands affected not continuous with lands taken.—Where the lands alleged to be "injuriously affected" are separated from the land taken by other land belonging to a person other than the claimant, no claim for compensation can be sustained (*a*).

When statutory compensation cannot be claimed—Damage to trade.—There are, however, many cases in which, although there would be a right to damages against an individual, there is neither a right of action nor a right to compensation against a company acting under the provisions of the Lands Clauses Acts. A railway company, authorized to construct works on its own land, may lawfully do acts which no private proprietor could have done without being liable to an action; and, although the railway company is bound in many cases to make compensation to the adjoining owners, yet, whereas the right to compensation can only arise when an individual, in the place of the company, would have been liable to an action, the converse does not hold good.

A mere personal inconvenience, or obstruction, or a damage occasioned to a man's trade or the goodwill of his business, will not be a sufficient ground for compensation, although of such a nature that it might, but for the Act of Parliament which authorizes the doing of the thing occasioning the injury, have been the subject of an action against the person occasioning it (*b*). Where a public body, in exercise of an Act of Parliament, lowered the roadway of a street, it was held that the occupier of a house in the street was not entitled to be compensated for the indirect injury to his trade, resulting from the diversion of traffic caused by the authorized act of lowering the roadway (*c*). So, also, if a highway has been narrowed and premises abutting thereon have been rendered less suitable for shops or a public-house, no compensation will be

(*y*) *Reg.* v. *Vaughan*, L. R., 4 Q. B. 190; 38 L. J., M. C. 49.

(*z*) *Caledonian Rail. Co.* v. *Ogilvy*, 2 Macq. Sc. Ap. 230. *Ricket* v. *Metropolitan Rail. Co.*, L. R., 2 H. L. 175; 36 L. J., Q. B. 205. See, however, *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J., Ch. 321. *London and North Western Rail. Co.* v. *Smith*, 1 Mac. & G. 216.

(*a*) See *Reg.* v. *Essex*, *ante*, p. 752.

(*b*) *Metropolitan Board of Works* v. *M'Carthy*, L. R., 7 H. L. 243; 43 L. J., C. P. 385. *Caledonian Rail. Co.* v. *Walker's Trustees*, 7 App. Cas. 259.

(*c*) *Bigg* v. *Corporation of London*, L. R., 15 Eq. 376.

759 payable (*d*), unless the narrowing of the road sensibly interferes with the light and air coming to a house, or permanently depreciates it in value for all purposes, so that it is worth less to let as a house, and not with reference to any particular trade (*e*). And where the injury is sufficient to substantially lessen the value of the property the owner is entitled to compensation for injury done during the execution of the works (*f*).

When statutory compensation cannot be claimed—Claim in case of abandonment.—Where the company's Act provides that in case of abandonment the deposit shall be applicable towards compensating owners whose property is injured by the commencement, construction, or abandonment of the railway, a landlord cannot as a rule recover on account of any collateral obligation entered into by the company, such as a covenant to put up fences (*g*); but he can recover where the company has entered into an obligation, the breach of which is necessarily involved in the abandonment of the railway and inseparable from it, such as a covenant to build a railway station (*h*).

When statutory compensation cannot be claimed—Damage occasioned by working the railway.—So, again, where the injury is occasioned, not by the construction, but by the working of the railway, the land is not injuriously affected within the meaning of the Acts, and there is no right to compensation (*i*). Thus, in the case of injury to adjoining houses by the vibration caused by trains running in the ordinary manner, without negligence, after the line is opened for traffic, or by the noise and smoke of the trains, although the right of action is taken away, there are no provisions either in the Lands Clauses or Railway Clauses Acts under which a person whose house is so injured can recover compensation (*k*). So, where a railway company, under the authority of their Act, constructed across a river, half a mile above an ancient ferry, a railway-bridge and a foot-bridge, and, the foot-bridge being used by persons going to the railway station and other places, the traffic across the ferry fell off and the ferry was given up, it was held that the injury having been occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act

(*d*) *R.* v. *London Dock Co.*, 5 Ad. & E. 163.

(*e*) *Ante*, p. 757.

(*f*) *Ford* v. *Metropolitan Rail. Co.*, *ante*, p. 696, dissenting from observations of Lord Chelmsford in *Ricket* v. *Metropolitan Rail. Co.*

(*g*) *In re Ruthin and Cerrig Railway Act*, 32 Ch. D. 438.

(*h*) *Ib.* per Cotton and Lindley, L.JJ., *diss.* Lopes, L. J.

(*i*) *Caledonian Rail. Co.* v. *Walker's Trustees*, 7 App. Cas. 259. *Reg.* v. *Essex*, 17 Q. B. D. 454. See Wood's Railway Law, Chap. XIV.

(*k*) *Brand* v. *Hammersmith Rail. Co.*, L. R., 1 Q. B. 130; 2 *ibid.* 223; 4 H. L. 171; 38 L. J., Q. B. 265. *City of Glasgow Union Rail. Co.* v. *Hunter*, L. R., 2 H. L. Sc. 78. See *London and North Western Rail. Co.* v. *Bradley*, 3 Mac. & G. 336; 6 Rail. Cas. 556.

760 or the Railway Clauses Act, and the owner was not entitled to compensation (*l*).

Statutory compensation—How obtained—Notice of the claim.—Every owner and occupier whose land has been taken by a public company for public purposes under statutory powers, or whose land has been injuriously affected by the execution of works of a public nature authorized by statute, must give notice in writing to the railway or other company, declaring whether he desires a settlement by arbitration or by the verdict of a jury, and stating in such notice the nature of his interest in the lands in respect of which he claims compensation, and the amount claimed by him, *i. e.*, such particulars of his estate or interest as will enable the company to form a proper judgment respecting the claim (*m*). If he desires an arbitration, and gives the requisite notice, and the compensation claimed is not paid, or agreed to be paid, he will be entitled to have the amount of the compensation settled by arbitration pursuant to the provisions of the statute (*n*). If, on the other hand, he desires to have the amount of compensation settled by the verdict of a jury, and gives the requisite notice, and the amount claimed is not paid, or agreed to be paid, the railway company are bound, within twenty-one days after the receipt of the notice, to direct the sheriff to summon a jury for settling the amount of compensation in the manner provided by the statute, and in default thereof the company are liable to pay to the party injured the amount of compensation claimed, and the same may be recovered by action in any of the superior courts (*o*). Where the owner of land taken by a railway company gave notice of his desire to have the amount of compensation settled by a jury, and, before the expiration of the twenty-one days limited by that section for the company to issue their warrant to the sheriff to summon a jury, the owner gave a second notice of his desire to have the question settled by a special jury under sect. 54, which fixes no time for the issuing of the warrant, it was held that the company were bound to issue their warrant for the special jury within twenty-one days after the receipt of the first notice or pay the compensation claimed (*p*).

How obtained—Assessment of damages.—The fact of the claimant being entitled to the compensation he seeks is a condition precedent to his right to avail himself of the machinery provided by the

(*l*) *Hopkins* v. *Great Northern Rail. Co.*, 2 Q. B. D. 224; 46 L. J., Q. B. 265.

(*m*) *Heeley* v. *Thames Valley Rail. Co.*, 34 L. J., Q. B. 55. *Cameron* v. *Charing Cross Rail. Co.*, 19 C. B., N. S. 764; 33 L. J., C. P. 313. In this country special provision for compensation is made in each State, either by general statute or in the Act authorizing the taking. Generally, either commissioners are appointed to appraise or a jury to assess is provided for. See 2 Wood's Railway Law, 832—857.

(*n*) 8 & 9 Vict. c. 18, ss. 25—37; see 46 & 47 Vict. c. 15.

(*o*) 8 & 9 Vict. c. 18, s. 68.

(*p*) *Glyn* v. *Aberdare Rail. Co.*, 6 C. B., N. S. 359; 28 L. J., C. P. 271.

761 statute; and it is not competent to the sheriff's jury or arbitrator to determine the right, which it is for the court to decide upon afterwards, but only the amount (*q*). If the claimant has no title to compensation, the whole proceedings before the arbitrator or a jury are *coram non judice* (*r*), of which the company are entitled to avail themselves in answer to an action on the award (*s*). Under the powers of the Public Health Act, 1848 (*t*), a local board made a sewer, and in so doing cut a trench through the claimant's land, and the local board contended that no damage had been thereby done to the claimant, but the claimant contended that he had sustained damage, and was entitled to compensation, and it was held that this clearly was a dispute as to the amount of compensation to be settled by arbitration, and that, if the arbitrator found the damage nominal or infinitesimally small, he might find the amount of compensation to be *nil* (*u*). But, when there is a dispute as to whether the act complained of was done by the local board, or as to some matter of fact which would, if found for the local board, show that there was no liability to make compensation, then the dispute is not within the jurisdiction of the arbitrator.

Neither the jury nor an arbitrator has any jurisdiction to inquire into collateral matters, creating a head of damage distinct from the damage flowing from the exercise of the statutory powers, unless the parties mutually consent to refer such matters to them for their decision (*x*); and in an action on the award the arbitrator may be examined, to prove what was the subject-matter into which he was inquiring, and upon which his judgment was founded, but not as to the motives which induced him to arrive at the particular sum awarded (*y*). Where the value of the

(*q*) *Reg.* v. *London and North Western Rail. Co.*, 3 El. & Bl. 465. *Read* v. *Victoria Station and Pimlico Rail. Co.*, 1 H. & C. 826; 32 L. J., Ex. 170. *Horrocks* v. *Metropolitan Rail. Co.*, 4 B. & S. 315; 32 L. J., Q. B. 367. *Reg.* v. *Metropolitan Commissioners of Sewers*, 1 El. & Bl. 702. *Newbold* v. *Metropolitan Rail. Co.*, 14 C. B., N. S. 405. *Chapman* v. *Monmouth Rail. &c. Co.*, 11 Exch. 267; 27 L. J., Ex. 97. *Barber* v. *Nottingham & Grantham Rail. Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193.

(*r*) *Reg.* v. *Cambrian Rail. Co.*, L. R., 4 Q. B. 320; 38 L. J., Q. B. 198.

(*s*) See *Hooper* v. *Bristol Port Rail. Co.*, 35 L. J., C. P. 299.

(*t*) 11 & 12 Vict. c. 63, s. 144 (repealed).

(*u*) *Bradby* v. *Southampton Local Board*, 4 El. & Bl. 1018. Parties cannot attend before an arbitrator and go into the inquiry, reserving to themselves the right to contest the jurisdiction of the arbitrator, on the ground that he has not complied with some bare formality, such as the enlargement of the time for making the award. If, therefore, they attend in such a case under protest, the protest is of no avail. But, where the objection is a substantial one,—that the arbitrator has no jurisdiction at all over the subject-matter of the inquiry, and no power to decide upon it, *e.g.*, if the time for making his award has expired, or he has misconducted himself, it is otherwise. *Ringland* v. *Lowndes*, 17 C. B., N. S. 514; 33 L. J., C. P. 337.

(*x*) *In re Byles*, 11 Exch. 464; 25 L. J., Ex. 53. *Brandon* v. *Brandon*, 2 Drew. & S. 305; 34 L. J., Ch. 333.

(*y*) *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R., 3 Ex. 307; 5 Ex. 221; 5 H. L. 418; 41 L. J., Ex. 137. *In re Dare Valley Rail. Co.*, L. R., 6 Eq. 429; 37 L. J., Ch. 719.

762 claimant's estate is increased by a particular covenant, such enhanced value must be taken into account in assessing the compensation (*z*). If part of a man's land is taken, and part of the remainder is severed from the rest, and such part has a prospective value for building purposes although then used as agricultural land, the owner is entitled to compensation for it as if access were absolutely cut off, and without regard to the power of justices to order accommodation works, under sects. 68 and 69, which only apply to agricultural land (*a*). If land is taken which is subject to restrictive rights, rendering it of little or no value to the owner, as, for instance, to a right of way, or if a churchyard which has been closed under an order in council is taken, the amount of compensation is assessed with reference to the value of the owner's interest therein, and not with reference to its value to the persons taking it (*b*).

How obtained—Future damages.—The jury have no right to assess prospective damages, unless there is an actually existing cause of damage proved before them. The provision respecting future damage is, that the jury shall assess the sum of money to be paid by way of recompense for the future temporary or perpetual continuance of any recurring damage which shall have been occasioned by the exercise of the powers thereby granted. A cause of damage, therefore, must exist in some work of the company already done, to give the jury the power of computing the future damage. They then know what the injury is at present, and how often it may accrue; and from these *data* they have the power of making a contingent assessment of damages. When no injury has been actually done, there is nothing in respect to which future damages can be assessed (*c*). When the amount of damage to be sustained in future years is not capable of being ascertained, and depends upon a variety of contingencies which may or may not occur, the compensation cannot be assessed at once and for ever in respect of this future contingent injury. But, when it is capable of being known and estimated, it ought to be brought forward, and the amount of compensation assessed at once and for ever (*d*).

(*z*) *Bourne* v. *Mayor of Liverpool*, 33 L. J., Q. B. 15.

(*a*) *Reg.* v. *Brown*, L. R., 2 Q. B. 630; 36 L. J., Q. B. 322.

(*b*) *Stebbing* v. *Metropolitan Board of Works*, L. R., 6 Q. B. 37; 40 L. J., Q. B. 1.

(*c*) Parke, B., *Lee* v. *Milner*, 2 M. & W. 841.

(*d*) *R.* v. *Leeds and Selby Rail. Co.*, 3 Ad. & E. 690. *Reg.* v. *Aire and Calder Navigation Co.*, 30 L. J., Q. B. 337. *Croft* v. *London and North Western Rail. Co.*, 3 B. & S. 436; 32 L. J., Q. B. 113. See 2 Wood's Railway Law, 899—930. The probable influence of the taking upon the value of land not taken, is a proper element of damage; and it is conclusively presumed that all damages, present and prospective, were included in the assessment of damages.

The cases relating to railways seem to establish that compensation is given in respect of the calculable damage caused, or to be caused, in or by the execution of the permanent works of the
763 company authorized by the statute, such as obstructing private ways, injuring lights, &c., and not the damage or injury which may result from the use of the railway after it has been constructed (*e*). Thus, where the plaintiff and a railway company, before a railway was constructed, referred to arbitration the sum to be paid by the company for the purchase of part of the plaintiff's land, and as compensation for all injury and damage to his remaining estate by severance or otherwise, it was held that the compensation awarded related only to all damage known or contingent by reason of the construction of the railway on the land purchased, and to such other damage arising from the construction of the railway as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, that it did not embrace contingent and possible damages which might arise afterwards, and which could not at the time have been foreseen by the arbitrator, and that the plaintiff was entitled, notwithstanding the award, to claim compensation for such damages (*f*).

The 81st section of the 8 Vict. c. 20, enacts that "a railway company shall from time to time pay to the owner, lessee, or occupier of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, &c.," by reason of the severance of the surface land, or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway, and, in case of dispute as to the amount "of such losses and expenses," the same shall be settled by arbitration. An arbitrator may, under this section, include damage not actually incurred, but which will be necessarily incurred, by the mine-owner, by reason of the severance and the interruption in the working of his mines, if it is reasonably ascertainable (*g*).

How obtained—Remedy for subsequent, unforeseen damages.—In respect of all damages which can be foreseen and ascertained at the time of the inquiry, there can be no further compensation; the assessment must "be once for all; finally; for all time" (*h*). But, if, after compensation has been obtained for the known, calculable

(*e*) *Broadbent* v. *Imperial Gas Co.*, 7 De G. M. & G. 436; 7 H. L. C. 600; 29 L. J., Ch. 377.

(*f*) *Lawrence* v. *Great Northern Rail. Co.*, 16 Q. B. 643; 20 L. J., Q. B. 293. *Hammersmith Rail. Co.* v. *Brand*, L. R., 4 H. L. 171; 38 L. J., Q. B. 265. *Bagnall* v. *London and North Western Rail. Co.*, 7 H. & N. 423; 31 L. J., Ex. 121.

(*g*) *Whitehouse* v. *Wolverhampton Rail. Co.*, L. R., 5 Ex. 6.

(*h*) *Croft* v. *London and North Western Rail. Co.*, 3 B. & S. 436; 32 L. J., Q. B. 120.

injury, damage has been sustained which could not have been
764 foreseen, and this damage is the natural and necessary result of the construction of the works authorized by statute, the remedy appears to be by resort to the sheriff's jury, under sect. 68 of the Lands Clauses Consolidation Act (*i*). Thus, if some violent storm has destroyed a portion of the earthworks of a railway, or if there has been a subsidence or fall of an embankment from purely accidental causes, and the accident and its reparation have caused injury to an adjoining landowner, the claim for compensation seems to fall within the compensatory clause of the statute. "The damage resulting from the reparation of a mischief of this sort," observes the Lord Chancellor, "appears to me to be damage strictly arising from the carrying on of the works, and as much within the Lands Clauses Consolidation Act as if it had occurred before the opening of the railway. I see no difference between the title to compensation of a person who has sustained loss by an unexpected land-slip, whether the accident happened before the line was opened, or two or three days, or two or three weeks, subsequently to that period" (*k*).

If, on the other hand, the subsequent injury results from negligence, or want of care and skill in the execution of the authorized works, or from the doing of some wrongful and unauthorized act, or from not doing what an Act of Parliament or a legal obligation requires to be done, the remedy is by action (*l*); for no compensation is given, as previously mentioned, by sect. 68 of the Lands Clauses Consolidation Act, or, generally speaking, by any compensation clauses in statutes authorizing the commission of injurious acts, unless the injury is the natural and necessary result of the doing of the authorized act. If the act is a wrongful act, notwithstanding the statute the compensation clauses do not apply (*m*); and, if the statutory remedy does not apply, an action for damage, is, as we have seen, maintainable (*n*).

How obtained—Recovery of the amount.—Although the verdict of the jury and the judgment are made records, they are not made records of any superior court; nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that an action must be resorted to for recovering the

(*i*) *In re Ware*, 9 Exch. 402; 7 Rail. Cas. 780. *Glover* v. *North Staffordshire Rail. Co.*, 16 Q. B. 912. *London and North Western Rail. Co.* v. *Bradley*, 3 Mac. & G. 336; 6 Rail. Cas. 556. See *Hammersmith Rail. Co.* v. *Brand*, *ante*, p. 763.

(*k*) *Lancashire and Yorkshire Rail. Co.* v. *Evans*, 15 Beav. 332.

(*l*) *Lawrence* v. *Great Northern Rail. Co.*, 16 Q. B. 643; 20 L. J., Q. B. 293. *Bagnall* v. *London and North Western Rail. Co.*, 7 H. & N. 423; 31 L. J., Ex. 121.

(*m*) *Broadbent* v. *Imperial Gas, &c., Co.*, 7 De G. M. & G. 436; 7 H. L. C. 600; 29 L. J., Ch. 377.

(*n*) *Ante*, p. 751. *Blagrave* v. *Bristol Waterworks Co.*, 1 H. & N. 385.

765 amount (*o*). An action for the compensation awarded for land compulsorily taken cannot be maintained until a conveyance has been executed (*p*).

How obtained—Assessment of damages to which the claimant is not legally entitled—Removal of the inquisition by certiorari.—If, upon an inquisition of damages resulting from the execution of works done under the authority of an Act of Parliament, the under-sheriff has directed the jury to assess and include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a *certiorari* clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction; and the excess of jurisdiction may be shown upon affidavits, and need not appear upon the face of the proceedings. Thus, where it was shown by affidavit that the under-sheriff directed the jury that they might give compensation in respect of an alleged nuisance resulting from persons standing on a railway platform, which had been constructed under statutory authority near the plaintiff's dwelling-house, and thence over-looking the plaintiff's premises, it was held that the nuisance was not a legitimate subject of compensation, and that the jury had exceeded their jurisdiction in giving compensation in respect of it; and, as they had given one lump sum for the damage done, the court quashed the inquisition (*q*). Wherever, therefore, several items of claim are brought under the consideration of a sheriff's jury, and it is doubtful whether they are all legitimate subjects of compensation, the proper course is for the under-sheriff to direct the jury to find separately upon each item, to guard against the quashing of the whole inquisition.

If the sheriff's jury had any jurisdiction over the subject-matter of the inquiry, and power to award compensation to the plaintiff, the defendants cannot afterwards, in an action upon the judgment, set up as a defence that there was an excess of jurisdiction as to some part of the claim. In an action upon the judgment, it must be taken that there was jurisdiction, and the *quantum* of it cannot be investigated; for, if that could be done, the plaintiff would have to go down to trial prepared to prove each part of his claim, and such a course would be most inconvenient. Where, therefore, an action was brought upon a judgment following an inquisition found before the sheriff in a proceeding by the plaintiff

(*o*) Coleridge, J., *Reg.* v. *London and North Western Rail. Co.*, 3 El. & Bl. 468. If the land damages are not paid, the landowner may have the company enjoined from using the land until payment is made. 1 Wood on Railway Law, 798, n. 1.

(*p*) *Guardians of the East London Union* v. *Metropolitan Rail. Co.*, L. R., 4 Ex. 309; 38 L. J., Ex. 225.

(*q*) *In re Penny*, 7 El. & Bl. 660; 26 L. J., Q. B. 225. *Reg.* v. *South Wales Rail. Co.*, 13 Q. B. 994.

766 to obtain compensation for an injury done to his premises by works carried on under the authority of an Act of Parliament, and the defendants sought to bar the action, and prevent the plaintiff from recovering, by proving that part of the damages was given in respect of an injury arising from the cutting off some water to which the plaintiff had no legal title, it was held that no such defence was open to the defendants in that action, and that, if the sheriff's jury had improperly taken upon themselves to give damages in respect of the loss of the water, the matter should have been set right by *certiorari* and the inquisition quashed (*r*). If compensation is claimed under two heads, and the arbitrator gives a lump sum for both, and the claimant is not entitled to compensation in respect of one of those heads, the whole award is bad, and cannot be enforced (*s*).

How obtained—Injunction or mandamus to make compensation for lands taken, or injuries inflicted upon private persons.—Whenever any public body, executing public works under statutory powers, is required by Act of Parliament to make compensation to all persons who may sustain injury from the exercise of the powers intrusted to it, and machinery is provided for ascertaining and determining the amount by arbitration, and the board refuses to make compensation, or denies its liability, the court will, by mandamus, compel it to make compensation, and put the necessary machinery in motion for ascertaining and settling the amount (*t*); and it is no bar to the prosecutor's right to a mandamus that he has not claimed a specific sum, or taken steps to have the amount ascertained and settled pursuant to the Act (*u*). Where a mandamus was issued to a local board of health, enjoining them to make compensation to the prosecutor for damage sustained by him by reason of the exercise by the board of certain powers conferred upon them by the Public Health Act, and the defendants returned that they had not denied their liability to make compensation, but were ready to make it so soon as it had been duly ascertained, but that the prosecutor had taken no steps to have it ascertained, nor given the defendants notice of his claim, or of the cause or amount thereof, and had not appointed an arbitrator, or given notice of his intention to do so, pursuant to the statute, and the return was traversed generally, and on the trial it was found that the defendants had denied all liability, it was held that the prosecutor was entitled

(*r*) *Mortimer* v. *South Western Rail. Co.*, 1 El. & El. 382; 28 L. J., Q. B. 129. *Corrigal* v. *London and Blackwall Rail. Co.*, 5 M. & G. 245.

(*s*) *Beckett* v. *Midland Rail. Co.*, L. R., 1 C. P. 241; 35 L. J., C. P. 163.

(*t*) *R.* v. *Nottingham Old Waterworks Co.*, 6 Ad. & E. 370.

(*u*) *Reg.* v. *Burslem Local Board, &c.*, 1 El. & El. 1077; 29 L. J., Q. B. 242.

767 to a verdict on the whole return, and to a peremptory mandamus. "It is said," observes Williams, J., "that, looking at the provisions of the Public Health Act, 1848 (*x*), and construing them by analogy to those of the Lands Clauses Consolidation Act, the proper course would have been for the applicant himself to have taken steps pursuant to sect. 144, and to have got the amount of the compensation fixed by means of the course there prescribed, and then to have brought his action to recover the amount, in which action the question of liability might have been decided; but that involves the necessity, in all cases where there is a doubt whether the party is entitled to compensation, of an expensive inquiry in the first instance, which in the result may prove entirely futile, and we think the question of liability should be first settled by mandamus. Secondly, it is said that the applicant ought to have claimed a particular amount. We are of opinion that there is no necessity for taking such a step. It would not regulate the frame of the mandamus, or the future rights of the parties" (*y*).

A local board of health gave notice to the owner of the soil in a pathway that they were going to make man-holes in a sewer underneath the pathway; it was held that these man-holes were parts of the sewer within the Public Health Acts, and could be made without purchasing the land, and the plaintiff was not entitled to an injunction but only to compensation for damage arising from making them (*z*).

A mandamus will go also against railway companies who have given notice to a landowner under the compulsory powers intrusted to them that they require to purchase his land, and are willing to treat, &c., to compel them to summon a jury and take the necessary steps for settling the amount of purchase-money and compensation (*a*). But commissioners acting on behalf of the public, and giving notice that lands are wanted for public purposes, may

(*x*) 11 & 12 Vict. c. 63, s. 144 (repealed).

(*y*) *Reg.* v. *Burslem, &c., supra.*

(*z*) *Swanston* v. *Twickenham Local Board*, 11 Ch. D. 838; 48 L. J., Ch. 623.

(*a*) *Reg.* v. *Birmingham, &c. Rail. Co.*, 15 Q. B. 647. *Fotherby* v. *Metropolitan Rail. Co.*, L. R., 2 C. P. 188; 36 L. J., C. P. 88. *Morgan* v. *Metropolitan Rail. Co.*, L. R., 3 C. P. 553; 4 C. P. 97; 38 L. J., C. P. 87. It is no defence to such an action that the whole capital of the company has not been subscribed, as required by sect. 16 of the Lands Clauses Act, that section only applying to lands compulsorily taken. *Guest* v. *Poole and Bournemouth Rail. Co.*, L. R., 5 C. P. 553; 39 L. J., C. P. 329. *Harding* v. *Metropolitan Rail. Co.*, L. R., 7 Ch. 154; 41 L. J., Ch. 371. *Great Western Rail. Co.* v. *Swindon Rail. Co.*, 9 App. Cas. 788. If the company and the landowner both choose to sleep on their rights and let the time expire, they are, it seems, disabled from going on with the purchase. *Richmond* v. *North London Rail. Co.*, 3 Ch. D. 680; 37 L. J., Ch. 886. But until the time expires the company may treat, although the time has so nearly expired that they could not complete the line in time. *Tiverton Rail. Co.* v. *Loosemore*, 9 App. Cas. 480; 53 L. J., Ch. 812.

768 revoke the notice before it has been acted upon, and cannot be compelled by mandamus to take and pay for the land (*b*).

A mandamus will go to an arbitrator, commanding him to give compensation in respect of lands being injuriously affected by the formation of a railway, or the construction of public works, executed under statutory authority (*c*); and, if after a railway has been made, and compensation given, fresh damage has been sustained from the execution of the railway works, the question whether the railway company is bound to make compensation in respect of this subsequent damage may be determined on a claim for a mandamus (*d*).

Injunction to prevent unnecessary injury from the execution of statutory powers.—The statutory right to compensation given by Act of Parliament to persons sustaining injury from the exercise of statutory powers, does not abrogate the regulating and restraining jurisdiction of the court; for nothing would be more pernicious than to leave the large and ample powers so frequently conferred by Act of Parliament free from all control. The powers conferred by the Lands Clauses Acts in derogation of individual rights must be exercised with moderation and discretion, and with a reasonable regard to the rights of other persons, and not in a careless or vexatious way; and, when the company can construct their works without injury to private rights, they are, in general, bound to do so. Thus, where a railway company, in executing works authorized by their statutory powers, took insufficient precautions to ensure the safety of an adjoining house, the court granted an injunction to restrain the further negligent exercise of their powers, and an inquiry as to damage already done (*e*). So, where a railway company for the construction of their works erected a mortar-mill on part of their land unnecessarily close to the place of business of the plaintiff, and caused a nuisance by the noise and vibration from the mill, the court granted an injunction (*f*). So, where a railway company, in the exercise of their statutory powers, commenced the building of a bridge across a mill-race in such a way as to diminish the full force of the current and lessen the working power of the mill, the Lord Chancellor by injunction prevented the erection of any bridge over the stream with arches of less dimensions than those recommended in the report of a particular engineer (*g*). Here it was shown that the

(*b*) *Reg.* v. *Commissioners of Woods and Forests*, 15 Q. B. 774.

(*c*) *Reg.* v. *Rynd*, 9 L. T. R., N. S. 27.

(*d*) *Reg.* v. *Aire and Calder Navigation Co.*, 30 L. J., Q. B. 337. *R.* v. *Leeds and Selby Rail. Co.*, 3 Ad. & E. 690.

(*e*) *Biscoe* v. *Great Eastern Rail. Co.*, L. R., 16 Eq. 636.

(*f*) *Fenwick* v. *East London Rail. Co.*, L. R., 20 Eq. 544; 44 L. J., Ch. 602.

(*g*) *Coats* v. *Clarence Rail. Co.*, 1 Russ. & M. 181.

769 bridge was altogether wrongly constructed, and the work negligently and unskilfully done; but, where there is no proof of negligence, and the accruing injury arises naturally and necessarily from the doing of what is authorized to be done, the court cannot interfere, but must remit the injured party to the statutory compensation for the damage, where that is provided (*h*). But the company are not necessarily confined to any particular mode of executing their works, provided they act *bonâ fide* and upon good advice, and so as not unnecessarily to interfere with the landlord's convenience (*i*).

Where a public body requires part of lands or buildings for the purposes of their undertaking, they may do so without taking the whole; and they cannot take the whole when they do not *bonâ fide* require it and the owner only wishes to sell part (*k*).

Injunction to prevent misuse of land acquired under statutory authority.—Acts of Parliament compelling landowners to part with portions of their property for purposes considered beneficial to the public, are regarded as contracts made by the legislature on behalf of all persons interested under them; and the purposes for which the land is taken are of the essence of the contract, so that the landowner may obtain an injunction to restrain the company from taking the land for another and different purpose (*l*), or from devoting it to such purpose, if they have already taken it (*m*). "The principle is this, that when persons embark in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object" (*n*). But, although this is so with regard to Acts of Parliament authorizing a company of adventurers, for their own profit, to take compulsorily the lands of others, the case is different where the legislature has entrusted an existing public body, such as the corporation of a city, with authority to take lands compulsorily for the purpose of public improvements, and [illegible]t for gain; and in such case a more liberal construction as to [illegible] poses for which the land is taken

(*h*) *Stainton* v. *Metropolitan Board*, 23 Beav. 232; 26 L. J., Ch. 300. *Biddulph* v. *St. George's Vestry*, 33 L. J., Ch. 411.

(*i*) *Wilkinson* v. *Hull Rail. Co.*, 20 Ch. D. 323. *Lynch* v. *Commissioners of Sewers*, *infra*.

(*k*) *Gard* v. *Commissioners of Sewers*, 28 Ch. D. 486; 54 L. J., Ch. 698. *Teuliere* v. *St. Mary Abbotts*, 30 Ch. D. 642; 55 L. J., Ch. 23. *Lynch* v. *Commissioners of Sewers*, 32 Ch. D. 72; 55 L. J., Ch. 409.

(*l*) *Flower* v. *London, Brighton, and South Coast Rail. Co.*, 2 Dr. & S. 330; 34 L. J., Ch. 540.

(*m*) *Bostock* v. *North Staffordshire Rail. Co.*, 3 Sm. & G. 291; 4 El. & Bl. 798. See *Carington* v. *Wycombe Rail. Co.*, L. R., 2 Eq. 825; 3 Ch. 377; 37 L. J., Ch. 213.

(*n*) Lord Cranworth, C., *Galloway* v. *Corporation of London*, *post*, p. 770.

770 will prevail (*o*); but they must still, of course, comply with the provisions entitling them to avail themselves of their compulsory powers (*p*). Nor does the same strict construction prevail where land is taken, not compulsorily under a statute, but in pursuance of an option reserved by agreement *inter partes* (*q*).

If any public body authorized to enter land and construct works in the execution of statutory powers, exceed the authority conferred upon them, and do acts *ultra vires*, or acts which, though colourably under their powers, are not really authorized by such powers, the court will by injunction restrain their proceedings (*r*), and confine them within the limits of their jurisdiction (*s*); "otherwise the result may be that, after your property has been taken and destroyed, after your house has been pulled down and a railway substituted in its place, you may have the satisfaction of discovering that the railway company were wrong, and that a pecuniary compensation is the only satisfaction you can receive for the injury" (*t*). Thus, where a local board of health withdrew their opposition to a railway bill, on the insertion of a clause that the bridges within their district were to have a certain gradient, and the company could not make the bridges of such a gradient without encroaching on adjoining lands, against which the adjoining proprietor obtained an injunction, and the company consequently made the bridges of a steeper gradient, the court granted a mandatory injunction to the company to alter the bridges (*u*).

So, whenever public bodies, acting in the exercise of statutory powers, have failed to comply with any condition imposed by statute for the protection of the public, the court will, as we have seen, by injunction prevent the exercise of the statutory authority, until the condition precedent has been strictly fulfilled (*x*). Thus, it will restrain a railway company from using land for which, and the injury to it, the compensation assessed under the Lands

(*o*) *Galloway* v. *Corporation of London*, L. R., 1 H. L. 34. *Quinton* v. *Corporation of Bristol*, L. R., 17 Eq. 524.

(*p*) *Thomas* v. *Daw*, L. R., 2 Ch. 1; 36 L. J., Ch. 201. See *Gard* v. *Commissioners of Sewers*, 28 Ch. D. 486.

(*q*) *Butt* v. *Imperial Gas Co.*, L. R., 2 Ch. 158. See *Carington* v. *Wycombe Rail. Co.*, *ante*, p. 769.

(*r*) See *Att.-Gen.* v. *Ely, &c. Rail. Co.*, L. R., 6 Eq. 106; 4 Ch. 194; 38 L. J., Ch. 258, as to making a more convenient road.

(*s*) *Tinkler* v. *Wandsworth District Board*, 2 De G. & J. 273; 27 L. J., Ch. 342. As to contracts *ultra vires*, see *Taylor* v. *Chichester and Midhurst Rail. Co.*, 4 H. & C. 409; L. R., 2 Ex. 356; 4 H. L. 628; 39 L. J., Ex. 217. If the shareholders have ratified the act, see *Phosphate of Lime Co.* v. *Green*, L. R., 7 C. P. 43.

(*t*) *Dun Navigation Co.* v. *North Midland Rail. Co.*, 1 Rail. C. 154.

(*u*) *Att.-Gen.* v. *Mid-Kent Rail. Co.*, L. R., 3 Ch. 100.

(*x*) *Gibson* v. *Hammersmith Rail. Co.*, 2 Drew. & S. 603; 32 L. J., Ch. 337. *Cosens* v. *Bognor Rail. Co.*, L. R., 1 Ch. 594. See *Kent Coast Rail. Co.* v. *London, Chatham, &c. Rail. Co.*, L. R., 3 Ch. 656. The company will also be liable in trespass, if they have taken the plaintiff's land, without performing the statutory conditions. *Cranwell* v. *Mayor, &c. of London*, L. R., 5 Ex. 284; 39 L. J., Ex. 193.

771 Clauses Act has not been paid, although the railway has been opened for public use (*y*). But, in cases where the effect of such an injunction would be to make the land useless to both parties, an injunction will be refused and a receiver appointed instead (*z*); nor will an injunction be granted to prevent the running of trains over the land until its sale, which has been ordered by the court (*a*). The court has also, it seems, jurisdiction to restrain an application to Parliament to enable a company to abandon the formation of certain lines, and the statutable contracts that they have made thereunder, or to restrain an improper application to Parliament for a private Act, though such a jurisdiction can hardly ever be exercised (*b*). "You cannot restrain a man from going to Parliament on public grounds; . . . but, if he is going on in violation of a plain contract, which is personal to himself, with which the public interests have nothing whatever to do, you cannot, under the pretence that he is going to Parliament, refuse the relief which, if there were no question about Parliament, this court would be bound to give" (*c*).

Sale of superfluous land—Right of pre-emption.—The 127th section of the Lands Clauses Consolidation Act (*d*) provides that within the prescribed period, or, if no period is prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell (*e*) and dispose of all superfluous lands, and in default thereof such lands will at the expiration of such period vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same. This section does not refer to the case of land becoming superfluous by reason of the railway being abandoned or given up (*d*), or to land bought for extraordinary

(*y*) *Walker* v. *Ware, &c. Rail. Co.*, L. R., 1 Eq. 195. *Field* v. *Carnarvon and Llanberis Rail. Co.*, L. R., 5 Eq. 100; 37 L. J., Ch. 176. *St. Germans (Earl of)* v. *Crystal Palace Rail. Co.*, L. R., 11 Eq. 568. *Stretton* v. *Great Western Rail. Co.*, L. R., 6 Ch. 751; 40 L. J., Ch. 50. The vendor, however, has no lien for the costs of the arbitration: *Ferrers (Earl)* v. *Stafford and Uttoxeter Rail. Co.*, L. R., 13 Eq. 524; 41 L. J., Ch. 362.

(*z*) *Pell* v. *Northampton and Banbury Rail. Co.*, L. R., 2 Ch. 100. *Munns* v. *Isle of Wight Rail. Co.*, L. R., 8 Eq. 653; 5 Ch. 414; 39 L. J., Ch. 522.

(*a*) *Lycett* v. *Stafford and Uttoxeter Rail. Co.*, L. R., 13 Eq. 261; 41 L. J., Ch. 474.

(*b*) *Steele* v. *North Metropolitan Rail. Co.*, L. R., 2 Ch. 237; 36 L. J., Ch. 540. *In re London, Chatham, &c. Rail. Co., Ex parte Hartridge*, L. R., 5 Ch. 671.

(*c*) Per Bacon, V.-C., *Telford* v. *Metropolitan Board of Works*, L. R., 13 Eq. 594; 41 L. J., Ch. 589.

(*d*) 8 & 9 Vict. c. 18.

(*e*) *I.e.*, reserving no interest. See *London & South Western Rail. Co.* v. *Gomm*, 20 Ch. D. 562; 51 L. J., Ch. 530. But they may attach conditions or restrictions such as ordinary vendors use for their own benefit. *In re Higgins' Contract*, 21 Ch. D. 95; 51 L. J., Ch. 772.

772 purposes, under sect. 12 of the Act (*f*). Land which is required for the making of accommodation works which the company are compellable to make is not superfluous land (*g*). Land is not required for the purposes of the undertaking when it ceases to be necessary for those purposes; and it may become so in any one of four ways: if more land has been taken than on the execution of the works appears to be needed; if the company has been forced to take it by reason of not being able to obtain a part of any property without taking the rest; if taken for works then deemed to be required for permanent use, but which afterwards are found not to be required, and are therefore abandoned; or, if taken only for a temporary purpose, where that purpose has been answered (*h*). But the land is "required," although not in actual use at the time, if, owing to the growing traffic of the line, it will be wanted for the railway within a reasonable time (*i*).

Where a railway company erected a post and rails on the boundary of land taken by them, and subsequently dug a ditch inside of the rails and planted a quickset hedge, and the post and rails were gradually removed, and the strip of land cultivated by the adjoining owner, it was held that the strip was "superfluous land," and the company's title was extinguished under the Statute of Limitations (*k*).

This and the following sections are not restricted to cases where the land has been acquired by the company under its compulsory powers, but extend also to land acquired by agreement (*l*).

The 128th section provides that, before disposing of the superfluous lands, unless they are "situate within a town, or are lands built upon or used for building purposes," the company shall offer them to the person entitled to the land from which they were originally severed, and, in case of his refusal, to the owners of the land adjoining (*m*). Under this section it has been held, that land situate within the limits of a borough, and chargeable and charged with paving, lighting, and other borough rates, and with a cottage upon it, but which was at some distance from the mass of houses forming the town, was not within the meaning of the words "within a town," or "built upon or used for building purposes," although the railway had paid the price of building land for it,

(*f*) *City of Glasgow Union Rail. Co.* v. *Caledonian Rail. Co.*, L. R., 2 Sc. App. 160. *Smith* v. *Smith*, L. R., 3 Ex. 282; 38 L. J., Ex. 37.

(*g*) *Lord Beauchamp* v. *Great Western Rail. Co.*, L. R., 3 Ch. 745; 37 L. J., Ch. 74.

(*h*) *Great Western Rail. Co.* v. *May*, L. R., 7 H. L. 283; 43 L. J., Q. B. 233.

(*i*) *Hooper* v. *Bourne*, 3 Q. B. D. 258; 5 App. Cas. 1; 49 L. J., Q. B. 370.

(*k*) *Norton* v. *London & North Western Rail. Co.*, 13 Ch. D. 268.

(*l*) *Hooper* v. *Bourne*, *supra*.

(*m*) *London & South Western Rail. Co.* v. *Blackmore*, L. R., 4 H. L. 610; 39 L. J., Ch. 713.

773 and that the original vendors to the company or purchasers from them might, therefore, exercise their right of pre-emption (*n*). But, if the land has been actually sold as building land, and been laid out for building purposes, or has been let upon building leases, although the houses have not been actually commenced, it is not within the section, and the right of pre-emption will not arise (*o*). This right of pre-emption accrues as soon as the company have clearly shown that the land is superfluous land, *e. g.*, by selling it to another person or otherwise permanently dedicating it to purposes other than those authorized by their Act, although the limit of time mentioned in the 127th section of the Lands Clauses Act, or the company's own Act, within which superfluous lands must be sold, has not yet arrived (*p*). But the mere selling of the land is not conclusive to show that the lands are superfluous, for the sale may be *ultra vires*, and therefore the owner's right of pre-emption may not have arisen (*q*). The right accrues to lessees for a long term of years of the adjoining land as well as to the owners of the fee (*r*). "Superfluous land" must be land separated by a vertical, not a horizontal boundary from the lands required, so that land over an arch (*s*), or land under an arch (*t*), used for the purpose of the railway cannot be dealt with as "superfluous land."

Statutory compensation to tenants and occupiers of lands taken for public works.—In the case of lands under lease required for railways or undertakings of a public nature, it is enacted (*u*), that every lessee shall be entitled to receive compensation for damage done to him in his tenancy by reason of the severance of his land for the purposes of the undertaking, or otherwise by reason of the execution of the works authorized by statute, and that, if any such lands are in the possession of any person having no greater interest therein than as a tenant for a year or from year to year, and such person is required to give up possession before the expiration of his interest, he shall be entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or

(*n*) *Carington* v. *Wycombe Rail. Co.*, L. R., 2 Eq. 825; 3 Ch. 377; 37 L. J., Ch. 213. *London & South Western Rail. Co.* v. *Blackmore*, L. R., 4 H. L. 610; 39 L. J., Ch. 713. How in such a case the arbitration to determine the price should be conducted, *quære?*

(*o*) *Coventry* v. *London, Brighton, and South Coast Rail. Co.*, L. R., 5 Eq. 104; 37 L. J., Ch. 90.

(*p*) *Rangeley* v. *Midland Rail. Co.*, L. R., 3 Ch. 306; 37 L. J., Ch. 313. *Lord Beauchamp* v. *Great Western Rail. Co.*, L. R., 3 Ch. 745. *London & South Western Rail. Co.* v. *Blackmore*, L. R., 4 H. L. 610; 39 L. J., Ch. 713.

(*q*) *Hobbs* v. *Midland Rail. Co.*, 20 Ch. D. 418; 51 L. J., Ch. 320.

(*r*) *Coventry* v. *London, Brighton, and South Coast Rail Co.*, L. R., 5 Eq. 104; 37 L. J., Ch. 90. As to the mode of dividing the superfluous lands where there are several adjoining owners, see *Moody* v. *Corbett*, L. R., 1 Q. B. 510; 35 L. J., Q. B. 161.

(*s*) *In re Met. Rail. Co. and Cosh*, 13 Ch. D. 607; 49 L. J., Ch. 277.

(*t*) *Mulliner* v. *Midland Rail. Co.*, 11 Ch. D. 611; 48 L. J., Ch. 258.

(*u*) 8 & 9 Vict. c. 18, s. 121. See Wood's Railway Law, pp. 857—866.

774 injury he may sustain; or, if a part only of such lands is required, compensation for damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same. A lessee, therefore, who has been obliged to give up his house and business for the purpose of a railway, is entitled to compensation for the loss he sustains in giving up his business, until he can get other suitable premises for carrying it on (*x*).

The general words of the 68th section of the statute are restricted by the 121st section, so that the proceedings in cases falling within the latter section must be in the mode there prescribed (*y*). Where the tenant held under a lease for two years, and the company took possession when the unexpired residue of the term was less than a year, it was held that he was a person having no greater interest than as a tenant for a year or from year to year (*z*). But, where no part of the land of a tenant from year to year is required to be given up, but is merely injuriously affected by the execution of the works of a railway, the claim to compensation is regulated by sect. 68, and does not come within the restrictive operation of sect. 121 (*a*).

A notice to treat under sect. 18 is not equivalent to requiring the tenant to give up possession (*b*).

(*x*) *Jubb* v. *Hull Dock Co.*, 9 Q. B. 443. *Chamberlain* v. *West End, &c. Rail. Co.*, 31 L. J., Q. B. 201.

(*y*) *Reg.* v. *Manchester, &c. Rail. Co.*, 4 El. & Bl. 103. *Knapp* v. *London, Chatham, &c. Rail. Co.*, 2 H. & C. 212: 32 L. J., Ex. 236.

(*z*) *Reg.* v. *Great Northern Rail. Co.*, 2 Q. B. D. 151; 46 L. J., Q. B. 4. See *Tyson* v. *Mayor of London*, L. R., 7 C. P. 18; 41 L. J., C. P. 6.

(*a*) *In re Somers*, 31 L. J., Q. B. 261.

(*b*) *Reg.* v. *Stone*, L. R., 1 Q. B. 529; 35 L. J., M. C. 208.

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CHAPTER XIV.

NOTICE OF ACTION.

Notice of action—Where requisite generally.—Protective clauses in Acts of Parliament in favour of officers acting in the execution of their offices, or of private individuals acting in the execution or in pursuance of particular Acts of Parliament, are intended for the benefit of those who want to act rightly, but have by mistake done wrong. It has been frequently observed by the courts, that the notice which is directed to be given to officers before actions brought against them is of no use to them when they have acted within the strict line of their duty, and is only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it (*a*). "The object," observes Lord Ellenborough, "clearly is to protect persons acting illegally, but in supposed pursuance of, and with a *bonâ fide* intention of discharging, their duty under the Act of Parliament. Where the law is not exceeded, the protection is not required" (*b*). "It is not wanted," observes Jervis, C. J., "by those who are in the right, and have a perfect justification under the Act of Parliament, but by those who are in the wrong, in order that they may have an opportunity of tendering amends. If the defendant *bonâ fide* believed that he was acting in pursuance of the statute, and in the exercise of a legal right, that is all that is necessary to entitle him to notice of action. It is not necessary that he should know the Act, chapter and verse." "Whether he had reasonable grounds for believing," further observes Maule, J., "that he was acting in pursuance of the statute, may be very fit to be considered when the question is as to his *bona fides;* for a case may be supposed, where there is such a want of reasonable ground for belief as to negative his *bona fides*" (*c*). In order to establish a claim to the statutory protection, it must appear that the act done was of that nature and description that the person doing it might

(*a*) Per Lord Kenyon, C. J., *Greenway* v. *Hurd*, 4 T. R. 555. *Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 139.

(*b*) *Theobald* v. *Crichmore*, 1 B. & Ald. 229. *Smith* v. *Shaw*, 10 B. & C. 284.

(*c*) *Read* v. *Coker*, 13 C. B. 861; 22 L. J., C. P. 205. *Booth* v. *Clive*, 10 C. B. 827; 2 L. M. & P. 283. *Jones* v. *Howell*, 29 L. J., Ex. 19. *Smith* v. *Hopper*, 9 Q. B. 1014. *Cox* v. *Reid*, 13 Q. B. 558. *Gaby* v. *Wilts Canal Co.*, 3 M. & S. 589.

776 honestly believe that the Act of Parliament gave him authority to do it (*d*).

"Several decisions have established that *bona fides* is not alone sufficient to bring a case within the privilege of these Acts of Parliament" (*e*). If there is no pretence or colour for the notion that the injurious act was done in execution of the statute under which the defendant shelters himself, he could have had no fair and reasonable ground for supposing that he was privileged and protected, and cannot, consequently, claim protection (*f*). "It would be wild work," observes Williams, J., "if a party might give himself protection by merely saying that he believed himself to be acting in pursuance of a statute. Still, protecting clauses of this sort would be useless if it were necessary that the person claiming the benefit of them should have acted quite rightly. The cases to which they refer must lie between a mere foolish imagination and a perfect observance of the statute" (*g*). And it is now quite settled, that, if the defendant honestly believes in the existence of a state of things, which, if it had existed, would have justified his doing the acts complained of, he is entitled to notice, and the reasonableness of his belief, provided some grounds exist for an honest belief, is not material (*h*).

When the privilege is accorded to a person who fills a particular character and situation, the defendant who claims the privilege, on the ground that he acted in good faith on the belief that he was clothed with the official character, must show some reasonable ground for his belief. A general persuasion that the defendant had the power he claimed to exercise will not entitle him to the privilege; but a mistaken opinion on any of the facts which must exist to give him the power will not deprive him of his right to the protection of the statute (*i*). If, as a reasonably reflecting and careful person, he must have known that he was not clothed with the requisite official character, he has no ground for claiming the protection of notice of action (*k*).

A person who acts as a prime mover and principal in setting a constable in motion, who commands the constable, instead of being commanded by the latter, is not acting in aid of the constable; but he who acts only when required by the constable to assist him is within the protecting clause of the statute (*l*).

(*d*) *Chamberlain* v. *King*, L. R., 6 C. P. 474; 40 L. J., C. P. 273.
(*e*) Ld. Denman, C. J., *Smith* v. *Hopper*, 9 Q. B. 1014. *Cook* v. *Leonard*, 6 B. & C. 351. *Home* v. *Grimble*, Car. & M. 23.
(*f*) *Shatwell* v. *Hall*, 10 M. & W. 525. *Eliot* v. *Allen*, 1 C. B. 37. *Hermann* v. *Seneschall*, 13 C. B., N. S. 392; 32 L. J., C. P. 43.
(*g*) *Cann* v. *Clipperton*, 10 Ad. & E. 589. *Hopkins* v. *Crowe*, 4 Ad. & E. 777.
(*h*) *Chamberlain* v. *King*, L. R., 6 C. P. 474; 40 L. J., C. P. 273.
(*i*) *Kine* v. *Evershed*, 10 Q. B. 150.
(*k*) *Lidster* v. *Borrow*, 9 Ad. & E. 654. *Booth* v. *Clive*, 10 C. B. 835.
(*l*) *Staight* v. *Gee*, 2 Stark. 449.

777 Some statutes enact that any person found committing any offence punishable either upon indictment or summary conviction by virtue of the Act, may be immediately apprehended without warrant by any person, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law (*m*). To entitle a person to notice of action in respect of an arrest made under such a section, it must be shown that at the time of the arrest he believed that the offence had been committed, and that he had found the person arrested in the act of committing it (*n*). Where, therefore, the offence, if any, was committed at 1 p.m., and the pursuit of the supposed offender not commenced till 3 p.m., it was held that the person arresting was not entitled to notice (*o*). Whether the apprehension was immediate is a question of fact; but the word "immediately" should receive a liberal interpretation (*p*).

Where the owner of property injured by the act of another *bonâ fide* supposes that he has a right to give the person injuring his property into custody, and there is a fair colour for the proceeding, he is entitled to notice of action, though he was altogether mistaken in the assertion of his rights, and cannot justify the trespass under the statute (*q*). The protection afforded by the statute is not confined strictly to the owner of the property injured, but is extended to all persons who had a *bonâ fide* belief, founded on some grounds, that they filled the character mentioned in the statute, and acted under that belief (*r*). If the plaintiff was found in the act of committing a malicious trespass, and the defendant had reasonable ground for believing that he had authority from the owner of the property to interfere, and take or give the plaintiff into custody, the defendant will be entitled to notice of action (*s*). But, as the statute only authorizes the arrest of persons "found committing an offence within the statute," the defendant must, if the plaintiff was not taken *flagrante delicto*, show that a malicious trespass had been committed; that the plaintiff was on the spot; and that there was reasonable ground for believing that the mischief was still going on; and that the plaintiff was the author or instigator of it (*t*).

To whom to be given—Justices of the peace.—By the 11 & 12

(*m*) See the 24 & 25 Vict. c. 96, s. 103.
(*n*) *Roberts* v. *Orchard*, 2 H. & C. 769; 33 L. J., Ex. 65.
(*o*) *Downing* v. *Capel*, L. R., 2 C. P. 461; 36 L. J., M. C. 97.
(*p*) *Griffith* v. *Taylor*, 2 C. P. D. 194; 46 L. J., C. P. 15.
(*q*) *Beechey* v. *Sides*, 9 B. & C. 809. *Norwood* v. *Pitt*, 5 H. & N. 801; 29 L. J., Ex. 127.
(*r*) *Hughes* v. *Buckland*, 15 M. & W. 346. *Horn* v. *Thornborough*, 3 Exch. 849. *Chamberlain* v. *King*, L. R., 6 C. P. 474; 40 L. J., C. P. 273.
(*s*) *Kine* v. *Evershed*, 10 Q. B. 150.
(*t*) *Cann* v. *Clipperton*, 10 Ad. & E. 588. *Ballinger* v. *Ferris*, 1 M. & W. 631. See *Chamberlain* v. *King*, *supra*.

778 Vict. c. 44, s. 9, it is enacted, that no action shall be commenced against any justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left at his usual place of abode, by the party intending to commence such action, or by his attorney or agent; in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode of the party intending to sue, and also of the attorney or agent, when the notice is served by an attorney or agent.

Statutory clauses for the protection of magistrates in the execution of the duties of their office, appear always to have been construed on the principle that, where the magistrate, with some colour of reason and *bonâ fide*, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may have proceeded illegally or exceeded his jurisdiction (*u*); and, where he acts in his magisterial capacity maliciously, and without *bona fides*, he is still entitled to the statutory protective preliminaries to an action, and to an opportunity of tendering amends. A magistrate may act maliciously, and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty, although he may act maliciously; and in all cases where the substance of the complaint is that he has abused his power as a magistrate, he is entitled to notice of action (*x*). The question as to whether the magistrate was acting in the execution of his office, is a question at the trial for the judge, and not for determination by a jury (*x*).

Wherever the magistrate has authority to act upon the subject-matter of the complaint brought before him, he must be considered to have acted by virtue of his office, although the place where the offence was committed was not within his jurisdiction (*y*). In a case where one magistrate acted alone in a matter which required the concurrence of two, it was held that he was acting in execution of his office, and was entitled to notice of action (*z*). But to be entitled to the protection, the party claiming it must be actually a justice, accidentally committing an error, and not doing a wrongful act for his own benefit (*a*).

To whom to be given—Constables.—Notice of action must be

(*u*) *Hazeldine* v. *Grove*, 3 Q. B. 1006. *Lawrenson* v. *Hill*, 10 Ir. Com. Law Rep. 504.

(*x*) *Kirby* v. *Simpson*, 10 Exch. 358; 23 L. J., M. C. 165.

(*y*) *Prestidge* v. *Woodman*, 1 B. & C. 12; 2 D. & R. 45.

(*z*) *Weller* v. *Toke*, 9 East, 363.

(*a*) *Morgan* v. *Palmer*, 2 B. & C. 729; 4 D. & R. 283. *Briggs* v. *Evelyn*, 2 H. Bl. 114.

779 given to special constables appointed under the 1 & 2 Will. 4, c. 41 (*b*), to metropolitan police constables (*c*), and to the county police (*d*).

To whom to be given—Revenue officers and tax collectors.—Notice of action also is required to be given in respect of things done by toll-collectors on turnpike roads acting in pursuance of the General Turnpike Act (*e*), or certain special Acts of Parliament authorizing the collection of toll (*f*), or by revenue-officers (*g*), tax-collectors (*h*), or commissioners and other persons acting in the execution of the several Acts relating to the land-tax (*i*). If the officer has reasonable grounds for thinking that his duty required him to do the injurious act complained of, he is entitled to notice of action (*k*). If a toll or tax, though not legally payable, is demanded *bonâ fide* by a collector, who intends to act rightly, and has fair and reasonable grounds for believing that he has a right to demand the money, the collector is entitled to the statutory protection, and must have notice of action (*l*). But, if a revenue-officer, toll or tax-collector, improperly, and without colour of right, extorts money by virtue of his office, and in plain and manifest abuse of the statute under which he acts, he will then lose the statutory protection, and will not be entitled to any notice of action. If he makes an improper seizure of goods, and then takes money as a bribe to deliver them up again, there is no statutory protection (*m*). If he makes a wholly unauthorized charge, and is guilty of manifest extortion under a threat of legal proceedings, or the pressure of a distress (*n*), he cannot shelter himself under the provisions of the statute.

To whom to be given—Registrars and bailiffs of county courts.—By the 9 & 10 Vict. c. 95, s. 138, notice of action, and of the cause thereof, is required to be given to all persons acting in pursuance of that Act, one month at least before the commencement of the action.

To whom to be given—Contractors, &c. under local boards of health.—Notice of action is required to be given by the Public Health Act, 1875 (*o*), in any action for damage against any local authority, or any member or officer, or person acting in his aid,

(*b*) Sect. 19, *ante*, p. 720.
(*c*) 2 & 3 Vict. c. 71, s. 53. *Ante*, p. 720, note.
(*d*) *Ante*, p. 720.
(*e*) 3 Geo. 4, c. 126, s. 143.
(*f*) *Waterhouse* v. *Keen*, 4 B. & C. 200; 6 D. & R. 257.
(*g*) *Greenway* v. *Hurd*, 4 T. R. 553; and 39 & 40 Vict. c. 36, s. 268.
(*h*) 43 & 44 Vict. c. 19, s. 20.
(*i*) 5 & 6 Will. 4, c. 20, s. 19. *Thomas* v. *Williams*, 1 D. & L. 624; 13 L. J., Ex. 87.
(*k*) *Daniel* v. *Wilson*, 5 T. R. 1.
(*l*) *Waterhouse* v. *Keen*, 4 B. & C. 211; 6 D. & R. 257.
(*m*) *Irving* v. *Wilson*, 4 T. R. 486.
(*n*) *Umphelby* v. *M'Lean*, 1 B. & Ald. 42.
(*o*) 38 & 39 Vict. c. 55, s. 264. In action for injunction no notice is necessary, see *Flower* v. *Low Leyton*, *post*, p. 782.

780 for anything done under the provisions of the Act. A contractor who contracts with a local board of health for the digging of drains and wells and making excavations, is a person acting under the direction of the board within the 11 & 12 Vict. c. 63, s. 139 (repealed), and is entitled to notice of action for digging a hole in a public thoroughfare, and leaving it unguarded and without a light, although the board may not be liable for the contractor's act (*p*). So a contractor is entitled to notice of action under the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), who, in enlarging a sewer, under a contract with the Metropolitan Board of Works, has dammed it up, although he has been guilty of negligence in not pumping away the sewage water which had accumulated, and which in consequence flowed into the plaintiff's house (*q*). But, where the injury is caused by the negligence of his servant, in leaving his cart unattended in the public streets, and the horse runs away and causes damage, he is not entitled to notice (*r*). Nor is a person who receives notice to drain his house under the 106th section of the 25 & 26 Vict. c. 102, and who in so doing commits a trespass by laying the drain-pipe in the land of another, entitled to notice (*s*).

To whom to be given—Surveyors and persons acting in execution of the Highway Acts.—The Highway Act (5 & 6 Will. 4, c. 50, s. 109) requires notice of action to be given for anything done in pursuance of the Act. Where, therefore, a surveyor of highways left an obstruction of gravel and sand in a highway, and had notice to remove it, and failed so to do, it was held that he was entitled to notice of action (*t*); and, where a highway board, with their surveyor, trespassed upon private grounds, and broke down a private gate in the assertion of a supposed right of way which had no existence, it was held that they were entitled to notice of action. "The defendants," observes Lord Denman, "might believe that they were acting in execution of the power to remove obstructions in public roads without coming to a very irrational conclusion. The argument against it is, indeed, founded on a specific clause, which prescribes a different course of proceeding to this end; but we are not prepared to hold that officers of this description are bound to argue on a comparison of clauses in a long Act, and to decide correctly" (*u*). Wherever, therefore, a surveyor is acting *bonâ fide* in his public capacity as surveyor, he is entitled to notice of action (*x*).

(*p*) *Newton* v. *Ellis*, 5 El. & Bl. 115; 24 L. J., Q. B. 337.
(*q*) *Poulsum* v. *Thirst*, L. R., 2 C. P. 449; 36 L. J., C. P. 225.
(*r*) *Whatman* v. *Pearson*, L. R., 3 C. P. 422.
(*s*) *Doust* v. *Slater*, 38 L. J., Q. B 159.
(*t*) *Davis* v. *Curling*, 8 Q. B. 292.
(*u*) *Smith* v. *Hopper*, 9 Q. B. 1014.
(*x*) *Hardwick* v. *Moss*, 7 H. & N. 136; 31 L. J., Ex. 207.

781 A person acting as surveyor under an appointment in fact, though an informal and illegal one, is, nevertheless, entitled to notice of action, if he was acting in what he did in the *bonâ fide* belief that he had been properly appointed (*y*); and so is a surveyor who has received payment under an informal assessment, made apparently under a repealed Act, but who *bonâ fide* intended to act according to the duties of his office, and in pursuance of the statute authorizing him in that behalf (*z*).

To whom to be given—Corporations and companies.—The right to notice of action has been extended by numerous Acts of Parliament to all sorts of trading corporations, joint-stock companies, and associations called into existence by statute for a variety of local and private purposes, and purposes of gain, so that, whenever an action of tort is brought against a company or association which is incorporated or regulated by statute, or derives its powers from some special Act of Parliament, or against the officers of any such company or association, it will, in general, be necessary to give notice of action. This will be found to be the case in actions against many of the gas companies or their officers for things done by them under the powers or in pursuance of their several Acts of incorporation, also against certain railway companies (*a*), when there has been an omission of some duty imposed upon the company by the Act, such as the non-repair of fences, or the charging or levying excessive tolls under the powers of their Act of incorporation (*b*); but, when the action is brought against them for a breach of their duty as common carriers, no notice of action is requisite (*c*).

Neither the Lands Clauses nor the Companies Clauses Consolidation Acts contain any section requiring notice of action to be given to companies in respect of things done by them under the authority of those statutes; but sect. 141 of the Companies Clauses Act (8 & 9 Vict. c. 16), and sect. 135 of the Lands Clauses Act (8 & 9 Vict. c. 18), entitle the company to a verdict, if before action they tender sufficient amends.

In what kind of actions.—Notice of action must be given in cases of non-feasance, where the person, having undertaken to act in pursuance of some statute, has failed to do what he ought to have done, as well as in cases of misfeasance, where he has acted negligently or wrongfully in the execution of the Act (*d*). Where

(*y*) *Hughes* v. *Buckland*, 15 M. & W. 355.

(*z*) *Selmes* v. *Judge*, L. R., 6 Q. B. 724; 40 L. J., Q. B. 287.

(*a*) *Carpue* v. *London and Brighton Rail. Co.*, 5 Q. B. 747.

(*b*) *Kent* v. *Great Western Rail. Co.*, 3 C. B. 725.

(*c*) *Palmer* v. *Grand Junction Rail. Co.*, 4 M. & W. 766. *Garton* v. *Great Western Rail. Co.*, El. Bl. & El. 837, 846.

(*d*) *Joule* v. *Taylor*, 7 Exch. 58; 21 L. J., Ex. 31. *Davis* v. *Curling*, 8 Q. B. 286. *Newton* v. *Ellis*, 5 El. & Bl. 115;

782 the principal object of the action is an injunction to restrain an immediate injury, it is not necessary to give notice of action, even although damages are claimed by way of subsidiary relief (*e*). Nor is any notice of action required, where the action is brought, not for a tort or a *quasi* tort, but for the breach of a specific contract (*f*).

Where an Act of Parliament (*g*) provided that no action or proceeding should be commenced against the Metropolitan Board of Works till after notice, and that "every such action and proceeding should be brought and commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards," it was held that these words referred to some hostile claim against the board, and not to a claim of arbitration for damage to buildings caused by the works of the board (*h*).

Time for giving the notice.—By the 5 & 6 Vict. c. 97, s. 4, it is enacted that, in all cases where notice of action is required to be given, such notice shall be given one calendar month at least before any action shall be commenced, and such notice shall be sufficient, any Act to the contrary thereof notwithstanding. The general rule is that, where time for a particular period is allowed to a person to do any act, the day from which the computation is to be made is to be reckoned exclusively; and, whenever a certain space of time is given to a person to do some act, which space of time is included between two other acts to be done by another person, "both the days of doing those acts ought," observes Alderson, B., "to be excluded, in order to insure to him the whole of that space of time. Thus, where a month's notice of action is required to be given to a justice of the peace before an action can be commenced against him, and the justice is to have the whole of that month for tendering amends, both the day of the giving of the notice and the day of the tendering amends are to be excluded from the computation of the time: for, wherever the Act of Parliament allows a party an intervening period of a month, within which to deliberate whether he will tender amends or not,

24 L. J., Q. B. 337. *Wilson* v. *Mayor, &c. of Halifax*, L. R., 3 Ex. 114; 37 L. J., Ex. 44. *Jolliffe* v. *Wallasey Local Board*, L. R., 9 C. P. 62; 43 L. J., C. P. 41. In Ireland it has been held that words spoken while acting in pursuance of statutes, are as much within their protection as acts done, and, consequently, that in an action for slander the defendant in such a case is entitled to notice of action. *Murray* v. *M'Swiney*, Ir. Rep., 9 C. L. 545.

(*e*) *Flower* v. *Local Board of Low Leyton*, 5 Ch. D. 347; 46 L. J., Ch. 621. *Att.-Gen.* v. *Hackney Local Board*, L. R., 20 Eq. 626; 44 L. J., Ch. 545.

(*f*) Wightman, J., *Davis* v. *Curling*, 8 Q. B. 293. *Fletcher* v. *Greenwell*, 4 Dowl. P. C. 166. *Davies* v. *Mayor, &c. of Swansea*, 8 Exch. 808; 22 L. J., Ex. 297.

(*g*) 25 & 26 Vict. c. 102, s. 106.

(*h*) *Delany* v. *Metropolitan Board of Works*, L. R., 2 C. P. 532; 3 C. P. 111; 37 L. J., C. P. 59.

783 unless you exclude both the first and the last day, you do not give him a whole month for that purpose" (*i*).

A person who intends to sue a justice of the peace for an act done by him in a matter respecting which he had no jurisdiction, need not wait for the quashing of the conviction or order of commitment before giving the notice of action. The notice of action may be given as soon as the wrongful act has been committed, though the action itself cannot be commenced until after the conviction or commitment has been quashed (*k*). If in the case of a conviction the magistrate receives notice of action before the conviction is quashed, he may at his peril rely upon the validity of the conviction, and abstain from tendering amends; but, if he does so, and the conviction is quashed, the action may be commenced against him one calendar month after service of the notice (*k*).

Form of the notice.—The notice of action should set forth the substantial ground of complaint, and should specify the time and place of the commission of the grievance (*l*), and should state positively that an action will be brought (*m*). If the notice contains a reference to a wrong statute, the wrong reference may be rejected, as a reference to the statute requiring notice to be given is not an essential part of the notice (*n*); but the court in which the action is brought, if stated at all, should be correctly stated, particularly if several notices of action have been served (*o*). It is not necessary in the notice to name all the persons meant to be made parties to the action, nor to express whether it is intended to be brought against several persons jointly, or against one person only (*p*); but every plaintiff who sues must give notice of action, and every defendant must receive notice. Notice on behalf of two complaining parties, one of them being dead, was held not to support an action brought by the survivor (*q*). It is quite sufficient, if the notice affords plain and substantial information of the cause of action; it is not necessary to describe in specific words precisely how the injury took place; nor is it in all cases material to state precisely where the cause of injury arose (*r*). When the statute requires the name and place of abode of the solicitor of the

(*i*) Alderson, B., *Young* v. *Higgon*, 6 M. & W. 54.

(*k*) *Hayloek* v. *Sparke*, 1 El. & Bl. 471; 22 L. J., M. C. 67.

(*l*) *Breese* v. *Jerdein*, 4 Q. B. 585. *Martins* v. *Upcher*, 3 Q. B. 662. *Taylor* v. *Nesfield*, 3 El. & Bl. 725; 23 L. J., M. C. 169. *Jones* v. *Nicholls*, 13 M. & W. 361.

(*m*) *Mason* v. *Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 406.

(*n*) *Macgregor* v. *Galsworthy*, 1 C. & K. 8.

(*o*) *Elstob* v. *Wright*, 3 C. & K. 35.

(*p*) *Bax* v. *Jones*, 5 Pr. 168.

(*q*) *Pilkington* v. *Riley*, 3 Exch. 741.

(*r*) *Jones* v. *Bird*, 5 B. & Ald. 837; 1 D. & R. 503. *Smith* v. *West Derby Local Board*, 3 C. P. D. 423; 47 L. J., C. P. 607.

784 party giving the notice to be indorsed on the notice, any material error or misstatement calculated to mislead will invalidate the notice; but, if the information given is sufficiently specific and sufficiently accurate to enable the defendant to avail himself of the privileges and advantages that the Act intended to confer upon him, it will be sufficient; and it is for the defendant to show that the error or misstatement, or insufficient description in the notice, has deprived him of the opportunity of taking advantage of the statute (*s*). The christian name of the solicitor need not be written out at full length (*t*); nor need his private residence be specified; for the place where a solicitor abides for the purpose of carrying on his business is his place of abode within the meaning of the statute. "Either will do, the place of residence or the place of business" (*u*). Care must be taken to address the notice to the right parties, and to serve it in the proper quarter (*v*).

In actions against justices, the nature of the cause of action, or of the complaint or grievance, should be explicitly stated on the face of the notice, so as to show whether the plaintiff proceeds against the magistrate for an act done by him maliciously and without reasonable and probable cause, in the execution of his duty as a justice, with respect to some matter within his jurisdiction, within the first section of the 11 & 12 Vict. c. 44, or for an act done by him in a matter over which he had no jurisdiction, or respecting which he had exceeded his jurisdiction, within the second section of that statute. If the notice fails clearly and explicitly to point out the nature of the cause of action, so as to show whether it is governed by the first or the second section of the statute, it will be a bad notice (*x*). "But the notice," justly observes Abbott, C. J., "ought not to be construed with great strictness, its object being merely to inform the defendant substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained" (*y*). The time and place of the doing the act complained of ought also to be stated in the notice. "I do not go so far," observes Lord Denman, "as to say that a party will always be strictly bound to prove the time and place which he names in his notice; but I think the words of the statute require that a time and place for the occurrence should be named" (*z*).

Tender of amends before action.—The statutes requiring notice of action to be given further provide that the action shall not be

(*s*) *Osborn* v. *Gough*, 3 B. & P. 554.
(*t*) *James* v. *Swift*, 4 B. & C. 681.
(*u*) *Roberts* v. *Williams*, 2 C. M. & R. 561; 4 Dowl. P. C. 486.
(*v*) *Hider* v. *Dorrell*, 1 Taunt. 384.
(*x*) *Taylor* v. *Nesfield*, 3 El. & Bl. 724; 23 L. J., M. C. 169.
(*y*) *Prickett* v. *Gratrex*, 8 Q. B. 1020. *Jacklin* v. *Fytche*, 14 M. & W. 387.
(*z*) *Martins* v. *Upcher*, 3 Q. B. 668.

785 maintainable, and that the jury shall give a verdict for the defendant, if there has been a tender of sufficient amends before action (*a*). If the plaintiff does not accept the tender, but prefers the chance of what he may gain by verdict, he has no claim to the amount tendered; and, if the verdict goes against him, he gets nothing (*b*).

By the 11 & 12 Vict. c. 44, s. 11, it is enacted that, after notice of action has been given to a justice, and before the action shall be commenced, the justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit, as amends for the injury complained of in such notice; and, if the jury at the trial shall be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be non-suited. Whether the preliminary matters required by statute for the protection of magistrates have been duly complied with appears to be a question for the decision of the judge at the trial, and not for determination by a jury (*c*).

(*a*) This is the case with the Lands Clauses Act (8 & 9 Vict. c. 18, s. 135); the Railway Clauses Act (8 & 9 Vict. c. 20, s. 139); County Courts Act (9 & 10 Vict. c. 95, s. 138); Public Health Act (38 & 39 Vict. c. 55, s. 264); the Waterworks Clauses Act (10 & 11 Vict. c. 17, s. 84); the Harbours, Docks, and Piers Clauses Act (10 & 11 Vict. c. 27, s. 91); the Towns Improvement Clauses Act (10 & 11 Vict. c. 34, s. 209); the Commissioners Clauses Act (10 & 11 Vict. c. 16, s. 103); the Markets and Fairs Clauses Act (10 & 11 Vict. c. 14, s. 51; see 38 & 39 Vict. c. 55, ss. 166—168); the Towns Police Clauses Act (10 & 11 Vict. c. 89, s. 72; see 38 & 39 Vict. c. 55, s. 171); the Cemeteries Clauses Act (10 & 11 Vict. c. 65, s. 61); the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74, s. 55); and the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43, s. 68).

(*b*) *Jones* v. *Gooday*, 9 M. & W. 744. It is not necessary, therefore, to pay the amount tendered into court. *Ibid.*

(*c*) Parke, B., *Kirby* v. *Simpson*, 10 Exch. 366; 23 L. J., M. C. 165. *Arnold* v. *Hamel*, 9 Exch. 405; 23 L. J., Ex. 137.

CHAPTER XV.

OF COSTS.

General rule as to costs.—The expenses that a party has incurred in maintaining his right, such as the fees of counsel, the solicitor's bills, and the expenses of witnesses, are termed costs; and these are given by the court, and taxed by their officer. In contemplation of law the word "damages" emphatically includes costs. It is so considered by Lord Coke, and in various authorities. Costs, therefore, properly fall under the *nomen generale* of damages (*a*). Before the Statute of Gloucester, 6 Edw. 1, c. 1 (now repealed; see 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49), there was no mode of giving a successful plaintiff his costs, unless the jury assessed them, and included them in the amount of damages; but that statute enabled the plaintiff to recover his costs, by the judgment of the court, in all cases where he recovered damages (*b*). By the 23 Hen. 8, c. 15, it was enacted that, if the plaintiff, in any action of detinue, or account, or upon the case, or upon any statute for any offence or personal wrong, should be nonsuited, or a verdict should pass against him, the defendant should have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judges of the court; and the 4 Jac. 1, c. 3, enacted (s. 2), that, if any person should commence any action of trespass or ejectment, or any other action whatsoever, wherein the plaintiff or demandant might have costs in case judgment should be given for him, and the plaintiff or demandant should be nonsuited, or any verdict should happen to pass against him, then the defendant should have judgment to recover his costs against the plaintiff or demandant. This statute, therefore, gave a successful defendant his costs in all cases where the plaintiff, if successful, would have been entitled to costs (*c*).

By the Judicature Act, 1875 (*d*), the costs of all proceedings

(*a*) Per Lord Ellenborough, C. J., *Phillips* v. *Bacon*, 9 East, 303. Co. Litt. 257 a.

(*b*) *Jackson* v. *Calesworth*, 1 T. R. 72.

(*c*) *Cobbett* v. *Wheeler*, 30 L. J., Q. B. 64.

(*d*) Order LXV. r. 1, which is as follows: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules

787 in the Supreme Court are in the discretion of the court. But, where any issue is tried by a jury, the costs will follow the event, unless the judge before whom the issue is tried, or the court, shall for good cause shown otherwise order. The costs of the several issues upon a claim or counterclaim, both in law and fact, unless otherwise ordered, follow the event (*e*).

All statutes as to costs which interfere with the discretion of the judge, and which are not preserved by the Judicature Acts, are repealed by this enactment; and, therefore, in the case of a trial before a jury, the costs will follow the event, except in the cases provided for by the Judicature Acts, unless the judge or court direct otherwise. Thus, where the plaintiff in an action of slander recovered one farthing damages, it was held that, notwithstanding the 21 Jac. 1, c. 16, s. 6, in the absence of any order by the judge or court to the contrary, the plaintiff was entitled to his costs (*f*).

"The costs of and incident to all proceedings in the High Court" means the costs of and incident to all proceedings that have actually come into the court, and does not include costs incurred before any proceedings are taken in the High Court, such as proceedings in the Registrar's office under the Trade Marks Registration Acts (*g*).

It has been held that an application to give or withhold costs may be made to the court, although none was made to the judge at the trial (*h*).

As a general rule, there is no appeal against the judge's decision as to costs only (*i*); but where the judge decides upon "good cause shown" within the above rule, there is, as it seems, an appeal to the Court of Appeal (*j*). Also, where the jurisdiction of a judge to inflict costs on a party arises from his being guilty of breach of an injunction, an appeal lies (*k*).

Exercise of discretion.—Where two parties engage in litigation with respect to the right to manufacture a certain substance intended to be used to deceive the public, no costs will be given

hitherto acted upon in the Chancery Division: provided also that, where any action, cause, matter, or issue is tried by a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall for good cause shown otherwise order." This rule is extended to civil proceedings on the Crown side by Order LXVIII. r. 2.

(*e*) Order LXV. r. 2. As to costs in cases of joinder of actions, see *Gort (Viscount)* v. *Rowney*, 17 Q. B. D. 625.

(*f*) *Garnet* v. *Bradley*, 3 App. Cas. 944.

(*g*) *In re Brandreth*, 9 Ch. D. 618.

(*h*) *Myers* v. *Defries*, 4 Ex. D. 176. *Siddons* v. *Lawrence*, 4 Ex. D. 176.

(*i*) Jud. Act, 1873, s. 49.

(*j*) *Collins* v. *Welch*, 5 C. P. D. 27, at p. 33; 49 L. J., C. P. 260. *Marsden* v. *Lancashire & Yorkshire Rail. Co.*, 7 Q. B. D. 641. *Jones* v. *Curling*, 13 Q. B. D. 262; 53 L. J., Q. B. 373; but see the powerful remonstrance of Lord Coleridge in *Huxley* v. *West London Rail. Co.*, 17 Q. B. D. 373. The judge may consider the conduct of the party previous to the action. *Harnet* v. *Vise*, 5 Ex. D. 307.

(*k*) *Stevens* v. *Metropolitan District Rail. Co.*, 29 Ch. D. 60; 54 L. J., Ch. 737.

788 to the successful party, as it is not the province of the court to protect speculation of this kind (*l*).

Costs—Actions for collision.—Where the defendant succeeds on the ground that the collision was the result of inevitable accident, it is the general rule in the Court of Admiralty to give costs to the defendant (*m*). The circumstances of each case will be considered; and the plaintiff will be ordered to pay the costs, if he had no sufficient ground for bringing the action (*n*). So, in the Admiralty Division, where a defendant pleads several defences, but only succeeds on the ground that the collision was caused by the negligence of the pilot whom he was compelled by law to employ, it has been the practice to give him no costs; but, in a case since the Judicature Acts, the Exchequer Division refused to apply that rule (*o*). Where both vessels are to blame, the owners are not entitled to the costs of any litigation arising out of the collision (*p*).

Costs—Actions triable in the county courts.—By the Judicature Act, 1873, s. 67, the provisions contained in the fifth section of the County Courts Act, 1867, are to apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a county court (*q*). By the 33rd section of that Act, all the sections of previous County Court Acts as to costs are repealed; and by sect. 5 it is enacted that, "If in any action commenced after the passing of this Act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort (*r*), whether by verdict, judgment by default, or on demurrer (*s*), or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record (*t*) that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs." By the County Courts Act, 1882 (*u*), this section

(*l*) *Estcourt* v. *Estcourt Hop Essence Co.*, L. R., 10 Ch. 276; 44 L. J., Ch. 223.

(*m*) *The Naples*, 11 P. D. 124.

(*n*) *The Marpesia*, L. R., 4 P. C. 212; 8 Moo. P. C., N. S. 468. *The Naples*, *supra*.

(*o*) *General Steam Navigation Co.* v. *London & Edinburgh Shipping Co.*, 2 Ex. D. 467.

(*p*) *The Hector*, 8 P. D. 218; 52 L. J., P. D. & A. 51.

(*q*) Actions for malicious prosecution, libel, slander, and seduction cannot be tried in the County Court (except by consent or remission), and the costs will therefore follow the event, under Order LXV. r. 1. As to the jurisdiction of County Courts in counterclaims, see 47 & 48 Vict. c. 61, s. 18; and as to costs in the County Courts, see County Court Rules 1886, Order L.

(*r*) As to detinue, see *Danby* v. *Lamb*, 11 C. B., N. S. 423; 31 L. J., C. P. 17.

(*s*) The prohibition as regards costs was held under the repealed Acts to apply to issues of law as well as of fact, so that, if in an action of tort there was an issue of fact and an issue of law, both of which were determined in favour of the plaintiff, but the damages recovered were less than the statutable amount, the plaintiff was wholly deprived of costs, unless he obtained an order or a certificate. *Dunston* v. *Paterson*, 5 C. B., N. S. 279; 28 L. J., C. P. 97. *Abley* v. *Dale*, 11 C. B. 893.

(*t*) *Jones* v. *Williams*, 13 M. & W. 423.

(*u*) 45 & 46 Vict. c. 57, s. 4.

789 is to be read as if the words "less than" were substituted for the words "not exceeding."

It has been held that this section applies to actions which have been commenced in an inferior court, but have been removed into a superior court by *certiorari* (*v*), and to an action begun in the county court, but stayed under the provisions of the 19 & 20 Vict. c. 108, s. 39 (*x*); and *à fortiori*, therefore, it applies to actions which have been commenced in a superior court, but have been sent, under the 19 & 20 Vict. c. 108, s. 26, for trial before a county court judge, who may certify on the "issues" sent with the judge's order (*y*). It also applies to actions referred by consent to an arbitrator, who is to have the power of a judge at Nisi Prius as to certifying, &c. (*z*). It is no ground for the exercise of the discretion of the court under the above section, that the plaintiff was misled by the registrar of the county court, or that the expense and delay of the proceedings in the county court would have exceeded those of the proceedings in the superior court (*a*), or that the parties reside a long way from one another (*b*). Notwithstanding any Act of Parliament or any rule to the contrary, it shall be in the power of the judge of a county court to award costs on the higher scale to the plaintiff on any amount recovered, however small, or to the defendant who successfully defends an action brought for any amount, however small, provided the said judge certify that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons or of general or public interest (*c*). If a cause be removed from an inferior court having jurisdiction in the cause, the costs in the court below are to be costs in the cause (*d*).

Actions triable in county court—Distinction between contract and tort.—When the foundation of the action is a contract, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must recover more than 20*l.*, or obtain a certificate, rule, or order, in order to entitle himself to costs in the superior courts (*e*).

(*v*) *Pellas* v. *Breslauer*, L. R., 6 Q. B. 438; 40 L. J., Q. B. 161.

(*x*) *Flitters* v. *Alfrey*, L. R., 10 C. P. 29; 44 L. J., C. P. 73. Sect. 39 does not apply where the action could only have been brought in the county court, as, for instance, under the Employers' Liability Act, s. 6. *Reg.* v. *City of London Court*, 14 Q. B. D. 818; 54 L. J., Q. B. 330.

(*y*) *Taylor* v. *Cass*, L. R., 4 C. P. 614. By Order LXV. r. 4, the costs of the action follow the event, unless by certificate of the judge who tried the case it appears that he was of opinion that the question of costs ought to be referred to the High Court. The High Court retains its power to deal with the costs. *Emeny* v. *Sandes*, 14 Q. B. D. 6. But where the action is remitted under s. 10 of 30 & 31 Vict. c. 142, the High Court has no jurisdiction over the costs. *Moody* v. *Stewart*, L. R., 6 Ex. 35.

(*z*) *Haslend* v. *Mayor, &c. of Newcastle-on-Tyne*, L. R., 5 Q. B. 47; 39 L. J., Q. B. 67.

(*a*) *Holborow* v. *Jones*, L. R., 4 C. P. 14; 38 L. J., C. P. 22.

(*b*) *Thompson* v. *Dallas*, L. R., 3 Q. B. 359; 37 L. J., Q. B. 133.

(*c*) 45 & 46 Vict. c. 57, s. 5.

(*d*) Order LXV. r. 3.

(*e*) *Legge* v. *Tucker*, 1 H. & N. 500; 26 L. J., Ex. 71. *Baylis* v. *Lintott*, L. R., 8 C. P. 345; 42 L. J., C. P. 119.

790 On the other hand, when the foundation of the action is a wrongful act, as, for instance, a tort to the right of property, and not a breach of contract, the action is in fact founded on tort (*f*). Where a vendor of goods, who has delivered them to a carrier for carriage to the vendee, exercises his right to stop *in transitu*, and requires the carrier to re-deliver the goods, but the carrier refuses to do so, and delivers the goods to the consignee, and the vendor brings an action against the carrier, the action is founded on tort and not on contract (*g*). But, where goods are delivered to a common carrier, to be carried, and are lost on the road, the action against the common carrier is founded on contract; for, where an action is brought against a common carrier for breach of the common-law duty to carry safely, the action is founded on contract, and is not an action *ex delicto* for negligence; and, therefore, if the plaintiff does not recover more than 20*l*., he is not entitled to his costs (*h*). Where the plaintiff in the first count of his declaration complained of an assault, and in the second count of slander, and recovered less than the statutable amount on the first count, and failed on the second, it was held that he was entitled to no costs without a certificate or judge's order (*i*).

Actions triable in county court—Claim reduced by successful counter-claim.—Where the plaintiff proves a claim, and a counter-claim of less amount is proved by the defendant, the plaintiff recovers judgment for the balance only: but it seems his right to costs must be decided with reference to the amount of the claim proved (*j*).

Actions triable in county court—Claim reduced by the return of the goods sued for.—Where, under the repealed Acts, an action was brought in a superior court for the detention of goods exceeding the value of 50*l*., and the goods were returned to, and taken back by, the defendant after action, and the plaintiff went on with the action to recover further damages and his costs, and obtained a verdict for a shilling damages, but the jury found that the value of the goods detained exceeded 50*l*., it was held that the plaintiff was entitled to judgment for his costs, as no plaint would lie in the county court for goods of the value assessed (*k*). But, where an action of trover was brought for the detention of a portmanteau of the value of 25*l*. for a claim of 1*s*. 6*d*., and the

(*f*) *Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J., C. P. 670.

(*g*) *Pontifex* v. *Midland Rail. Co.*, 3 Q. B. D. 23; 47 L. J., Q. B. 28.

(*h*) *Fleming* v. *Manchester and Sheffield Rail. Co.*, 4 Q. B. D. 81. See, however, *Tattan* v. *Great Western Rail. Co.*, 2 El. & El. 844; 29 L. J., Q. B. 184; and *Foulkes* v. *Metropolitan District Rail. Co.*, 4 C. P. D. 267; 5 C. P. D. 157.

(*i*) *Smith* v. *Harner*, 3 C. B., N. S. 829.

(*j*) *Stooke* v. *Taylor*; *Baines* v. *Bromley*, *post*, p. 791. *Ellis* v. *De Silva*, 6 Q. B. D. 521. *Lund* v. *Campbell*, 14 Q. B. D. 821. *Hawke* v. *Brear*, 14 Q. B. D. 841. *Ahrbeeker* v. *Frost*, 17 Q. B. D. 606. These cases are inconsistent with *Staples* v. *Young*, 2 Ex. D. 324.

(*k*) *Leader* v. *Rhys*, 10 C. B., N. S. 369; 30 L. J., C. P. 345.

791 portmanteau was delivered up to the plaintiff, and received back by him in court, and the jury then gave a verdict for 40*s.* damages, and the plaintiff failed to take a verdict for the value of the portmanteau, it was held that an order for costs could not be made, as a plaint could have been entered in the county court, and no sufficient reason was shown for bringing the action in the superior court (*l*).

Actions triable in county court—Money paid into court.—When money has been paid into court, not exceeding 20*l.* or 10*l.*, as the case may be, and the plaintiff accepts it in satisfaction of the cause of action, he cannot get any costs, as he has not recovered more than the amount mentioned in the Act (*m*); but, if the amount recovered in the action, together with the amount paid into court, exceeds the amount mentioned, the plaintiff will be entitled to his costs.

Actions triable in county court—Causes referred.—What the legislature meant by the word "'recover' was what the plaintiff is to get and put into his pocket" (*n*) by means of the action; and, therefore, if the action is referred, although by consent, and the arbitrator awards a sum less than 20*l.* or 10*l.*, as the case may be, the plaintiff will be deprived of his costs accordingly (*o*). If the cause is referred compulsorily, the same rule holds, both with regard to the costs of the cause and also the costs of the reference or award, which in such a case form part and parcel of the costs of the cause (*p*). There is no distinction between causes referred before, and causes referred after, verdict (*q*). When the cause has been referred therefore, the plaintiff will not obtain his costs, if he does not recover through the instrumentality of the award and the verdict a sum exceeding 10*l.* or 20*l.*, as the case may be (*r*). Where, however, an action is referred by consent, and the costs of the reference are in the discretion of the arbitrator, the plaintiff will be entitled to those costs if the arbitrator so awards, although he recovers less than the statutable amount, and so cannot have the costs of the cause (*s*). If the reference is of the cause and all matters in difference, and the submission states that the costs are to follow "the event of the reference," and the arbitrator finds, on

(*l*) *Dimsdale* v. *London and Brighton Rail. Co.*, 11 W. R., Q. B. 729. *Wigens* v. *Cook*, 6 C. B., N. S. 784; 28 L. J., C. P. 312.

(*m*) *Boulding* v. *Tyler*, 3 B. & S. 472; 32 L. J., Q. B. 85. *Parr* v. *Lillierap*, 1 H. & C. 615; 32 L. J., Ex. 151. As to set-off, see *Stooke* v. *Taylor*, 5 Q. B. D. 569. *Baines* v. *Bromley*, 6 Ex. D. 691. *Neale* v. *Clark*, 4 Ex. D. 288.

(*n*) *Gwens* v. *Moore*, 3 H. & N. 540.

(*o*) *Cowell* v. *Amman Coll. Co.*, 6 B. & S. 333; 34 L. J., Q. B. 161. *Fergusson* v. *Davison*, 8 Q. B. D. 470.

(*p*) *Moore* v. *Watson*, L. R., 2 C. P. 314; 36 L. J., C. P. 122. *Robertson* v. *Sterne*, 13 C. B., N. S. 248; 31 L. J., C. P. 362. But see *Galatti* v. *Wakefield*, 4 Ex. D. 249, 251.

(*q*) *Cowell* v. *Amman Coll. Co.*, *supra*.

(*r*) *Smith* v. *Edge*, 2 H. & C. 659; 33 L. J., Ex. 9.

(*s*) *Forshaw* v. *De Wette*, L. R., 6 Ex. 200; 40 L. J., Ex. 153.

792 a balance of accounts, less than the statutable amount due to the plaintiff, the plaintiff may nevertheless obtain his costs if the arbitrator so decides; for he cannot be said to "recover" such amount within the meaning of the County Courts Act (*t*).

Actions triable in county court.—*The certificate* that it appeared to the judge that there was sufficient reason for bringing the action in the superior court is very much a matter of discretion with the judge. There is no rule to guide him; but he must form his own opinion from the materials before him at the trial; and the court will not review his decision where the question is one of damages only (*u*). Where, however, an action is *bonâ fide* brought to try a right, and the right is of sufficient importance to make the action one proper to be brought in a superior court, the judge ought to certify; and, if he does not, his decision may be reviewed by the court and reversed if it appears clearly to be wrong (*x*). A judge may, under this statute, it would seem, certify for costs at any time before taxation (*y*); but the under-sheriff, or presiding officer, on a writ of trial, who has to certify on the writ of inquiry, must do so probably before it is returned (*z*). Although the plaintiff may be deprived of costs by the County Courts Act, he is, nevertheless, entitled to levy poundage fees, and expenses of execution, in addition to the sum recovered, costs of execution not being costs of the action (*a*).

Costs—Married women.—By the Married Women's Property Act, 1882, any damages or costs recovered by a married woman shall be her separate property, and any damages or costs recovered against her shall be payable out of her separate property, and not otherwise (*b*).

Costs—In patent cases.—The 31st section of the Patents, Designs, and Trade Marks Act, 1883 (*c*), empowers the court or a judge, before whom an action is tried, to certify that the validity of the patent came in question; and if the court or judge so certifies, then in any subsequent action for infringement the plaintiff in such action, on obtaining a final order or judgment, shall have his full costs, charges, and expenses, as between solicitor and client,

(*t*) *Stevens* v. *Chapman*, L. R., 6 Ex. 213; 40 L. J., Ex. 123.

(*u*) *Hatch* v. *Lewis*, 7 H. & N. 551; 31 L. J., Ex. 26. *Dimsdale* v. *London, Brighton, &c. Rail. Co.*, 11 W. R., Q. B. 729.

(*x*) *Hinde* v. *Sheppard*, L. R., 7 Ex. 71; 41 L. J., Ex. 25. *Strachey* v. *Lord Osborne*, L. R., 10 C. P. 92; 44 L. J., C. P. 6.

(*y*) Martin, B., *Mason* v. *Tack*, 4 H. & N. 538. *Bennett* v. *Thompson*, 5 El. & Bl. 683; 25 L. J., Q. B. 378.

(*z*) *Graves* v. *Smith*, L. R., 4 Ex. 146; 38 L. J., Ex. 90.

(*a*) *Arnridge* v. *Jessop*, L. R., 2 C. P. 12; 36 L. J., C. P. 63.

(*b*) 45 & 46 Vict. c. 75, s. 1, sub-s (2). Where the husband and wife are sued in respect of debts contracted or wrongs committed by the wife before marriage, and the husband is found not to be liable, he will have the costs of his defence, and if he is liable there will be a joint judgment against the husband and wife. See sect. 15.

(*c*) 46 & 47 Vict. c. 57.

793 unless the court or judge shall certify that he ought not to have such full costs.

Costs in the superior courts in actions against justices.—By the 11 & 12 Vict. c. 44, s. 14, it is enacted that, if the plaintiff, in an action against a justice of the peace for anything done by him in the execution of his office, recovers a verdict, or the defendant allows judgment to pass against him by default, the plaintiff shall be entitled to costs as if the Act had not been passed; or if, in such case, it be stated in the declaration, or in the summons and particulars in a county court action, that the act complained of was done maliciously and without reasonable or probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit, to be taxed as between attorney and client (*d*); and that in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict, or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client.

The 24 Geo. 2, c. 44, s. 6, enacts that the constable or officer executing a justice's warrant shall, in a certain event, be sued only in conjunction with the justice or justices who issued the warrant, and that the jury on proof of the warrant shall find for the constable (*e*); and as regards the costs it is enacted that, if the verdict be given against the justice, the plaintiff shall recover his costs, to be taxed so as to include the costs the plaintiff is liable to pay to the defendant for whom such verdict shall be found.

In actions against constables and officers, and parties acting or intending to act in the execution of statutory powers, such as those contained in the 1 & 2 Will. 4, c. 41, the plaintiff, though he obtains a verdict, cannot (sect. 19) recover any costs from the defendant, unless the judge before whom the trial takes place certifies his approbation of the action and of the verdict; and, generally, when an action is brought against a constable or a police-officer, or against private individuals, for anything done in pursuance of an Act of Parliament, or with the *bonâ fide* intention of executing the provisions of some particular statute, and a verdict passes for the defendant, or the plaintiff becomes nonsuit or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant is entitled to recover his full costs as between solicitor and client, and has the like remedy for the same as any defendant has in ordinary cases.

(*d*) See the exception in sect. 13, *ante*, p. 680.

(*e*) *Ante*, p. 716.

794 *In actions for things done in supposed pursuance of the Act for the protection of property from malicious injuries.*—By the 71st section of the 24 & 25 Vict. c. 97, it is enacted that, though a verdict shall be given for the plaintiff in an action against any person for anything done in pursuance of the Act, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action. If, therefore, the judge does not at the trial give a certificate of approbation in conformity with the statute, the defendant is entitled to a suggestion of the fact on the record, in order to deprive the plaintiff of costs which he would otherwise recover (*f*).

Repeal of divers statutes enabling plaintiffs in certain actions to recover double costs.—By the 5 & 6 Vict. c. 97, s. 1, it is enacted, that so much of any clause or enactment in any local and personal Act, or in any Act of a local or personal nature, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and in lieu thereof the usual costs between party and party may be recovered and no more; and (sect. 2) that so much of any enactment in any public Act, not local or personal, whereby it is enacted that either double or treble costs, or any other than the usual costs between party and party, may be recovered, shall be repealed, and instead of such costs the party shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action or other legal proceeding as shall be taxed by the proper officer in that behalf.

In compensation cases (*g*).—An offer of compensation by a railway company to a person whose land has been injuriously affected by the construction of a railway, must be made at least ten days before the holding of the inquisition of damages, in order to throw upon the party seeking compensation, and not obtaining more than the sum offered, the burthen of paying his own costs (*h*). There is nothing, however, to prevent the company from subsequently making a larger offer, provided they make it in time; and, if the aggregate of the sums recovered by the claimant does not

(*f*) *Norwood* v. *Pitt*, 5 H. & N. 801; 28 L. J., Ex. 212; decided under the 41st section of the repealed Act, 7 & 8 Geo. 4, c. 30.

(*g*) Under the 8 Vict. c. 18, s. 52, the costs of any inquiry, and under the 32 & 33 Vict. c. 18, s. 1, the costs of any arbitration as to compensation under the Lands Clauses Act, may be taxed by a master; but the Act only refers to arbitrations pure and simple under the Lands Clauses Act, and not to cases where other matters are involved. *Doulton* v. *Metropolitan Board of Works*, L. R., 5 Q. B. 333; 39 L. J., Q. B. 165. Where the costs are settled by a master, the court has no jurisdiction to review his taxation. *Owen* v. *London & North Western Rail. Co.*, L. R., 3 Q. B. 54; 37 L. J., Q. B. 35. *Sandbach Charity Trustees* v. *North Staffordshire Rail. Co.*, 3 Q. B. D. 1; 47 L. J., Q. B. 10.

(*h*) *Metropolitan Rail. Co.* v. *Turnham*, 14 C. B., N. S. 212; 32 L. J., M. C. 249.

795 exceed the aggregate of the sums so offered by the company, he will not be entitled to his costs (*i*). Where the company give the claimant notice of their intention to issue their warrant for summoning a jury, and make an offer of the sum they are willing to give, and the claimant then gives notice of his desire to have the compensation settled by arbitration, the company may make a fresh offer; and such offer is made in time, if made at the time that notice is given of the appointment of the arbitrator (*j*). But an offer made after both the arbitrators have been appointed is too late (*k*). The offer must be unconditional. An offer of one sum for compensation and costs is, therefore, bad (*l*). In the case of a landowner, whose land has been severed, demanding a communication to be made, and the company preferring to take to the land as being of less value than the expense of making the communication, the Act makes no provision as to costs (*m*). A person whose lands are injuriously affected, and who recovers by the verdict of a jury under sect. 68 of the 8 & 9 Vict. c. 18, more than the company offered, is entitled to the costs of the inquiry (*n*). Where land is compulsorily taken, the execution of a conveyance is not a condition precedent to the payment of the taxed costs of the arbitration (*o*).

(*i*) *Hayward* v. *Metropolitan Rail. Co.*, 4 B. & S. 787; 33 L. J., Q. B. 73. See *Caledonian Rail. Co.* v. *Carmichael*, L. R., 2 Sc. Ap. 56.

(*j*) *Fitzhardinge* v. *Gloucester and Berkeley Canal Co.*, L. R., 7 Q. B. 776; 41 L. J., Q. B. 316.

(*k*) *Gray* v. *North Eastern Rail. Co.*, 1 Q. B. D. 696; 45 L. J., Q. B. 818.

(*l*) *Balls* v. *Metropolitan Board of Works*, L. R., 1 Q. B. 337; 35 L. J., Q. B. 101.

(*m*) *Cobb* v. *Mid-Wales Rail. Co.*, L. R., 1 Q. B. 342; 35 L. J., Q. B. 117.

(*n*) *South Eastern Rail. Co.* v. *Richardson*, 15 C. B. 810; 21 L. J., C. P. 122.

(*o*) *Cassell* v. *Great Western Rail. Co.*, 11 Q. B. D. 345; 52 L. J., Q. B. 345.

GENERAL INDEX.

NOTE.—*The paging refers to the black type* [**288**], *which is that of the English Edition.*

INDEX.

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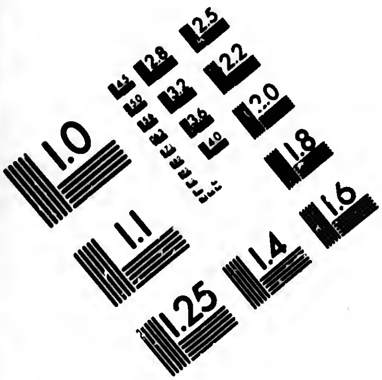

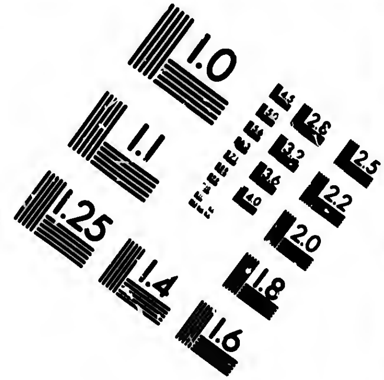

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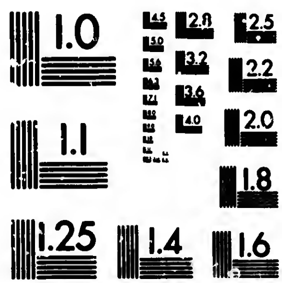

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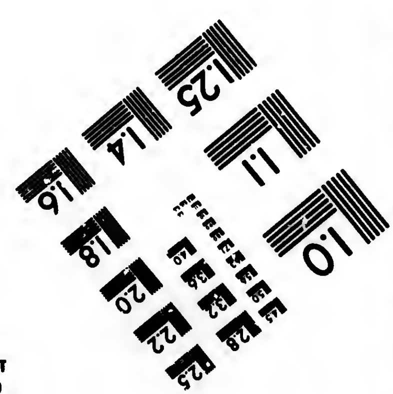

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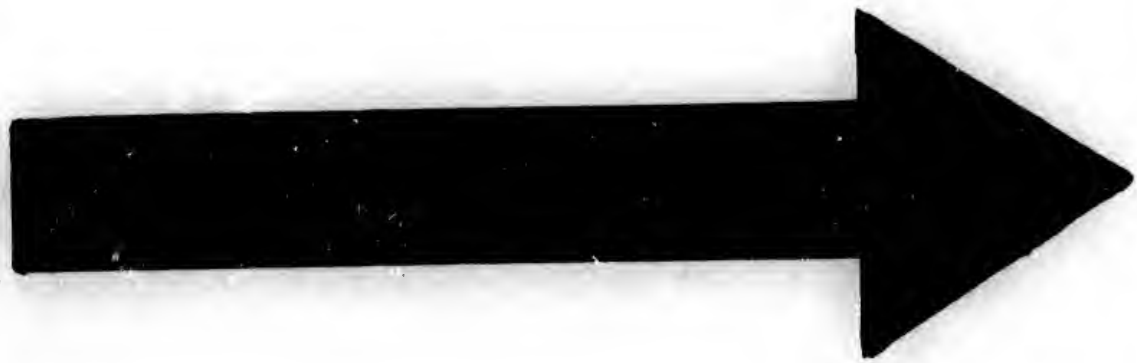

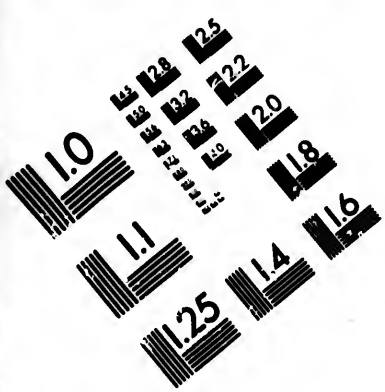

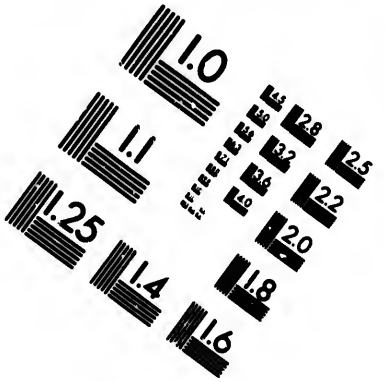

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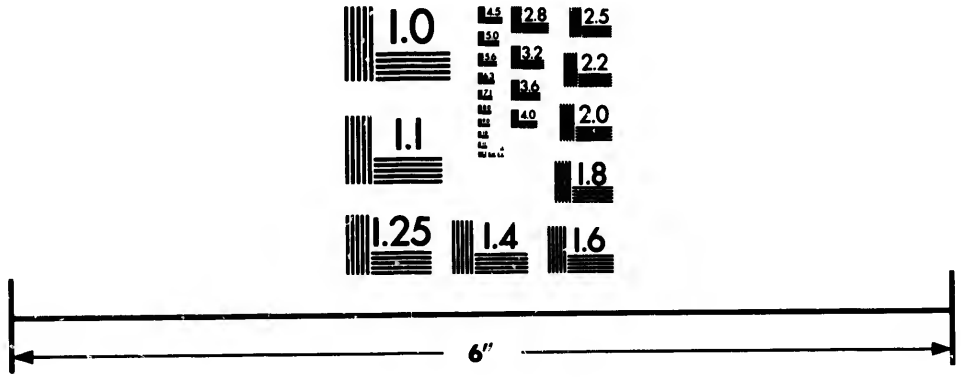

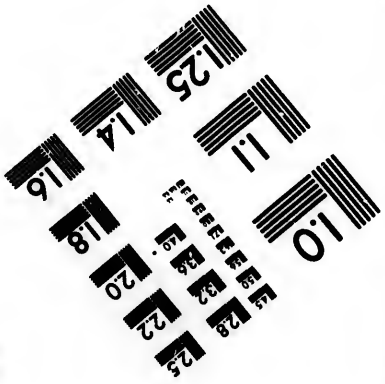

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