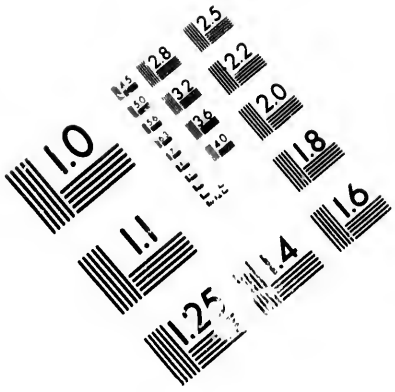

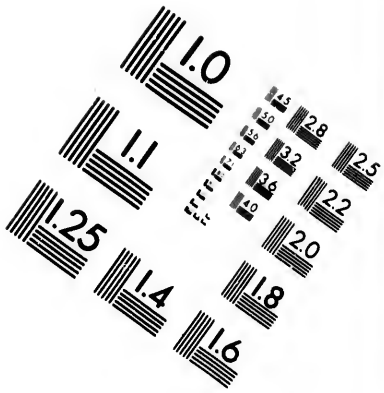

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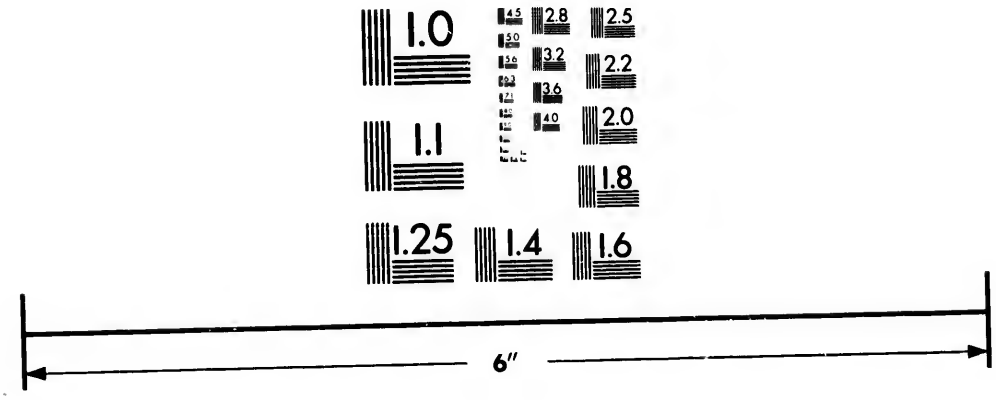

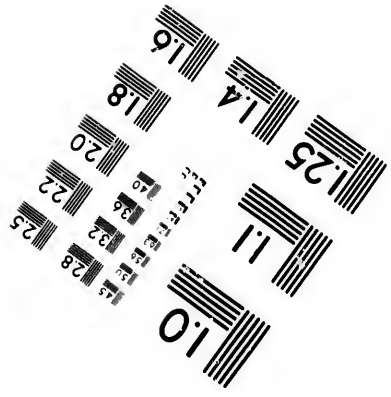

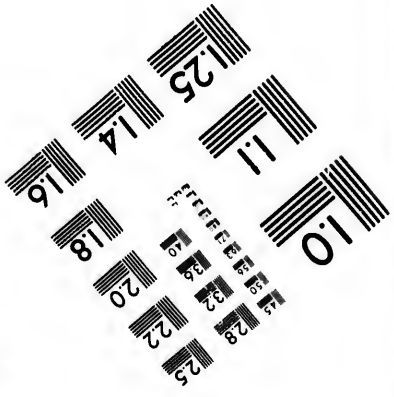

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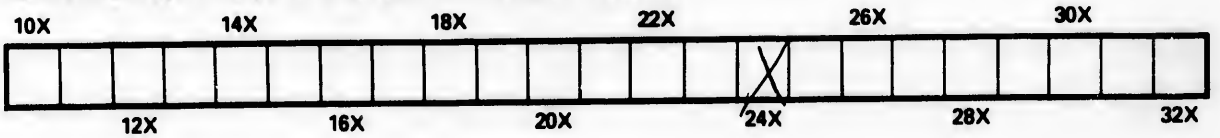

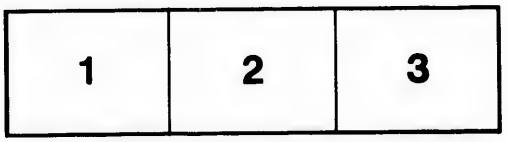

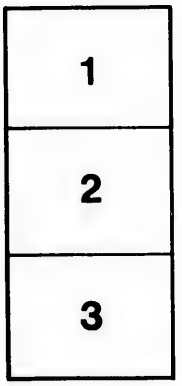

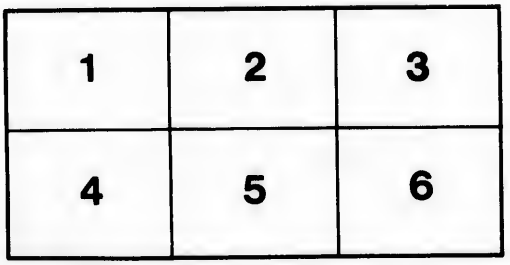

THE CIVIL REMEDY

—FOR—

INJURIES ARISING FROM THE SALE OR GIFT

—OF—

INTOXICATING LIQUORS.

BY JOHN D. DAVISON LAWSON,
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THE CIVIL REMEDY FOR INJURIES

ARISING FROM THE

SALE OR GIFT OF INTOXICATING LIQUORS.

SECTION 1. *Introduction—The Statutory Remedy.* The following discussion, relative to the traffic in intoxicating liquors, will be restricted to a consideration of the civil remedy given in many of the states for injuries resulting from the sale or gift of such commodities. It is not proposed that this shall be an argument, either in favor of or against the liquor trade. The sale of intoxicating liquors is, at common law, as lawful and as unrestricted as the sale of dangerous weapons or of poisonous drugs. But in this country, there has, within recent years, grown up a deep-seated prejudice, or perhaps to speak more correctly, an honest and sincere sentiment against this particular kind of commerce, which can

hardly be said to be the outgrowth of any party or of any sect. The advocates of this idea, having in some states become powerful enough to obtain temporary possession of the legislatures, have proceeded to prohibit its sale, either entirely or under extraordinary restraints; to treat the trade in spirits as an outlaw, and as an enemy to society and good government. In other states, and still more recently, its supporters have become sufficiently imprudent and ill-advised, to set the law at defiance, under the form of a modern crusade, thus retarding the advancement of their own opinions, by making those whom they regard as the enemies of sobriety and good morals the victims of injustice, and themselves the disturbers of the peace and of law and order. The difference between the rumseller who vends his wares in violation of law, and the prohibitionist who seeks to prevent him by conspiracy and riot, is certainly very slight; and it would seem that the latter has come to recognize the fact, that public opinion will not sustain even a meritorious object if sought to be attained by illegal means. It is more than probable that the advocates of probibitory laws may never be successful. There are two considerations against which they are waging an almost hopeless war, the one without which a government can hardly endure, the other with which we do not desire to part even in the least —revenue and liberty.

The laws, which are the subject of this review, are open to no such objection; and that they have been adopted in but eleven states, is at least singular. In the enactment of the statutes giving a right of action for damages caused by the sale of intoxicating liquors, the legislatures have not sought to interfere with their sale, but have endeavored to give redress and compensation for damages actually inflicted by one person and suffered by another, in cases where no remedy was to be had under the law as understood and administered in the courts.[1] The seller of intoxicating liquors is made responsible for the injurious results of his

[1] Bedore v. Newton, 34 N. H. 117; s. c., 2 Cent. L. J. 363.

sales on the same principle as common carriers, bailees and agents are liable for the negligent conduct of their affairs. The statutes but extend a well-known principle of the common law, that one shall be held to strict account for the consequences of his acts, and the application of an ancient maxim that there is no wrong without its appropriate remedy. The traffic itself is not restricted. The dealer may sell, if he so desires; but he is required to be careful to whom he sells, not to sell enough to cause intoxication, nor to a person whom he knows to be in the habit of becoming intoxicated and wasting his own and his family's property, nor to add to an intoxication already commenced, and the consequences of which he may reasonably foresee.[2] The law does not say you must not deal in such wares. It says: "You may legally sell, but if what you sell produces intoxication and consequent damages, you must pay; if you sell to any one who is intoxicated, or who will use it to become so, you must take the risk of damages; you may do the legal act, but you must do it in a proper manner."[3] An owner is not prevented from renting his premises for the purpose of liquor selling; but he is required to see that he rents them to persons who will so carry on their business, that no one shall be injured in person, property or means of support, by reason of such sales. It is required of the owner, who alone has the power to select his tenant, that he shall assume the risk of his tenant's acts in the business of selling intoxicating liquors.[4] It is hardly necessary to say that such an action is purely the creature of the statutes. The familiar doctrines of the common law allowed of no such remedy, on account of the remoteness of the injury.[5]

The constitutionality of these acts has been more than once raised, but without exception they have been sus-

[2] Bertholf v. O'Reilly. 8 Hun. 18.
[3] Jackson v. Brookins, 5 Hun, 535.
[4] Bertholf v. O'Reilly, *supra*.
[5] Dillon v. Linder, 36 Wis. 344; Struble v. Nodwift, 11 Ind. 64

tained.[6] It has been settled that the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by the fourteenth amendment to the Constitution, the states are forbidden to abridge. The legislature has a right to prohibit the selling of articles which are considered injurious to society.[7] The question is doubtful only, when such prohibitions interfere with the vested rights of property. This question was raised in the Supreme Court of the United States in the case last cited, but not decided, on the ground that it was not properly presented in the record. But from the expressions of the judges who delivered opinions then, it would seem that such rights in property, even when standing in the way of the public good, can be divested only by awarding proper compensation to the owner. But the question, as it arises under the damage acts, presents wholly different features. Under these acts, no property is taken away; only the use of a license is interfered with, and such a regulation can not be said to differ essentially from the provisions of the excise laws forbidding sales to minors or on Sunday. As the right of the legislature to restrain the sale of liquors is unquestionable, the person taking a license is subject to all existing laws, and to such as may thereafter be passed. The right given is personal, and may be wholly taken away, or it may be restricted or burdened with conditions or penalties to any extent the law-making power may deem proper. It is not a contract depriving the legislature of the right to act.[8] The Supreme Court of the United States has very recently reiterated these views,[9] as to the regulation of private property, wherever necessary for the public good.

[6] Bedore v. Newton, 54 N. H. 117; s. c., 2 Cent. L. J. 363; Mulford v. Clewell, 21 Ohio St. 191; Duroy v. Lechter, 10 *Ib.* 483; Schafer v. Smith, 4 Cent. L. J. 271; State v. Johnson (Ill.), 3 Month. West. Jur. 72.

[7] Bartmeyer v. Iowa, 18 Wall. 129.

[8] Baker v. Pope, 2 Hun, 557.

[9] Munn *et al.* v. People, 4 Cent. L. J. 250.

SEC. 2. *The Laws of Maine, Connecticut, Indiana and New Hampshire.*—The Maine law of 1858 contained a general provision that any person, not authorized under the act, selling intoxicating liquors, should be liable for all injuries committed by the person to whom the liquor was sold, while intoxicated, to be recovered in an action on the case;[10] and a statute of Connecticut contains a somewhat similar provision.[11] A statute of Indiana, passed in 1853, but repealed two years later, gave a like remedy,[12] limited, however, to a suit on the bond of the vendor,[13] and to the case of a licensed retailer.[14] In 1873, an act, commonly known as the Baxter Law, was passed, giving to the wife, child, parent, husband, guardian, employer, or other person, a right of action for injuries caused to them by the sale of intoxicating liquors, against the seller, and the landlord of the premises where the sale took place. This was, however, repealed in 1875 by an act which restricts the right of action to damages caused by sales in violation of law.[15]

[10] "If any person, not authorized as aforesaid, shall sell any intoxicating liquors to any person, he shall be liable for all the injuries which such person may commit while in a state of intoxication arising therefrom, in an action on the case, in favor of such person." Maine, Rev. Stats. of 1871, p. 304, sec. 32.

[11] "Whoever shall sell intoxicating liquor to any person who thereby becomes intoxicated, and while so intoxicated shall, in consequence thereof, injure the person or property of another, shall pay just damages to the person injured in an action on this statute; and if the person selling such intoxicating liquor is licensed, the recovery of a judgment for such damages shall be conclusive evidence of a breach of the bond." Revision of 1875, p. 269, sec. 9.

[12] "Any wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person, and his sureties, on the bond aforesaid, who shall, by retailing spirituous liquors, have caused the intoxication of such person, for all damages sustained, and for exemplary damages." Act of March 4, 1853, sec. 10.

[13] Martin v. West, 7 Ind. 657. [14] Struble v. Nodwift, 11 Ind. 65.

[15] The Indiana Act of March 17, 1875 (Acts Special Session, 1875, p. 55), requires a person to whom a license to sell spirituous liquors is granted to give a bond, with good sureties, in the sum of $2,000, con-

Under the former law it was decided by the Supreme Court, in construing the provisions of the act, that in an action by a wife, under the statute, it was necessary for her to establish: 1. The intoxication of her husband, habitual or otherwise. 2. That she had been injured in person, or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused in whole, or in part, by the selling, bartering, or giving intoxicating liquors to the husband by the defendant.[16] In New Hampshire, in case of the death or disability of any person in consequence of intoxication from the use of liquor unlawfully furnished, damages may be recovered by any one dependent upon the injured person, or upon whom the injured person is dependent for means of support, from the person unlawfully selling or furnishing the liquor.[17] Under this act there are five different cases in which a remedy by action is given. All of them

ditioned that he will keep an orderly house, and pay all fines, costs, and judgments that may be rendered against him. Sec. 20 of this Act is as follows: "Every person who shall sell, barter, or give away any intoxicating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond, to any person who shall sustain any injury, or damage, to their person, or property, or means of support, on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

[16] Fountain v. Draper, 49 Ind. 441.

[17] "Whenever any person in a state of intoxication, shall commit any injury upon the person or property of any other individual, any person, who by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action, as such intoxicated person would be liable to, and both such parties may be fined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case; and any married woman

involve such private and personal relations as that of parent and child, husband and wife, and an injury to either, with a remedy to the other; or, without such relations, a remedy, founded on an injury to person or property, by an action by the party injured. These cases are: The case of injury by one intoxicated to the person or property of another, with a remedy to such other; the case of the death or disability of the person injured, from such injury, with a remedy to any person dependent on him for means of support; the case of death or disability, in consequence of intoxication, with a remedy to such persons as are dependent on him for means of support; the case of death or disability from the injury received, with a remedy to any person on whom the injured party may be dependent; and the case of death or disability, in consequence of intoxication, with a remedy to any party on whom the injured person may be dependent.[18]

SEC. 3. *The Laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin.* In addition to the laws on this subject just cited, in seven other States, Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin,[19]

may bring such action in her own name, and recover such damages to her own use." Laws of 1870, ch. 3, sec. 3.

[18] Hollis v. Davis, 56 N. H. 74.

[19] *Illinois*—Rev. Stats. Ill. Ch. 43, p. 439, approved March 30, 1874.—SECTION 8. "Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for, and compelled to pay, a reasonable compensation to any person who may take charge of, and provide for, such intoxicated person, and $2 per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction."

SEC. 9. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person, or persons, who shall, by selling, or giving, intoxicating liquors, have caused the intoxication, in whole, or in part, of such person, or persons; and any person owning, renting, leasing, or permitting, the occupation of

statutes have been passed, and are now, and for some years have been, in force, providing a more complete remedy for damages resulting from the sale of intoxicating liquors. These statutes are substantially the same in their provisions

any building, or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person, or persons, selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits, and to control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor, under this act, shall be paid either to such minor, or to his or her parent, guardian, or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract, of rent upon the premises where such unlawful sale, or giving away, shall take place; and all suits for damages under this act may be by any appropriate action, in any of the courts of this State having competent jurisdiction."

SEC. 10. "For the payment of any judgment for damages, and costs, that may be recovered against any person, in consequence of the sale of intoxicating liquors, under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent, or lease, to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid. *Provided*, that if such building or premises belong to a minor, or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

SEC. 5. "No person shall be licensed to keep a dramshop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give bond in the penal sum of

and effect, and, for the purposes of this review, may be grouped together. In the first place, they differ from the laws of Connecticut, Indiana, Maine and New Hampshire, in giving a right of action for the consequences of the in-

$3,000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person, or property, or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. * * * * Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant."

Iowa—Code of 1873, Sec. 1556; see Sec. 8 of Illinois Act.

Sec. 1557; see Sec. 9 of Illinois Act.

SEC. 1558. "For all fines and costs assessed, or judgments rendered, of any kind against any person for any violation of the provisions of this chapter, the personal and real property, except the homestead as now provided by law, of such person as well as the premises and property, personal or real, occupied and used for that purpose, with the consent or knowledge of the owner thereof or his agent, by the person manufacturing or selling intoxicating liquors contrary to the provisions of this chapter shall be liable, and all such fines, costs, or judgments, shall be a lien on such real estate until paid; and when any person is required by Secs. 1528 and 1529 of this chapter to give a bond with sureties, the principal and sureties in the bond mentioned shall be jointly and severally liable for all civil damages, costs, and judgments that may be adjudged against the principal in any civil action authorized to be brought against him for any violation of the provisions of this chapter," etc.

Kansas—1 Dassler's Stats., Ch. 35, p. 354.

Sec. 9; see Sec. 8 of Illinois Act.

Sec. 10; see Sec. 9 of Illinois Act.

Michigan—Laws of 1871, p. 363. This act was approved and took effect April 20, 1871. Sec. 2 is as follows: "That every wife, child, parent, guardian, husband, or other person, who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have the right to recover actual and exemplary damages. And the owner or lessee, or person or persons renting or leasing any building or premises, having knowledge that

toxication of a person, without regard to the unlawfulness of the sale. They even go further than this, in making no distinction between a sale and a gift. They provide that every husband, wife, child, parent, guardian, employer, or

intoxicating liquors are to be sold therein at retail as a beverage, shall be liable severally or jointly with the person so selling or giving intoxicating liquors as aforesaid. And in every action by any wife, husband, parent, or child, general reputation of the relation of husband and wife, parent and child, shall be *prima facie* evidence of such relation, and the amount recovered by every wife or child shall be his or her sole and separate property. Any sale or gift of intoxicating liquors by the lessee of any premises resulting in damage shall, at the option of the lessor, work a forfeiture of his lease; and the circuit court in chancery may enjoin the sale or giving away of intoxicating liquors by any lessee of premises, which may result in loss, damage, or liability to the lessor or any person claiming under such lessor." Comp. Laws, 1871, Vol. 1, Ch. 69, p. 690.

New York—Laws of 1873, *Ch.* 646, *Sec.* 1.—"Every husband, wife, child, parer ., guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name against any person or persons who shall, by selling or giving away intoxicating liquors, [have] caused the intoxication in whole or in part of such person or persons; and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian, or next friend as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises." (Rev. Stats., 1875, Vol. 2. p. 946.)

Ohio.—Act of May 1, 1854, 2 S and C. 1431. Section 6 of this act is substantially the same as section 1556, and section 7 as section 1557 of the Iowa code. By the Act of April 18, 1870 (Saylor 2360), section 7 of the Act of May 1, 1854, was amended so as to read like section 9 of the Illinois act. (3 Saylor's Stats. 2360, ch. 1871.)

Section 10 of the Act of May 1, 1854, is amended by Act of April 18, 1870, so as to read as follows: "For all fines, costs and damages assessed against any person or persons in consequence of the sale of intoxicating liquors, as provided in section 7 of this act, and the act to which this is amendatory, the real estate and personal property of such person or persons of every kind, without exception or exemption, except under the act to amend an act entitled an act to regulate judgments and executions at

other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name

law, passed March 1, 1831 (Chase 826), passed March 9, 1840, took effect March 15, 1840 (Curwen, ch. 306), shall be liable for the payment thereof; and such fines, costs and damages shall be a lien upon such real estate until paid; and in case any person or persons shall rent or lease to another or others any building or premises to be used or occupied in whole or in part for the sale of intoxicating liquors, or shall permit the same to be used or occupied, in whole or in part, such building or premises so leased, used or occupied, shall be held liable for and may be sold to pay all fines, costs and damages assessed against any person or persons occupying such building or premises; and proceedings may be had to subject the same to the payment of any such fine and costs assessed or judgment recovered which remain unpaid, or any part thereof, either before or after execution shall issue against the property of the person or persons against whom such fine and costs or judgment shall have been adjudged or assessed; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid; and in case such building or premises belong to a minor, insane person, or idiot, the guardian of such minor, insane person or idiot who has control of such building or premises, shall be liable and account to his or her ward for all damages on account of such use and occupation of such building or premises, and the liabilties for the fines, costs and damages aforesaid; and all contracts whereby any building or premises shall be rented or leased, and the same shall be used or occupied in whole or in part for the sale of intoxicating liquors, shall be void; and the (lessee) person or persons renting or leasing said building or premises, shall, on and after the selling or giving intoxicating liquors, as aforesaid, be considered and held to be in possession of said building or premises." (3 Saylor's Stats., 2364, ch. 1871.)

Section 7 of the Act of 1870, is again amended by an Act of February 18, 1875 (4 Saylor's Stats., p. 3394), as follows: "Provided, that such husband, wife, child, parent, guardian, or other interested person liable to be so injured by any sale of intoxicating liquors to any person or persons aforesaid, who shall desire to prevent the sale of intoxicating liquors to the same, shall give notice either in writing or verbally before a witness or witnesses to the person or persons so selling or giving the intoxicating liquors, or to the owner or lessor of the premises wherein such intoxicating liquors are given or sold, or shall file with the township or corporation clerk in the township, village or city wherein such intoxicating liquor may be sold, notice to all liquor dealers not to sell to such person or persons any intoxicating liquors from and after ten days from the date of so filing said notice; and such notice or notices filed with such clerk

severally or jointly against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication in whole or in part of such persons, for all damages sustained from the effect of such intoxication, and for exemplary damages.[20] Under the Illinois and Kansas

shall be entered by the clerk of such township, city or village in a book to be kept for such purpose, which said book shall be open for the inspection of all, etc.; otherwise, the aforesaid injured person or persons shall not be entitled to real or exemplary damages for the alleged injuries which they may have sustained by the intoxication of any of the aforesaid persons, viz,: husband, wife, child, parent, guardian, employee or any other person or persons whomsoever; provided, that such notice, whether served personally or filed with the clerk as aforesaid, shall, during its existence, enure to the benefit of all persons interested.'

SECTION 2 makes it unlawful for any saloon keeper or other person to publish the fact of such notice having been given, by posting or printing in any paper or circular.

Wisconsin.—By section 1, ch. 127, of the Laws of 1872, it is declared to be unlawful for any person to sell intoxicating liquors without having first obtained a license therefor; and that no person shall be granted such a license without giving a bond "conditioned for the payment of all damages to any person, which may be inflicted upon or suffered by them, either in person or property, or means of support, by reason of obtaining a license, selling or giving away intoxicating drinks, or dealing therein;" and that such bond may be sued or recovered upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquors by the persons so obtaining the license. Section 6 of the same act is, in its provisions, like section 1 of the New York Statute. This section was repealed by ch. 179, Laws of 1874. Section 16 of the latter act reads as follows: "Any person or persons who shall be injured in person, property or means of support, by or in consequence of the intoxication of any minor, or habitual drunkard, shall have a right of action severally or jointly in his, her or their name against any person or persons who have been notified or requested in writing by * * * the husband, wife, parent, relatives, guardians or persons having the care or custody of such minor or habitual drunkard, not to part with liquor or other intoxicating drinks to them, and who, notwithstanding such notice and request, shall knowingly sell or give away intoxicating liquors, thereby causing the intoxication of such minor or habitual drunkard, and shall be liable for all damages resulting therefrom. A married woman shall have the same right to bring suit and to control the same as a *feme sole*." As to the effect of the amendment on causes then pending, see Dillon v. Linder, 36 Wis. 344; Farrell v. Drees, Supreme Court of Wis., Feb. Term, 1877.

[20] Rev. Stats. Ill., ch. 43, sec. 9: Iowa Code of 1873 sec. 1557; Kas. l

Statutes, it is declared that any person who shall, in Illinois, by the "sale,"—in Kansas, by the "sale, barter or gift," of intoxicating liquor, cause the intoxication of another, shall be liable and compelled to pay a reasonable compensation to any person who may take charge of, and provide for such intoxicated person; and in Illinois "two dollars," in Kansas "five dollars" per day in addition thereto for every day such intoxicated person shall be kept in consequence of his intoxication, which sum may be recovered in an action of debt before any court having jurisdiction.[21] In Iowa and Ohio, the right to recover such compensation is restricted to cases of unlawful sales of liquor, or sales made without the proper license, and to the sum of "one dollar" for each day.[22] These sections, it may be observed, contemplate two conditions, in which the person cared for may be placed. For simply taking charge of and providing for him while drunk, a reasonable compensation is allowed; while for keeping him in consequence of his intoxication—as when sickness ensues, or if while drunk he injures himself, or becomes disabled, and it thereby becomes necessary that care should be bestowed upon him—a sum certain is allowed to be recovered from the seller. And as no more than the penalty can be recovered under the latter part of the section, evidence of what it was worth to care for the person injured is inadmissible.[23] A wife may recover under this section the stated compensation for taking care of her husband while intoxicated, in addition to any injuries to person or property, or means of support, for which she may claim damages under the other sections.[24]

Besides the personal liability of the vendor or donor of intoxicating liquors for all damages arising therefrom, under

Dassler's Stats. ch. 35, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio, Saylor, 2360, sec. 7; Mich. Laws of 1871, Vol. 1, ch. 69, sec. 2; Wis. Laws of 1872, ch. 127, sec. 1.

[21] 1 Dassler's Stats., ch. 35, sec. 9; Rev. Stats. Ill., ch. 43, sec. 8.

[22] Iowa Code of 1873, sec. 1556; Ohio, 2 S. and C. 1431, sec. 6.

[23] Brannan v. Adams, 76 Ill. 335.

[24] Wightman v. Devere, 33 Wis. 370.

the statutes of Illinois, Michigan, New York and Ohio, any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased a building for other purposes, shall permit the sale of intoxicating liquors therein, which may have caused, in whole or in part, the intoxication of any person, is made liable, severally or jointly, with the person or persons selling or giving the intoxicating liquors, for all damages that may be sustained from such sale or gift, and likewise for exemplary damages.[25] By the Illinois, Iowa and Ohio statutes, the premises in which the sale is made are liable, and a judgment obtained under the acts becomes a lien upon the property, whether owned by the person who sold or gave away the liquor, or by one who has rented it to be used for the sale of intoxicating liquors, or though leased or rented for another purpose, permits it to be used in such manner;[26] and proceedings may be had to subject the premises to the payment of a judgment, either before or after execution is issued against the property of the person against whom the judgment may have been recovered. And if the building or premises belong to a minor, or other person under disability, the guardian or conservator of such person, and his real and personal property, are liable in the place and stead of the property of his ward. In Illinois, Ohio, New York and Michigan, the sale or gift of intoxicating liquors, contrary to the provisions of the act, works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises, where such unlawful sale or gift takes place.[27] The court of chancery, under the last statute, is authorized to enjoin the sale or gift of intoxicating liquors, by any lessee of premises, which may result in liability on the part

[25] Rev. Stats. Ill., ch. 43, sec. 9; Mich. Laws of 1871, Vol [illegible] 69, sec. 2; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, sec. [illegible]

[26] Rev. Stats. Ill., ch. 43, sec. 10; Code of Ia. sec. 1558; Ohio (Saylor) Stats., 2364, ch. 1871.

[27] Rev. Stats. Ill. ch. 43, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, sec. 7; Mich. Laws, 1871, ch. 69, sec. 2.

of the lessor. Under all the statutes, a married woman is given the right to bring suits, and to control them and the amount recovered, as a *feme sole*, and all damages recovered by a minor are directed to be paid either to him or her, or to his or her parent, guardian, or next friend, as the court may order.

In Illinois, Iowa, and Wisconsin, a party applying for leave to sell intoxicating liquors is required to give a bond, with sureties, conditioned to pay all damages that may be sustained by any one from the sale, either in person, property, or means of support. A bond, given in pursuance of this provision, may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquor by the person licensed, or his servant or agent.[28] This section of the act, and the section giving a general cause of action by the parties therein named, are to be construed together; the latter defining more specifically and limiting the obligation of the bond required by the former.[29]

By recent amendments to the statutes of Ohio[30] and Wisconsin,[31] the liability of the seller is restricted to the consequences of sales made after notice to him not to sell to the person intoxicated, given by any of the parties mentioned in the acts as having the right of action.

Under the statutes of the seven states which we have classed together, it has been remarked that the liability for the sale or gift does not, in case of damage resulting, depend upon its unlawfulness.[32] Herein the liability differs from that created under the laws of Connecticut, Maine, Indiana and New Hampshire, where the remedy is given only when the transaction has been in violation of law,—such as a sale by an unlicensed person, or to a minor or habitual drunkard,

[28] Rev. Stats. Ill. ch. 43, sec. 5; Code of Ia. sec. 1558; Wis. Laws of 1872, ch. 127, sec. 1.

[29] State v. Ludington, 33 Wis. 107.

[30] Act of 1875 (4 Saylor, p. 3394).

[31] Laws of 1874, ch. 179, sec. 16.

[32] Hayes v. Phelan, 4 Hun, 732.

or to one after notice from his wife or family of his dissolute habits. It may be here remarked, however, that the Ohio statute, although wanting the proviso, "contrary to the provisions of this act," has been construed to authorize actions of this kind in cases only where the sale has been unlawful. But this construction was arrived at upon a consideration of several acts passed at different times, and amended at different periods, and is neither in accordance with the wording of the laws, nor the decision of a court of final resort.[33] And except in this instance, it has not been attempted to evade the law and the intention of its framers by such an interpretation. A defendant may, it seems, nevertheless show that he had been licensed to sell spirituous liquors, and was legally selling them under that authority on the occasion complained of, not as a defense, but in mitigation of damages.[34]

SEC. 4. *Who Liable—Master and Servant—Principal and Agent.*—The words "any person," as used in the statutes, are very broad, and embrace all persons making the sale, without regard to their capacity—whether owner, son, clerk, or servant.[35] With regard to the proprietor, in the construction of these statutes, the doctrine of agency, the liability of the master for the acts of his servant in the

[33] Granger v. Knipper, 2 Cin. 480; Mason v. Shay, 7 C. L. N. 152.

[34] 8 Alb. L. J. 135.

[35] Worley v. Spurgeon, 38 Ia. 465.

The servants, as well as the principals, are liable in criminal prosecutions under the liquor laws. State v. Schicker, 33 Ia. 195. And assuming to act as agent for the owner without authority will not exonerate one from the responsibility; though merely acting as messenger, as in transmitting the liquor from the seller to the buyer, and the money from the buyer to the seller, would hardly bring him within the statute. Com. v. Williams, 4 Allen, 587. But see, Johnson v. People, 3 West. M. Jur. 723. Evidence that his employer had prohibited him from selling in his shop would be inadmissible in his behalf. Com. v. Tinkham, 14 Gray, 12. So in suits to recover penalties under the acts. Roberts v. O'Connor, 33 Me. 496. As to the liability of a servant in a social club, who deals out liquors to its members, see State v. Mercer, 32 Ia. 405, and of the members themselves, Marmont v. State, 48 Ind. 21; Com. v. Smith, 10 Mass. 144.

course of his employment, has been strictly applied. One engaged in the sale of intoxicating liquors is held responsible for the acts of his servants in that business, even though in the particular transaction they disobeyed his instructions.[36] "No man," says Cooley, C. J., in a leading case under these statutes,[37] "can be excused from responding for the negligent conduct of his servant because of having instructed him to be careful, or for his frauds because of having told him to be honest." He is not liable for wrongs done by the servant outside of his employment; but he is responsible for everything arising in the course of his business, and the fact that he gave orders to the contrary does not relieve him from liability if they be disobeyed.[38] It is essential, however, that the sale should have been with the consent of the owner or servant, and a subsequent ratification will not render him liable. The case of Kreiter v. Nichols[39] is in point here. In this case the evidence showed that the intoxicating liquors were not furnished to the husband of the plaintiff by the defendant himself, but that he refused to let him have the liquor, and instructed his servants to do the same, which they did. It appeared, however, that the defendant kept a grocery store, at which liquors were sold, and he was also a brewer of lager beer, and it was not disputed that the husband, who had been an employee of defendant, had procured liquor at the store, and had drunk beer at the brewery on several occasions. The trial judge charged the jury that the defendant would be liable for the sales in violation of his orders, if, when he found it out, he charged the liquors to him and deducted the amount from his wages. On appeal, the judgment was reversed for error in this instruc-

[36] Peterson v. Knoble, 35 Wis. 80; Smith v. Reynolds, 8 Hun, 128; Keedy v. Howe, 79 Ill. 133.

[37] Kreiter v. Nichols, 28 Mich. 496. But see Oviatt v. Pond, 29 Conn. 479.

[38] But in criminal prosecutions the rule is different; and if a servant sell, in violation of law, without the knowledge and against the instructions of his employer, the latter is not responsible. Lathrope v. State, 51 Ind. 192; O'Leary v. State, 44 Ind. 91; Wreidt v. State, 48 Ind. 579.

[39] 28 Mich. 496.

tion. The court held that no such principle, as above stated, could be applied to the case of a person who, without the permission of the owner, obtains his liquor, and that the fact of the owner demanding and receiving pay for it could not make him a wrong-doer in the original trespass on his rights. "By the statute law of this state," say the court, "as well as by the common law, beer is recognized as property, and the brewing of beer is a lawful business. The law protects this property precisely as it protects any other lawful product. If one steals it from the owner, he is punished for it; if he converts it to his own use in any form, a civil action will lie to recover from him the value. And this civil action would not depend in any degree upon the method or purpose of the conversion. Whether destroyed from a belief in its deleterious effects, or made way with in carousals or private drinking, the legal responsibility to pay for its value would be the same. And it will scarcely be disputed that, in this case, if defendant's statement is truthful, he might have recovered from the husband the value of the beer, on the same grounds precisely as he might have recovered for any unlawful conversion of other property. But if defendant might lawfully recover for the conversion, he might, also, lawfully settle for it. He does not thereby sanction what was originally done; but he makes one who has done him a wrong compensate him for the wrong."

It is not necessary that the party selling should compel the purchaser to drink, or use any art, device or trick, to cause him to become intoxicated, or know that he would become so.[40]

SEC. 5. *The Joint Liability of Several Sellers.*—A seller of intoxicating liquors by which another is injured in person, property or means of support, is not released from liability, if a part of the liquors causing the intoxication was sold by others. He is liable if he contributed to the result.[41]

[40] Barnaby v. Wood, 50 Ind. 405.

[41] Woolheather v. Risley, 38 Iowa, 486; Fountain v. Draper, 49 Ind. 441

This proceeds upon the well-settled principle, that where a person undertakes to do an unlawful act, which will result in injury to another, and uses the means calculated to produce such a result, the fact that other persons may have been engaged in producing the same result will not exonerate him from the consequences of his act. From his using the means, the law presumes not only that he intended to produce the result, but that the common intent which will create mutual liability exists without proof of a previous agreement, or a common understanding, when the means employed lead to that inference. Therefore, it will not avail the defendant to show that others sold the party liquor which may have contributed to his intoxication.[42] "If two persons willfully administer distinct portions to

[42] Hackett v. Smelsey, 77 Ill. 109; Emory v. Addis, 6 Ch. L. N. 336.

The rule in criminal law is, that if persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone, and it is the same if, the act being divided into parts, each proceeds with his several part unaided. And if, while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole; because he contributed to the result. But if, in these cases, there is no mutual understanding of each other's purpose, each who contributed to the result will be responsible simply for what he personally meant. 1 Bishop on Crim. Law, 630, 642. So all joint tort-feasors are jointly liable where, in legal consideration, the act complained of might have been committed by more than one, and a joint action may be brought against several for an assault and battery, or a malicious prosecution. The question of the joint liability of several sellers of liquors, under the statutes, has generally been decided, when not specially enacted, upon the common-law principle governing the liability of joint tort-feasors. But it is submitted that the rule, as stated in the text, having regard to the result and the separation of the damages, is the correct one. The case of Stone v. Dickenson, 5 Allen, 29, has been looked upon as settling the question. Nine different creditors wrongfully sued out writs against their debtor: placed them in the hands of the same officer, who arrested the debtor on all the writs at the same time; each creditor being ignorant of what the other was doing; it was held that they were jointly or severally liable, though there was no preconcerted action. Bigelow, C. J., said: "As a matter of first impression, it would seem * * * they could not be regarded as co-trespassers in the absence of proof of an intention to act together, or of knowledge that they were engaged in a common enterprise. But a careful consideration of the nature of the action and of the wrong done

another, which together produce death, will it be claimed that neither of the parties can be punished, because the death was not solely caused by the poison administered by either one of them? If plaintiff's husband had taken one or more glasses of liquor at some place other than at defendant's saloon, which did not intoxicate him, and before * * * will disclose the fallacy of this view of the case. The wrong which constitutes the gist of the action is, that he has been unlawfully arrested. * * * It is only one wrong. The error consists in supposing that the several parties * * * can not be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they are all united in the wrongful act, or set on foot, or put in motion the agency by which it was committed, that renders them jointly liable to the person injured." On the other hand, several cases have been cited as establishing a contrary doctrine. In Auchmuty v. Ham, 1 Denio, 495, it was held, that where dogs belonging to several owners are found in company engaged in killing sheep, each owner is responsible for the injury done by his own dog, and for no more. In this case, the trial court instructed the jury "that the defendant was liable to pay for all the sheep of the plaintiff which had been killed or bitten by dogs between the first of July and the first of October, 1843," against a contrary instruction asked by defendant—"that he was only chargeable for the injury done by his own dog," etc. Jewett, J., said: "The court should have charged that the plaintiff was entitled to recover of the defendant the value of all the sheep of the plaintiff which, from the evidence in the case, they were satisfied the defendant's dog had killed or wounded; and that he was not accountable for such as Minkler's dog had killed, nor for any damage done the plaintiff's flock of sheep by other dogs than his own." To this and other cases of like character it is answered, that separate owners are not at common law jointly liable for injuries jointly committed by their respective animals, though all happens as part of a single transaction. In such cases each owner is liable only for the injuries committed by his own animal, because of his negligence in permitting it to run at large. This *neglect* is the ground of the owner's liability. As the animals are supposed to be under the separate control of each owner, and his negligence is distinct from that of the other, and not in furtherance of a common object, they can not be jointly liable, because the wrongful neglect of each is wholly independent, and the damages are not the direct result of the act. There is no concurring agency of the owners in the trespass. If, however, the separate owners of such animals keep them in common, and suffer them to run at large as one herd or body, then they are jointly liable for all damages by the united trespasses of all, or any, of the animals. Jack v. Hudnall, 25 Ohio St. 255; Boyd v. Watt, 27 Ohio St. 259.

its effect had passed off, he obtained several glasses of liquor from defendant which, together with that previously drunk, did cause intoxication, are both of the defendants to be deemed innocent, or are they both guilty?"[43] Clearly the latter rule must be adopted in such cases.

But a different rule must be adopted where the wrongs are successive and independent, though committed against the same person. There must be concurrent action, a co-operation, or a consent, or approval, in the accomplishment by the wrong-doers of the particular wrong, in order to make them jointly liable. For it has been held, that a joint action may not be brought against a physician who prescribed, and an apothecary who put up noxious medicines. In an Iowa case[44] it was held that the sale, by one defendant, of liquors to the husband of the plaintiff became an independent and complete cause of action, and a sale to him of intoxicating liquors by another person on the next day, the next week, or the next month, would not give a joint right of action for either the first or last sale. Each was complete in itself. This is true where the drunkenness complained of was not a single fit of intoxication.[45]

The rule of joint liability would seem to apply specially to a case where several persons supply liquor to one who commits a trespass while in a state of intoxication, produced by the liquor so furnished.[46] And so it does, except under the New York statute, where it is held, that a joint action will not lie against two or more persons who separately, and at different times, and at different places, have sold liquor to the same person, each quantity of liquor having contributed to produce the intoxication that caused the injury.[47] But when any other rule than that before stated is adopted, the difficulty arises in this, that there can seldom be any mode of separating the liability of the different parties. If a

[43] Woolheather v. Risley, 39 Ia. 486.
[44] La France v. Krayer, 42 Ia. 143.
[45] Jewett v. Wanshura, 8 Ch. L. N. 324.
[46] Bodge v. Hughes, 53 N. H. 616.
[47] Jackson v. Brookins, 5 Hun, 530.

dozen sales are made by a dozen dealers, no inquiry is possible as to the particular glass of liquor which caused the intoxication, or as to the particular drink from the effect of which the damage arose.[48] But there may undoubtedly be cases where such a separation might be made. To take an illustration.[49] A, on the first day of January, sold a pint of whiskey to D, who paid for it; D's wife needed the money so expended, to buy bread. On the tenth of January B sold brandy to D, for which he paid the money; D's wife required the money at the time to pay for meat to eat. On the twentieth of January C sold a quart of whiskey to D and received payment, and D's wife needed the money to purchase raiment. On each occasion D became intoxicated, and wasted so much of the plaintiff's means of support, as he expended money in the purchase of the liquor, and time while so intoxicated. In such a case it might not be impossible to separate the damage resulting to the plaintiff from the acts of each. But the case is very different where successive sales by several have produced a particular intoxication from which the injury sued for has resulted; or where the damages result from the state or condition of one, caused by repeated sales for a series of years. To state the rule of joint liability which should govern in this class of cases briefly: 1. If the defendant is the sole cause of the intoxication, he is liable for all the damages resulting. 2. If some of the injury is caused by others, he is not liable for damages resulting from their sales. 3. But if the damages can not be separated, then he will be liable for all injuries to which he has contributed.

Where all are considered as joint wrong-doers, and each is liable for the injury done by all, all may be sued together or one or any number of them separately; but there can be but one satisfaction for the injury.[50] A plaintiff can collect bu

[48] Kearney v. Fitzgerald (Ia.), June Term, 1876.
[49] Boyd v. Watt, 27 Ohio St. 259; s. c., 3 Cent. L. J. 756.
[50] Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported Emory v. Addis, 3 Ch. L. N, 336.

one sum, though several amounts may be awarded him in different actions. He is, however, entitled to the costs in each suit.[51] But if he has prosecuted several jointly, and the jury has assessed a different sum as damages against each defendant, the plaintiff may enter judgment against all for any of the amounts as he elects.[52]

On the other hand, where each seller is liable for the injuries produced by himself only, settling with, or suing one, will not release the others.[53]

The common-law doctrines, concerning the liability of tort-feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are not affected by the new system of procedure introduced by the codes.[54] The question of misjoinder may be raised by demurrer, or the parties may apply for a severance. A neglect to demur does not waive this objection; as, under the codes,—and in nearly all of the states where this action is allowed, codes of procedure are in force,—the defendant may, at the trial, interpose the same objection to the plaintiff's recovery, though he has omitted to allege it on the record,[55] Whether it will be for the interest of a defendant, where several are joined, to obtain a severance, will depend upon the particular case. Though, as there can be but one satisfaction, it would seem to be to his interest to remain where he will have to assume but a share of the damages and costs. But it may happen that his connection with the injury to the plaintiff has been only slight, while that of his co-defendants may have been of such a nature as to sustain a claim for punitive or vindictive damages;—a claim which, under some circumstances, as will be seen in a subsequent section, where the question of damages is more fully considered, may be allowed.

51 Pomeroy on Remedies, 314.
52 First Nat. Bank v. Indianapolis, 45 Ind. 5.
53 Jewett v. Wanshura, 8 Ohio L. N. 324.
54 Pomeroy on Remedies, 307.
55 *Ib.* 291; Jackson v. Brookins, 5 Hun, 533, and cases cited.

SEC. 6.—*The Liability of Owners or Lessors of Premises.* These statutes also, as has been seen, give a right of action against the owner or lessor of the premises, where the sale is made, severally or jointly with the person making the sale, where the owner has leased or rented the property for such a purpose, or has knowledge that intoxicating liquors are being sold therein.[56] While the plaintiff may bring an action against the seller of liquors causing intoxication and damage alone, and having recovered judgment, by another action against the owner, enforce it, yet he has the right to join them in one action, and therein obtain complete relief.[57] And the judgment so recovered may be reversed as to one and affirmed as to the other.[58]

This part of the law, however, does not apply to the owner of premises, who himself sells liquor therein. Therefore, where the owner sells in violation of the act, he is liable because of his sales, and not on account of his ownership of the premises in which the sales are made; and to proceed against him, under this section, in such a case, would be improper.[59] What will amount to "knowingly permitting" or "suffering" intoxicating liquors to be sold in violation of the statutes, on the part of a lessor of premises, who may have rented them for legal purposes, the lessee subsequently engaging in illegal sales, has been the subject of considerable discussion. Must he not, it has been suggested, have a present absolute right to control the use, before he can be said to permit? Can permission exist without active participation in the control of the property? Can the law be construed as laying hold of the lessor as a hostage for the lawful behavior of his tenant, and hold him to knowingly permit, where he merely knowingly suffers the unlawful act to be done by one who has exclusive control as against him and all the world? If

[56] Berthold v. O'Reilly, 8 Hun, 15.
[57] La France v. Krayer, 42 Ia. 143.
[58] Rengler v. Lilly, 26 Ohio St. 48.
[59] Barnaby v. Wood, 50 Ind. 405.

obliged to resort to law for an injunction to restrain or to compel a forfeiture, the breach of duty being of conditions subsequent, will not the very law which exacts a resort to it, apply the strictest rules to the lessor's case, and estop him from a remedy upon the slightest grounds of acquiescence, such as once accepting rent after having reasonable grounds to believe in the existence of the unlawful user, or deny him relief, except upon proof beyond a reasonable doubt?[60] It is, we apprehend, a sufficient answer to this objection to say that the owner is entirely protected, under the very sections of the statutes creating his liability, by the forfeiture which ensues upon the sales being made by the tenant. He is not required to move until the forfeiture is complete, and he will not be held liable unless he does some affirmative act signifying his assent to the use of his property for such purposes, or his permission for its continuance.[61] Mere inactivity on his part to find out the fact, or a failure to take steps to prevent such a use of the premises, will not render him liable.[62] The permission to occupy the premises, with knowledge that intoxicating liquors are to be sold therein, constitutes the basis of the liability imposed by the act. Neither the permission nor the knowledge is to be presumed or inferred, but should be established by clear and satisfactory proof. It is doubted whether, considering the relations of the parties, the occupation, by the husband, of premises belonging to his wife, where he and she reside, is such a permission to occupy as would make her liable under the statute. And it has been held that from the mere fact that the wife, the owner of the premises, lived with her husband in a hotel, it could not be inferred that she had knowledge that intoxicating liquors were sold therein, it not being proved that she ever witnessed a sale, or had ever been present in the bar-room where the sales were made, or had ever given her consent that such sale

[60] Granger v. Knipper, 1 Cin. (S. C.) 480.
[61] State v. Ballingall, 42 Ia. 87.
[62] State v. Abraham, 6 Ia. 117.

should be made, or that she was informed that they were in fact made, or of any circumstances tending to induce such an inference.[63] But general reputation of the place being used for the purpose of selling spirituous liquors is admissible on the question of the defendant's knowledge.[64] Where it was proved that the defendant by a written lease let a building to one F for the sale of liquor, on an understanding that F was to occupy it for that purpose, and F did occupy it for that purpose, it was held that such facts would sustain an allegation of "suffering" the premises to be occupied for the purposes named, as well as an allegation of "letting" for a like purpose.[65]

Again, a landlord certainly has power to prevent the use, by his lessee, of his property for illegal purposes, as he has power to restrain the use of his property for a purpose different from that for which it was leased, or for a purpose which may render it dangerous,[66] and this on general principles, without regard to the statutory provisions which declare a forfeiture, and, in one case, expressly empower the court to enjoin this particular use of property.[67] And where a landlord seeks to avoid a lease for a violation of the act on these grounds, the defendant can not prevent such avoidance by showing a payment of rent for the entire term.[68]

The Ohio law provides that all contracts, whereby any building or premises shall be rented and leased, and used or occupied in whole or in part for the sale of intoxicating liquors, shall be void, and the person renting or leasing the premises shall, upon such a sale taking place, be considered and held to be in possession of the premises.[69] The existence of two conditions is necessary to render a contract void under this statute. 1. The building

[63] Mead v. Stratton, 8 Hun, 151.
[64] State v. Shanahan, 54 N. H. 437.
[65] *Ibid.*
[66] Bennet v. Sadler, 14 Ves. 526; Mayor v. Bolt, 5 Ves. 129.
[67] Mich. Stats., *supra*.
[68] McGarvey v. Puckett, 27 Ohio St. 669.
[69] Ohio Law, *supra*.

or premises must have been rented or leased for the sale of intoxicating liquors. 2. The leased property must be used or occupied for that purpose. The mere use or occupation of the property by the tenant for the purpose indicated is not enough; it must have been contemplated at the time of the making of the lease. Neither is it sufficient, that such a use of the lease was contemplated at the making of the contract by the tenant; it must have been known to the lessor. From its wording, the meaning of the statute is very ambiguous; but, as used in this section, the lessor is the actor, and it is the lessor, and not the lessee, who is "to be considered and held to be in possession," on and after the sale.[70] The difference between this section and the sections contained in the several acts, in relation to forfeitures is, that in the other cases the use of the premises by the tenant for the sale of intoxicating liquors renders the lease void at the election of the lessor, while in this the lease becomes void as to both parties.[71]

The word "premises," as used in the statutes, includes lands and tenements. Therefore, a justice of the peace in most of the states would not have jurisdiction in an action against the owner or lessee of premises, who knowingly permits liquor to be sold therein, whereby injury is sustained, such an action being one in which the title to real estate is drawn in question.[72] If the sale be made upon any portion of the property leased, it works a forfeiture of the whole. Therefore where the act which it was claimed forfeited the lease was committed in a grocery store upon the property leased, judgment was held to be properly rendered by the restitution of the whole premises of 350 acres.[73]

The provisions of the statutes declaring that real estate not owned by the seller, but wherein the sale is made, shall

[70] Zink v. Grant, 25 Ohio St. 353.
[71] Justice v. Lowe, 26 Ohio St. 373.
[72] Bowers v. Pomeroy, 21 Ohio St. 184.
[73] McGarvey v. Puckett, 27 Ohio St. 672.

be held liable for the payment of a judgment against him, do not create a lien upon the property, but simply authorize it to be subjected to the payment of the judgment in a suit against the owner, instituted for that purpose. Until the commencement of a suit against him, the judgment creditor acquires no interest in the property; and if before the suit is brought it has been sold and conveyed, it can not be subjected to the payment of such a judgment. To construe the statutes, so as to make a judgment against the seller a lien on the property, either from the rendition of the judgment against the seller of the liquor, or from the time the action accrued, would render titles to land very insecure. No one could safely purchase real estate on the faith of the records showing that it was free from incumbrances. He would be obliged to search for the previous occupiers of the property, and to ascertain whether any judgments or causes of action existed against them while in possession.[74]

The statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin, give a right of action for three separate descriptions of injury caused by the sale of intoxicating liquors, viz.: Injury to the person, to property, and to means of support.

SEC. 7. *Injuries to the Person.*—To sustain the action for injuries to the person, an assault, or some actual violence, or physical injury to the person, or health, must be shown.[75] So, where the plaintiff charged that in conse-

[74] Bellinger v. Griffith, 23 Ohio St. 619.

[75] Mulford v. Clewell, 21 Ohio St. 193.

Under a statute of Missouri, making it a ground for divorce at the suit of a wife, if the husband shall "offer such indignities to her person as to render her life and condition intolerable and burdensome," it was held, in Cheatham v. Cheatham, 10 Mo. 296, overruling Lewis v. Lewis, 5 Mo. 278, that unfounded charges made and repeated against a wife by her husband, calculated to render her life intolerable, were not a sufficient ground for the granting of a decree. "If mere words," say the court, "will constitute the indignities to the person mentioned by the statute, by what standard of refinement shall the offended sensibilities of the

quence of his intoxication her husband at times became delirious, wild and dangerous, compelling her to nurse and attend him, and that she had been put to much fear, and had been forced to abandon his house on account of his bad conduct and disagreeable society, but complained of no actual violence, it was held that the action could not be sustained for injury to her person. "Mortification and sorrow and loss of her husband's society is not enough. This is her misfortune, for which she has no remedy under the law. If she had been attacked by her drunken husband and injured by his violence, she could recover."[76] But under the Wisconsin statute, where the husband, while intoxicated, without actual violence, but by threats and abusive language and intimidation, drove his wife out of his house, and kept her out for several hours, it was held that this constituted a physical injury and suffering sufficient to sustain an action.[77]

SEC. 8. *Injuries to Property.*—The term "property," as used in these statutes, requires no special construction. Damages caused through the squandering of the money or chattels of a wife, or other person,[78] or the value of the property destroyed by a person while intoxicated, may be recovered under this section from the seller of the liquor causing the intoxication.[79] Unlawfully depriving a person of his money or other property, upon general principles, creates a right of action in favor of the party injured, and these principles apply equally to the case of one obtaining

female be estimated? Natural temperament, education and the associations of life will very much vary the degree of unhappiness and discomfort, which reproaches of this character would be likely to produce. If words, unaccompanied with actual violence, constituted the charge, they must have been such as to inflict indignity and threaten pain, and produce a reasonable apprehension of injury to the person or health of the party complaining." Hooper v. Hooper, 19 Mo. 355.

[76] Mulford v. Clewell, 21 Ohio St. 193; Albrecht v. Walker, Supreme Court of Illinois, not yet reported.

[77] Peterson v. Knoble, 35 Wis. 80; Wightman v. Devere, 33 Wis. 570.

[78] Mulford v. Clewell, 21 Ohio St. 197; Hemmes v. Bentley, 32 Mich. 89.

[79] Woolheather v. Risley, 38 Ia. 187.

the money of another by the unlawful sale of intoxicating liquors. Therefore a party may sue for money paid during a period of time for liquor sold to him in violation of these statutes. And the same right exists in favor of his personal representatives, it being an injury to the estate of the intestate of a proprietary character, as distinguished from a mere personal injury.[80] No demand of the chattels, or notice of claim, is necessary before the suit can be brought. An action of this kind differs from an ordinary action for conversion of property; for it is not brought for the vendee's conversion, but for the act of the party making away with the property while under intoxication effected by the defendant. The wrongful act for which suit is brought is not the conversion of the property, but the sale of the liquor.[81] And where a wife sues the vendor of liquors for the value of property belonging to her, which has been made away with by her husband, while under the influence of liquor supplied by the defendant; if, as between the plaintiff and the husband, the property was hers, whether it would have been hers as to creditors or a purchaser from her husband in possession, is not material; for the defendant in such a proceeding does not occupy either of these relations.[82] Where the plaintiff's son took his horse, saying that he was going to visit a friend some miles distant, but instead of this went directly to the saloon of one of the defendants, where he became intoxicated, and while in such condition afterwards drove the horse so violently that it died; it was held, under the New York statute, that an action could be maintained against the saloon-keeper and the landlord of the premises jointly for the value of the horse.[83] And an action may be maintained by a person prevented from following his usual occupation by being struck, beaten or wounded by an intoxicated person, against

[80] Kilborn v. Coe, 48 How. (N. Y.) 141.
[81] Mulford v. Clewell, *supra*.
[82] Woolheather v. Risley, *supra*.
[83] Bertholf v. O'Reilly, 8 Hun, 16.

the seller of the liquor by which the intoxication was produced, and the owner of the building in which it was sold.[84]

Sec. 9. *Injuries to Means of Support—Rights of Wife.*—The term "means of support," as used in the statutes under consideration, has received a different interpretation by different courts. The wife is the person whose damage in most cases is laid under these words, and a statement of the application and extent of the term requires an examination of the rights of a wife, under the law, to the support of her husband. Broadly, the phrase as used in the statutes relates to whatever a husband might have earned or made by his labor and attention to business, and contributed to the maintenance of his family.[85] A husband is morally and legally bound to supply his family with the necessaries and comforts of life. If he have no other resources, it is his duty to contribute his labor and its proceeds to their support. A wife has thus an interest in his capacity to labor, and this especially, if she be wholly dependent. Therefore, his intoxication of itself, as affecting his capacity to labor, gives her a cause of action.[86] Nor is the liability of the defendant confined to cases of injury resulting immediately from drunkenness, or arising during its continuance; it extends as well where the injury results from insanity or sickness produced by intoxication.[87] Health is as indispensable to the ability to labor, as is the ability to labor to means of support. To sustain the action by the wife, it is not necessary that she has actually been without support, or at any time in whole or in part deprived of support. Means of support relate to the future as well as to the present. It is sufficient if the sources of her future maintenance have been stopped or diminished below what is reasonable for one in her station

[84] English v. Beard, 51 Ind. 489.
[85] Wightman v. Devere, 33 Wis. 570.
[86] Schneider v. Hosier, 21 Ohio St. 99.
[87] Mulford v. Clewell, 21 Ohio St. 191.

of life.[88] In Iowa, the refusal of the court below to charge the jury that, "if the plaintiff was in no worse condition after, or by reason of the sale of liquors to her husband, than she was before, she has not suffered in her means of support, and can not recover therefor," was held correct.[89] So, in Illinois, the ruling of the trial judge, in rejecting an instruction submitted by the defendant, that if the wife had sufficient means in her own right to maintain herself as comfortably as she was supported by her husband before the date of the charges, or was able and competent to earn her own livelihood, she could not maintain the action, was assigned for error but overruled. The Supreme Court said: "From the earliest period of the law, there has been a legal obligation on the husband to support his wife. No act of the legislature of this state, when this cause of action accrued, had ever abrogated such law. It has never been annulled by judicial construction, nor do we recognize in courts the right to annul it. The right of support is not limited to the supplying of the bare necessaries of life, but embraces comforts that are suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of her own. There are always independent means of support. No one is absolutely dependent on another for means of support; for, where there is the absence of other means, it is provided by public authority."[90] But in a Wisconsin case it is intimated that, if the husband when sober was physically incapable of performing any work or labor, or attending to any business, or was of such indolent or shiftless habits that he in fact made his wife support him, his intoxication would not injure her means of support, as used in the

[88] Mulford v. Clewell, *supra*.
[89] Woolheather v. Risley, 38 Ia. 189.
[90] Hackett v. Smelsley, 77 Ill. 109.

statute.[91] And in New York, the exposition of this phrase in all the other states has been entirely dissented from. The Supreme Court of that state, in one case, say, that the reasoning adopted in the other states, "if carried out consistently, would result in the doctrine that the wife has an interest in the property of her husband, so that she could maintain an action for its injury, as he is as much bound to support her out of his property as out of his wages; and that a creditor would be injured in his means of support by the intoxication of his debtor, for the debtor is as much legally and morally bound to pay his creditors as to support his wife."[92] This extraordinary ruling stands alone, and seems to have been made without any regard to the obvious intent of the framers of these laws. But leaving this out of the question, it would certainly seem a sufficient answer to it, that in the same section the wife is authorized to bring an action for injury to her property, and that even at common law she may maintain a suit for an injury to her contingent interest in her husband's estate, though an interest which is not an actual one, but which the law considers as more than a possibility.[93] The fact that the wife is specifically mentioned in the statute, and the creditor is not, makes it unnecessary to consider whether legally their rights are precisely the same. An examination of this case shows, however, that the expression just quoted is more in the nature of a *dictum* than a judicial decision; and it may be considered as settled under this section, wherever it is found in the statutes of the states which have adopted the civil damage law, that the wages of the husband are part of the wife's means of support, in that they belong to her for that object; that a diminution of them from the causes stated will give her a right of action, and that having the right to rely upon the support of her husband, his previous conduct, except under extraordinary

[91] Wightman v. Devere, *supra*.
[92] Hayes v. Phelan, 4 Hun, 738.
[93] Bullard v. Briggs, 7 Pick. 533; Buzick v. Buzick, 3 Cent. L. J. 786.

circumstances, or the possession by her of independent means, will not alter the case. It has been held, however, under the New Hampshire statute, which makes a person unlawfully furnishing spirituous liquors responsible for injuries resulting therefrom, and gives a remedy to any person on whom such injured person may be dependent for means of support, that this does not give one upon whom a person becomes dependent in consequence of intoxication produced by liquor so furnished, and who was not previously dependent upon him, any right of action.[94]

An action will lie, at the suit of a wife or child, against the seller of liquors to one who while so intoxicated, and in consequence of such intoxication, receives injuries resulting in death.[95] In one of the earliest cases decided under the New York statute, a contrary conclusion was reached. There the complaint alleged that plaintiff's husband died early on the morning of the 5th of July; that he was intoxicated on the evening previous; that his death was caused by such intoxication, produced by the sale to him and others of intoxicating liquor, whereby an affray took place in which he was killed by one of his drunken companions, and that the plaintiff by reason thereof had sustained damages in being deprived of the companionship of her husband, and of the customary support and maintenance of herself and her children. The court held that this did not show any cause of action; that the intent of the statute was to throw the responsibility for the injurious acts of an intoxicated person on the vendor or giver of the intoxicating liquor, but not to make him liable for all results arising therefrom, and that under the statute a right of action existed against the donor or seller in cases alone where it would lie against the intoxicated person.[96] But this opinion may be said to be over-

[94] Hollis v. Davis, 56 N. H. 74.

[95] Emory v. Addis, 6 Ch. L. N. 335; Jackson v. Brookins, 5 Hun, 533; Krach v. Heilman, 4 Cent. L. J. 233; Schmidt v. Mitchell (Sup. Court Ill.), not yet reported; Mason v. Shay, 7 Ch. L. N. 152.

[96] Hayes v. Phelan, 4 Hun, 743.

ruled by a later case in the same court, where several persons became intoxicated and engaged in a drunken affray, in which one of their number was killed, and an action was brought against the sellers of the liquors which caused their intoxication. The opinion of the court in this case is an excellent exposition of the meaning and purposes of these statutes. "It is true," says the court, "the statute does not in express terms give the right of action upon the cause of death. It does not define the injuries meant to be covered, or enumerate them. It says, generally, 'injuries to person, property or means of support, in consequence of the intoxication of any person.' If death ensues, as the natural and legitimate result of the intoxication, it is covered by the language of the statute. All injuries are covered that are consequent upon the intoxication. If death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded. The statute should not be so construed. It admits of the other construction, and that is more consonant with its benign purposes. Its main object was to provide a remedy for cases before remediless. Had it been confined to injuries to person and property, it might have been said, that only those injuries were meant to be covered, for which there was before then a remedy against the intoxicated person. But when it provided for injuries to means of support, it made actionable a new class of injuries without remedy at common law, and unprovided for by any previous statute. The wrong consisted in the fact that the sellers of liquors shut their eyes to the condition, in person or family, of those to whom they sold. They dealt out an article which, under certain circumstances often liable to exist and to be known to the seller, would, without fail, produce injury, and perhaps death. Carelessness and neglect, morally criminal, were shielded under the license law. For this wrong, the statute under consideration provided a remedy. Notice the class of persons especially endowed with a right of action;

—husband, wife, child, parent, guardian. When the statute provided that any of them might have a right of action for any injury to his or her means of support, in consequence of the intoxication of any one, is it reasonable that the legislature only meant to provide for such causes of action, as before then already existed against the intoxicated person? It seems not; but that the main object was to provide a remedy for an evil entirely without remedy before. The law does not provide how the injury to the means of support must be produced in order to be actionable, when it is in consequence of intoxication. It is therefore without limit in that respect."[97]

The fact of the marriage being illegal and void, if proved, will prevent the plaintiff from recovering for injury to means of support, but will not deprive her of the right to maintain an action against the seller of intoxicating liquors to her alleged husband, if she shall have sustained injuries to her person or property by reason thereof.[98]

SEC. 10. *Actual and Exemplary Damages.*—The statutes authorize the recovery of damages co-extensive with the injury, and likewise exemplary damages. But it is well settled that exemplary damages can not be awarded without proof of actual injury; the seller can not be punished, even if he has sold in violation of the wishes of the friends and family of the drunkard, unless the party bringing suit has sustained an actual and substantial loss.[99] But if it appear that a wife has sustained actual damages to her means of support, exemplary damages may be awarded even without proof of aggravating circumstances, such as the defendant furnishing the husband with liquor after notice from her no

[97] Jackson v. Brookins, 5 Hun, 533.

[98] Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported.

[99] Ganssly v. Perkins, 30 Mich. 495; Wightman v. Devere, 33 Wis. 57(
Keedy v. Howe, 79 Ill. 133; Roth v. Eppy, 16 Am. L. R. 111; Freese
Tripp, 6 Ch. L. N. 330; Boyd v. Watt, 3 Cent, L. J. 756; Kellerman
Arnold, 71 Ill. 632; Brantigan v. Waite. Blanke *et al.* v. Fulford, an
Albrecht v. Walker, decided in the Supreme Court of Illinois, and n
yet reported.

to do so, or endeavoring to prevent him from reforming by tempting or inducing him to drink intoxicating liquors.[100] But the fact of the wife having notified the seller not to sell to her husband should always enhance the damages;[101] for he can in such a case have no excuse for his conduct, and his disregard of the law and of the rights of others may well merit the award of punitive damages. In a recent case,[102] in speaking of exemplary damages, it was said, where a seller of intoxicating drinks had been notified not to sell in a particular case, or where he placed temptations in the way of one to seduce him from the paths of sobriety, or where one, who had been an habitual drunkard, was endeavoring to reform and free himself from the toils in which he had been bound, if he should be interfered with by the dram-seller, to conquer his resolution, such a person would be a fit subject for exemplary damages, and such damages, so awarded, would be in the nature of compensation to the injured party. And though, as has been seen,[103] anguish of mind and mental suffering do not constitute such an injury as to be the ground for an action under these statutes, yet actual damages being proved, they may be taken into consideration upon the question of exemplary damages.[104] "Whatever may be the rules of the common law," it is said in an Ohio case, "as to the state of facts necessary to justify the assessment of exemplary damages, it is clear that exemplary damages may be recovered in any action brought under this section, in which the evidence shows a right to recover actual damages."[105] And in the same state an action was brought under the act of 1854 by several railroad contractors who had in their employ a number of hired hands, for the sale to them by the defendants of intoxicating liquors, 'whereby they became drunk, unable themselves

[100] Hackett v. Smelsley, 77 Ill. 109.
[101] McEvoy v. Humphrey, 77 Ill. 388.
[102] Kellerman v. Arnold, 74 Ill. 632.
[103] *Ante*, Injuries to the Person, Sec. 7.
[104] Freese v. Tripp, *supra;* Roth v. Eppy, *supra.*
[105] Schneider v. Hosler, 21 Ohio St. 98.

to work, prevented the other hands and teams from working to advantage, and the progress of the job was hindered and delayed, and the contractors were thus injured in their property and means of support." The Supreme Court sustained a verdict awarding actual and exemplary damages against the defendants.[106] In Wisconsin, in a case where a husband, in consequence of becoming intoxicated by liquor sold to him by the defendant, received certain injuries, it was held that the wife was entitled to recover: 1. Compensation for watching, nursing and taking care of him during his sickness; 2. Damages for injury to her own health in consequence; 3. The expenses of employing medical attendance and assistance; 4. The cost of hiring labor to attend to his business.[107] And in Illinois, where the husband of the plaintiff had become a confirmed drunkard, abandoning an occupation in which he was earning five dollars a day, and had squandered a valuable property, a verdict of $10,000 actual, and $2,000 exemplary damages was considered not excessive.[108] In Michigan, the statute has received a somewhat stricter construction. In a recent case in that state,[109] the court say: "There can be no exemplary damages without actual injury. It is to be observed that injuries received from the intoxication of strangers are embraced in the same clause with those suffered from the intoxication of wards, relatives or husbands and wives, and that persons who have no blood or marital connection with the intoxicated person are also grouped together. It is plain, therefore, that the measure of damages can not be the same in all cases, and that there must be some of them where exemplary damages would be absurd. There is nothing in these cases to exempt them from the rules applied to any other cases of actionable wrongs. The actual damages should be as nearly commensurate with the

[106] Duroy v. Blinn, 11 Ohio St. 332.
[107] Wightman v. Devere, 33 Wis. 570.
[108] Jewett v. Wanshura, 8 Ch. L. N. 324.
[109] Ganssly v. Perkins, 30 Mich. 492.

actual injury as the nature of the case will permit; and exemplary damages should be given in those cases alone where the plaintiff has some personal right to complain of a wanton and willful wrong which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff himself, in spite of the injury he must have known she was likely to suffer by it. The foundation of exemplary damages rests on the wrong done willfully to the complaining party, and not on wrong done without reference to the party." And, in another place, they say: "The plaintiff's testimony indicated that she had *not* been deprived of the sober society of her husband; defendants were liable for the mischief which they may have produced, by preventing his improvement or making him worse; but they are not responsible for damages as they would have been, if they had reduced him from sobriety to sottishness. The moral quality of contributing to the degradation of one already debased is no better than if he were sober. But the remedy is given for the injury suffered by the wife; and she loses much less in property and comfort when her condition is not seriously changed, than when there is considerable change." And, in New York, it is held that exemplary damages should be given only where there are circumstances of abuse or aggravation proved in the case on the part of the vendor of liquor.[110]

The defendant may prove that he had forbidden his servants to supply the intoxicated person with liquor, and that they willfully disobeyed him without his connivance,[111] or that he endeavored to prevent his obtaining the liquor, and had frequently refused him, or that he had procured it by artifices,[112] not in bar of the action, but in mitigation of exemplary damages. For a like purpose it has been held in New York, that he may prove that he was, on the occasion complained of, lawfully selling under the author-

[110] Franklin v. Schermerhorn, 8 Hun, 112.
[111] Freese v. Tripp, *supra;* Kreiter v. Nichols, 28 Mich. 499.
[112] Bates v. Davis, 76 Ill. 223.

ity of a license granted by the state or town.[113] But such evidence is not admissible in Illinois.[114] In Indiana, in an early case, it was held that where the sale was illegal, thus rendering the seller liable to a criminal prosecution, he could not be punished with vindictive damages in a civil action.[115] But it has been since held that the act of 1873 has expressly abrogated this rule.[116] In Illinois, on proof of illegal sales, exemplary damages may be recovered.[117]

The statutes providing that any person who shall be injured in person, property or means of support, *in consequence* of the intoxication, habitual or otherwise, of any person, shall have a right of action, it would seem to require an extraordinary interpretation to hold that the defendant is not responsible for all consequences arising from the sale of intoxicating liquors, but only for consequences which he may be presumed to have foreseen as likely to be the result of his sales. Yet, in a recent Indiana case,[118] where a husband became grossly intoxicated from liquor sold to him by defendant, and while being hauled home in his wagon in this state, received injuries from a barrel of salt falling upon him, from which injuries he died, it was held that his widow had no right of action under the statute, the death of the husband being the immediate, and the intoxication of the husband only the remote cause of the injury to her. In support of this view the court say: "The defendants, in causing the intoxication of the deceased, could not have anticipated that, on his way home, he would be fatally injured by the salt barrel. This was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by

[113] 8 Alb. L. J. 337.
[114] Roth v. Eppy, *supra*.
[115] Struble v. Nodwift. 11 Ind. 65.
[116] Schafer v. Smith. 4 Cent. L. J. 271.
[117] Mason v. Shay, 7 Ch. L. N. 152.
[118] Krach v. Heilman, 4 Cent. L. J. 233, citing Marble v. Worcester, 4 Gray, 395; Crain v. Petrie, 6 Hill, 522; Ryan v. N. Y. C. R. R., 35 N. Y. 210; Fairbanks v. Kerr, 70 Penn. 86.

reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him; could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation, the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed it may be assumed as clear, that the parties causing the intoxication would not be liable under the statute to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here." It is likely that, on the general principles applicable to such a case, the conclusion reached by this court is correct; for, to make the defendant liable, it is not enough to say, that as the injury would not have occurred but for his act in selling the liquor, and thereby intoxicating the person who was killed, therefore the defendant is responsible; for he can only be held liable where his act, in the absence of any independent intervening agency, would be likely to be followed by an injury to another. But a fair construction of the statute, and the intent of its framers, would seem to justify the adoption of a different rule in this peculiar class of cases. Such has been the tendency of the courts generally.[119]

The Supreme Court of Indiana, in a still more recent case,[120] has applied the same rule to the case of one who, while intoxicated, was run over and killed by a train of cars. The death of the person (the husband of the plaintiff in the case referred to), caused by the train of cars, the court say, "is an effect which is not naturally, necessarily, or even probably connected with the fact of unlawfully selling intoxicating liquors to him by the defendant,

[119] See Roth v. Eppy, 16 Am. L. R. 111; Schmidt v. Mitchell, Supreme Court of Illinois, not yet reported; Emory v. Addis, 6 Ch. L. N. 336.

[120] Callier v. Early, 4 Cent. L. J. 406; Monthly Jurist, May, 1877.

whereby he became drunk; and when the death could take place only upon the coincidence of his stepping on the track and the train passing at the same time, the consequence becomes more remote and more disconnected with the cause alleged. The death need not take place immediately and directly upon the cause, but it must be effected by a chain of natural effects and causes, unchanged by human action; or the party who committed the first act will not be responsible. In this case, the running of the train of cars was the human action, which changed the course of natural effects and causes connected with the act alleged against the defendant. * * * The plaintiff's husband was killed by the train of cars, and not by the act of the defendant in unlawfully selling him intoxicating liquor." In an article upon the Ohio liquor law, published in the Monthly Jurist for May, 1877, and which has come under our notice since this review went to press, the decision of the Indiana court in these two cases is very ably criticised. "It seems apparent," says the writer, "that a saloon keeper, in selling intoxicating liquor, must contemplate that the person buying the same may, and even probably will, if he becomes intoxicated, be hurt by some one of the many instruments of danger found in cities and towns where liquors are sold. Stripped of his reason and the use of his limbs, what is more natural or probable than that the purchaser will meet injury or death? Just how he may be injured,—by what train, or in what place—the saloon keeper probably can not tell; but that injury will probably befall him, the seller must contemplate. So if one sells liquor to another by which he becomes intoxicated, and the seller then places him in a wagon, with another drunken man for a driver, is it not probable that an accident will happen to them? A wrong-doer is liable for the natural, necessary and even probable consequences of his acts. The intention of the legislature in passing this law seems to have been to provide for cases like these, and give a remedy where none existed. Prior to the adoption of this law, a wife was

without a remedy, if her husband became intoxicated and was killed by the cars. On account of the deceased being drunk, she could not recover in an action against the railroad company. It was clearly the intention of the legislature to apply the law to cases like these; and to do so, requires no extension of the act by judicial construction." In dismissing this phase of the subject, it may be sufficient to say, that in no other state where these statutes exist has such a narrow construction been placed upon their provisions, or such an apparent attempt been made to defeat the wholesome remedy which their framers have endeavored to give.

SEC. 11. *Pleading—Limitation.*—The action under these statutes is confined to persons who are injured in person, property or means of support; no right of action is given on the mere ground of relationship.[121] Though it was probably the intention of the legislature to give a single right of action and single damages to but one person for a single injury, it would seem that such right may arise under these statutes to a husband or wife and each of their children, be they ever so many, as well as to all other persons mentioned in the section.[122]

In a very recent Illinois case the declaration averred that the defendant sold and gave to one E intoxicating liquors, "and thereby caused him to become, and he was during that time before named, habitually intoxicated." It was contended that this was an averment that the intoxication was caused in whole by the defendant; that such must be the proof; and that it was not sufficient, to sustain the count, to show that the intoxication was caused in part by the defendant. But the court overruled the objection. "The statute," they say, "gives the right of action where the defendant shall have caused the intoxication in whole or in part. Contracts are entire, and must be proved substantially as alleged; but torts are divisible, and in them the

[121] Ganssly v. Perkins, 30 Mich. 495.
[122] Franklin v. Schermerhorn, 8 Hun, 112.

plaintiff may prove a part of his charge and recover, if there be enough proved to support the tort.[123] But a complaint on the bond under the Indiana statute, which averred that the intoxication was caused in part by liquors sold by the defendant's principal, and that while so intoxicated, and by reason of such intoxication, the purchaser caused damage, has been held bad.[124] Under the New Hampshire statute, a declaration in trespass alleging an assault and battery as having been committed directly by the defendant, is sufficient where the plaintiff seeks to recover damages for an assault upon him committed by a person while in a state of intoxication caused by liquors unlawfully furnished him by defendant.[125] In Indiana, it is held that the complaint must distinctly aver that the injury complained of, and the damages sought to be recovered, resulted in consequence of a sale of intoxicating liquors; and therefore an averment that, whilst A was intoxicated by reason of liquor sold him by C, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the wound was inflicted by reason of the intoxication of A.[126] But a complaint by a wife, alleging that her husband became intoxicated by liquor purchased from the defendant, and thereby neglected his work, squandered his money, and damaged the plaintiff in her means of support, is good.[127]

In actions under these statutes, the intoxicated person is not a necessary party defendant.[128]

The *ground* of action for personal injuries is the tortious act against the person injured, although the *right of action* therefor is conferred by the statutes upon the wife or personal representatives, and the statute of limitations runs from the time of the selling of the liquor which caused the

[123] Roth v. Eppy, 16 Am. L. Reg. 111; Hill v. Blanford, 45 Ill. 8.
[124] Schafer v. Cox, 49 Ind. 460.
[125] Bodge v. Hughes, 53 N. H. 615.
[126] Schafer v. Cox, 49 Ind. 460.
[127] Barnaby v, Wood, 50 Ind. 405.
[128] English v. Beard, 51 Ind. 489.

intoxication, and not from the date of the injury.[129] But the right of action so far vests at the time of the injury, that the statute does not divest it upon the death of the husband, nor does it abate upon common-law principles. The party doing the injury has no interest in it and no control over it. The right of action vests in the injured person to be prosecuted in his or her own name, and for his or her own use. The wife does not lose her identity by the death of her husband. The relation of wife, though essential by the terms of the statute to the inception of the right of action, is not necessary in the prosecution of the remedy, and after the death of the husband she may bring her action for the cause of his death under the statute, though "widow" be not expressly named in it.[130] The statute does not require that she be a wife at the time of bringing her action, but only at the date of the wrongful act.[131] So an employer may sue for injuries done to him by the intoxication of his servant, after the relation of master and servant has terminated.

Sec. 12. *Evidence—What Acts will bar a Recovery.*—The injuries sought to be established in these cases not being recognized or redressed under the rules of the common law, the evidence necessary or competent to prove them and their extent is not confined within the bounds of that admissible to establish a common-law tort.[132] Under the rule, however, adopted by the Ohio courts in this class of cases, the plaintiff is required to prove his case beyond a reasonable doubt.[133] What constitutes intoxication is a question of fact to be determined by the jury upon the whole evidence in the light of their own observation.[134]

[129] Emmett v. Grill, 39 Iowa, 690.
[130] Hackett v. Smelsley, 77 Ill. 109.
[131] Schneider v. Hosler, 21 Ohio St. 116; Jackson v. Brookins, 5 Hun, 530.
[132] Dunlavey v. Watson, *supra;* Gneneresh v. Smith, 34 Ia. 348; Kniffen v. McConnell, 30 N. Y. 285.
[133] Mason v. Shay, 7 Ch. L. N. 152.
[134] Roth v. Eppy, 16 Am. Law Reg. 111.
As to the meaning of the term intoxicating liquors, as used in these

The injury to the means of support of a married woman, caused by the sale of intoxicating liquors to her husband, by which he acquires habits of intemperance and idleness, may vary greatly, according to the age, condition and circumstances of herself and husband. Evidence therefore in such cases that the husband was a sober, industrious man, providing for and supporting his family prior to the time when the defendant caused his intoxication by selling to him intoxicating liquors, and after such sales and in consequence thereof he became less industrious than he had been before; that such sales caused him to neglect his business or work, or squander his means to any extent so as to decrease the means of support of his wife, is admissible; and the jury may be instructed to take these circumstances into consideration on the question of damages.[135] But it is improper for the court to charge as a matter of law that the selling of intoxicating liquors to a person far gone in habits of intoxication, and who had become diseased bodily and mentally, would be more aggravating than selling to one not so badly addicted to intemperance, or who had

statutes, see Worley v. Spurgeon, 38 Iowa, 465; Jewett v. Wanshura, 8 Ch. L. N. 324; and in criminal prosecutions, State v. Stapp, 29 Iowa, 551. The court will take judicial notice of the fact that spirituous liquors are intoxicating. Carmon v. State, 18 Ind. 450; Com. v. Peckham, 2 Gray, 514. But not that common brewers' beer is intoxicating. Klare v. State, 43 Ind. 483. In Jackson v. State, 19 Ind. 312, it was held that, where an indictment charged the sale of wine, the court did not judicially know that it was not intoxicating. It was argued by the defendant that wine was not intoxicating, and that it was not in the power of the legislature to declare it so. In State v. Moore, 5 Blackf. 118, it was held, that "fermented" was not "spirituous" liquor. Evidence that lager beer is not intoxicating is inadmissible in a complaint for selling "intoxicating liquors." Com. v. Bubser, 14 Gray, 83. It has been held that ale, being produced by fermentation and not by distillation, is not "spirituous liquor." People v. Crilley, 20 Barb. 248; State v. Moore, 5 Blackf. 418; Nevin v. Ladue, 3 Denio, 437; Com. v. Markoe, 17 Pick. 465; Com. v. Jordan, 18 Pick. 228. But in State v. Wittmar, 12 Mo. 407, ale, beer, porter, rum, gin, brandy, whiskey and wine, are held to be within the term "intoxicating liquors." See also Houser v. State, 18 Ind. 106.

[135] Dunlavey v. Watson, 38 Ia. 400.

more vigor of body or mind. All such questions are for the jury.[136] Evidence is admissible to prove the fact of the intoxication of the party who caused the injury during a certain period, before it has been shown that such intoxication was caused by the defendant.[137] So it is proper to prove the practice of the drunkard in visiting other saloons, in order to show what proportion of the money he had spent for liquors had been paid to defendant.[138] The inability of the husband to obtain employment on account of his habits of intoxication may be shown, but not his desire for intoxicating liquors.[139] Evidence is inadmissible to prove sales of liquor made prior to the passage of the acts giving the remedy,[140] or subsequent to the commencement of the action;[141] and evidence that the wife, since the suit was brought, had purchased liquors and drunk them with her husband, is admissible only where damages are sought by her for injury to her feelings and disgrace caused by her husband's intoxication.[142]

Under that section of the statutes, allowing the recovery of compensation for taking care of a person while intoxicated, it is held that, if the person so intoxicated had recovered from the effect of the liquor sold him by the defendant, and was sober at the time of receiving the injury, or if he had become sober and afterwards got intoxicated upon liquors sold by others, the first seller would not be held liable. Therefore, in such a case, any evidence is admissible which may tend to show that the injured party had become sober before the accident, or had injured himself while under the effects of an intoxication subsequent to that caused by the defendant. So, also, evidence is proper which may show the length of time required to recover from an intoxica-

136 Ludwig v. Sager, Supreme Court of Illinois, January Term, 1877.
137 Woolheather v. Risley, 38 Ia. 486.
138 Hemmens v. Bentley, 32 Mich. 89.
139 Roth v. Eppy, *supra*.
140 Dubois v. Miller, 5 Hun, 332.
141 Woolheather v. Risley, *supra*.
142 Kearney v. Fitzgerald, *supra*.

tion,[143] and the delivery of the liquor to the person is sufficient evidence of a sale.[144] The evidence must be confined to the cause stated in the declaration or petition; and where the injury alleged is to means of support, it is error to admit proof of injury to property.[145]

Under those acts which give a remedy in case only of sales or gifts made in violation of their provisions, the proof is required to be more direct, such an action being in its nature *quasi* criminal. Where the action is brought for damages caused by the sale of liquors to an habitual drunkard, it must be shown that the defendant knew him to be such,[146] although it need not be proved that he was intoxicated at the time the liquor was furnished.[147] But knowledge of the intemperate habits of the person may be proved by reputation.[148] And in the case of a sale to a minor, the burden of proof is upon the defendant to show that he believed him to be of full age.[149] And it has been held that a sale to a minor, who asks for the liquor in behalf of one to whom it might lawfully be sold, is in contravention of the statute.[150] The furnishing of liquors to a minor, as prohibited in the statute, is complete, although the liquor may have been purchased by another, and supplied by the seller in pursuance of such purchase.[151] And the statement of a physician who was in the habit of getting intoxicated, made at the time of his purchases of liquor, that he wanted it for a patient, and for medical purposes, did not, it has been held, in the absence of proof to the contrary, raise the presumption that the sales were made to the patient.[152]

143 Brannan v. Adams, *supra*.
144 State v. Fairfield, 37 Me. 517.
145 Hackett v. Smelsley, 77 Ill. 109.
146 Markert v. Hoffner, 4 Am. L. Rec. 111.
147 Fountain v. Draper, 49 Ind. 441.
148 Elam v. State, 24 Ala. 77; Wickwire v. State, 19 Conn. 477; State v. Kalb, 14 Ind. 404.
149 Farback v. State, 24 Ind. 77; Rineman v. State, *Ib.* 80; Seltz v. State, 41 Ind. 162.
150 State v. Fairfield, 37 Me. 517.
151 State v. Munson, 25 Ohio St. 381.
152 Boyd v. Watt, *supra*.

The intent of these statutes is to furnish redress and compensation to innocent sufferers from the consequences of the sale of intoxicating liquors; and, therefore, if a person has by his acts and conduct voluntarily and knowingly encouraged and contributed to bring about such a condition in another, he can not be permitted to complain of any wrongs which he may suffer at the hands of one while in a state which he has assisted to produce. Therefore the seller would not be protected from the consequences of his own actions, if he should receive injury at the hands of one of his intoxicated customers. On the same principle, a wife suing for injury to her means of support, may be estopped by her acts from recovering any damages for an injury to which she may have contributed.[153] Therefore, in an action by the wife, if it be proved that she voluntarily bought liquors of the defendant to be drunk as a beverage by herself and her husband, she can not be considered as an innocent sufferer from the effects of intoxicating liquors, if injured by him while intoxicated, and will not be entitled to the protection of the statute. But the purchase by her of liquor for the use of her husband at home, in order to prevent him from squandering time and money at saloons, is not such a complicity on her part as to bar her recovery for such injuries.[154] The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his home and drank the same at home with the wife's knowledge and approval, and that all of such drinking on the part of her husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages. But such facts do not constitute a bar to the action,[155] and the wife may prove that her husband compelled her to attend such

[153] Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported; Engleken v. Hilger, *Ib.*

[154] Kearney v. Fitzgerald, *supra.*

[155] Hackett v. Smelsley, 77 Ill. 109.

places, and may be permitted to show the whole circumstances of the case as explanatory of her conduct. And where the plaintiff's husband was an habitual drunkard, and she had forbidden the sale of liquors to him by the defendant, but a day or two after such notice she went to the defendant's saloon in company with her husband, and in his presence directed the defendant to sell him all the liquor he asked for, it was held, in an Iowa case, that the only reasonable inference from such conduct was that the plaintiff acted under the coercion of her husband, and that the jury had a right to find that the defendant drew this inference, and therefore knew that she was not acting voluntarily.[156] In a New York case, it was held that the plaintiff's allowing his son to take his horse to drive to a neighbor's, though knowing the son to be of intemperate habits, was not such contributory negligence as to defeat his right of action for the value of his horse, where the son had gone to a saloon and procured liquor, and, while under its influence, driven the horse so violently that it died.[157]

[156] Jewett v. Wanshura, *supra*.
[157] Bertholf v. O'Reilly, *supra*.

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