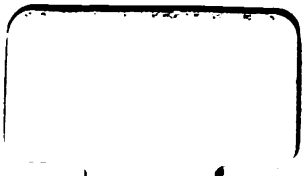

A TREATISE

ON THE

LAW OF TRESPASS

IN THE

TWOFOLD ASPECT

OF

THE WRONG AND THE REMEDY.

By THOMAS W. WATERMAN,
COUNSELLOR AT LAW.

IN TWO VOLUMES.

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TRESPASS ON REAL ESTATE.

BOOK IV.

TRESPASS ON REAL ESTATE

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10. Private property in highway.
11. Private way.
12. Property in fences.
13. Boundary established by deed.
14. Boundary established by monuments.
15. Boundary established by agreement.
16. Boundary established by acquiescence.
17. Rights and duties in relation to party walls.
18. Right to lateral or subjacent support of soil.
19. Rights in relation to growing crops.
20. Property in trees standing on line.
21. Property in church pew.
22. Private property in burying ground.
23. Public right to use of river.
24. Private property in bed of stream.
25. Right to natural flow of stream.
26. Right to use of artificial water-course.
27. Public right of access to sea shore.
28. Private property in sea shore.
29. Rights and liabilities of the parties to a mortgage.

1. *Title by prescription.*

§ 630. Prescription is "the manner of acquiring property by a long, honest, and uninterrupted possession or use, during the time required by law;"[1] as "when a man can

[1] Bouv. L. Dict.

show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it."[1] Although in England, a prescription must have existed beyond the time of legal memory, yet in the United States, by analogy to the statute of limitations, an uninterrupted user of an incorporeal hereditament under a claim of right for twenty years, as between parties under no disability, with the knowledge and without interruption from those adversely interested, affords conclusive evidence of a grant or right, as the case may be. Such user and enjoyment may be employed as proof of a deed or record which has been lost by time or accident, or of a prescriptive right, which always presupposes a grant. Such a title may well be called a prescription, agreeably to the ancient use of that term, though it depends upon a period of twenty years, and has no connection with the time of legal or actual memory. In an action for an encroachment by means of an eaves trough, the evidence did not show when the roof and eaves trough were put upon the defendant's house. The court remarked that if it was more than twenty years before the action was commenced, and there had been no material change in the mean time to the injury of the plaintiff, the defendant had acquired a prescriptive right to continue them in the same way and manner as when they were first put there; that she would be at liberty to change the form, provided the object would be equally well secured, without injury to the interests of the plaintiff; but that the right of prescription was an affirmative defense, which it was incumbent upon the defendant to prove.[2] *

[1] 2 Blk. Com. 263.

[2] Neale v. Seeley, 47 Barb. 314.

* To constitute a title by prescription, the owner must be ousted, and the ouster must continue uninterruptedly for the prescribed period. In an action for trespass on land, the defendant justified the act charged, by setting up two rights by prescription: The one a right to depasture the beach embracing that which adjoined the plaintiff's land; the other, that the plaintiff should fence his land against the defendant's horses and cattle running upon and depasturing the beach. It did not appear who was the owner of the beach adjoining the plaintiff's, but that the public, as far back as memory extended, had enjoyed a right of way over the whole beach, and that two roads thereon passed over that part

§ 631. Incorporeal hereditaments can alone be claimed by prescription; as a right of way;[1] a right to take water from another's well, or to wash and water cattle at a neighbor's farm;[2] to hang and dry clothes or nets on lines on a neighbor's land;[3] to turn the plow on another's premises;[4] to discharge water thereon from the roofs and eaves of houses;[5] or to have the benefit of a neighbor's fence or hedge, which is maintained and repaired at the expense of such neighbor.[6] There cannot be a prescriptive right which destroys the ordinary uses of property by the owner. Therefore a claim to go at all times and in all directions over every portion of land for purposes of recreation and amuse-

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which adjoined the defendant's land, across which, however, there were gates. These roads were from time to time repaired by the town, and deemed public highways, notwithstanding the gates. The beach from which the defendant's horses passed into the plaintiff's close was lying waste, and there was no evidence that it had ever been fenced or in any manner made available. The defendant proved that he and those from whom he derived his estate had been in the habit of turning their cattle and horses into their own pasture, and there being no fence on the sea side, they had been accustomed to run upon the beach generally, and upon that part of it which adjoined the plaintiff's land. It was held that the right of the defendant to depasture the beach was not of that adverse and marked character which established the prescription upon which the defendant relied; and that he had therefore also failed in showing the incidental and attendant right to require the plaintiff to fence against his cattle and horses (Donnell v. Clark, 19 Maine, 174).

In this country there is much waste and uncultivated land upon which cattle belonging to the owners of farms adjacent are accustomed to run. The fact may not be known to the non-resident owner; or if known, he has no motive to interfere to prevent it. If there is herbage upon it which he does not choose to make available to his own use, it does not injure him to have it fed by the cattle of others. If he forbears to resist or to complain, where complaint would be so unreasonable, an accommodation thus enjoyed or suffered ought not to ripen into a prescriptive right.

In an action of trespass for entering upon the plaintiff's flats, and digging and carrying away therefrom large quantities of earth, some evidence having been offered to prove digging on the flats from thirty to fifty years previous, and so occasionally at a later period, for the purpose of establishing a common right by usage, the judge left the fact to the jury, with the remark that the evidence seemed to be somewhat slight for the establishment of so extensive a claim. It was held that this remark was warranted by the state of the evidence, and did not encroach on the rights of the jury, or go beyond a fair commentary upon the nature and application of the evidence to the matter in issue (Porter v. Sullivan, 7 Gray, 441).

[1] 2 Bl. Com. p. 264.

[2] Race v. Ward, 4 El. & Bl. 702; 24 L. J. Q. B. 153; Manning v. Wasdale, 5 Ad. & E. 758.

[3] Drewell v. Towler, 3 B. & Ad. 735; 7 Vin. Abr. 183.

[4] 7 Vin. Abr. 174. [5] Thomas v. Thomas, 2 C. M. & R. 34.

[6] Barber v. Whiteley, 34 L. J. Q. B. 212.

ment, is bad. Such an easement is enjoyed only by the inhabitants of particular villages over open and uninclosed village greens and village play grounds, which have been immemorially dedicated to the recreation and amusement of the inhabitants of the village.[1] Where a defendant claimed a prescriptive right as the occupier of a brick kiln, to dig and carry away from an adjoining close of the plaintiff as much clay as was required for the making of bricks in the brick kiln, it was held that an unlimited claim and demand of this nature upon the soil of the plaintiff could not be sustained, for it would enable the defendant "to take all the clay, or, in other words, to take from the plaintiff the whole close."[2] A privilege claimed of taking sand without limit is bad;[3] and so likewise is a claim by the customary tenants of a manor having gardens, parcels of their customary tenements to dig and carry away turf from the waste within the manor for the improvement of their garden walks, or for making and repairing banks and mounds of grass on their customary tenements.[4] It seems, however, that a custom to dig sand and gravel in the waste, for the repair of a dwelling, may be supported.[5] *

2. *Title by adverse possession.*

§ 632. Adverse possession is "the enjoyment of land or an estate lying in grant, under such circumstances as indicate

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[1] Dyce v. Hay, 1 Macq. 305.

[2] Clayton v. Corby, 5 Q. B. 419–422; Wilkes v. Broadbent, 1 Wils. 63.

[3] Blewit v. Tregonning, 3 Ad. & E. 554.

[4] Wilson v. Willes, 7 East, 121. [5] Peppin v. Shakspear, 6 Term R. 748.

* When a defendant pleads a prescription which covers a more extensive tract of land than the *locus in quo*, he may aver that the *locus in quo* is parcel of the more extensive tract, and then plead his prescription over the whole. And in such case, as all prescriptions are in their nature entire, the plaintiff will not be permitted to deny a part only of the prescription, but must traverse the whole (Simpson v. Coe, 3 N. Hamp. 12; Morewood v. Wood, 4 D. & E. 157).

Public rights cannot be destroyed by long continued encroachments, unless the possession has continued so long that the party may put his title on the ground of prescription (County of Susquehanna v. Deans, 33 Penn. St. R. 131; Com. v. McDonald, 16 Serg. & R. 394).

Permissive trespasses, however long continued, never raise the presumption of a right as against an individual, much less as against a public body (Woodward, J., County of Susquehanna v. Deans, *supra*.

that the enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor."[1] The adverse use is presumed to have been with the knowledge and acquiescence of the owner; and we have seen that the same is true where an easement is acquired by prescription.[2] To give this knowledge and obtain this acquiescence, the law requires that the owner shall be ousted of possession; that the ouster shall continue uninterruptedly; and that it shall be open, visible, and exclusive. The law designs that the owner shall have ample knowledge on the subject, and a full opportunity to assert his claim; but if he sleeps on his rights, he is presumed to have acquiesced in the claims of another.[3]

§ 633. Knowledge of the owner may be proved either by direct evidence of the fact, or the jury may presume it from circumstances, as where it is proved that the owner's cattle have been turned off the land, or his servants refused an entry, or that the trespass has continued for a long period and that the owner or his agent lives in the neighborhood. Very strong acts of exclusive possession, such as building, inclosing, or cultivating, and that for a long time, and openly and notoriously, are necessary in order to constitute an ouster of the true owner who has no notice of such acts.[4] But whatever may be the evidence of such knowledge, it is a fact to be found by the jury.[5] The object of the law in requiring that possession or user in order to authorize the presumption of a grant shall be adverse, is that the person against whom the claim is made or the right is exercised shall be made aware of the fact, so as to give him an opportunity of legally resisting before the time for doing so expires. Generally,

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[1] Bouv. L. Dict. [2] *Ante*, § 630. See *post*, § 701.

[3] School District v. Lynch, 33 Conn. 330; Props. of Kennebec v. Call, 1 Mass. 483.

[4] Blood v. Wood, 1 Metc. 528. See Props. of Kennebec Purchase v. Springer, 4 Mass. 416; Brimmer v. Props. of Long Wharf, 5 Pick. 131; Poignard v. Smith, 6 Pick. 172; s. c. 8 Ib. 272.

[5] Pray v. Pierce, 7 Mass. 381.

mere possession or use will not be sufficient to arrest his attention, or to put him on inquiry. To effect this, it is necessary in many cases that the person in possession or exercising the use should give some additional indication that it is hostile to another's claim. It is a well established rule, therefore, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption, it is said, is in favor of possession, in subordination to the title of the true owner. The possession must be under claim and color of title, and exclusive of any other right.[1] *

§ 634. To constitute an adverse possessory title by the possession of successive occupants, the possession must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them. But such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and which is accompanied by a transfer of possession in fact.[2]

§ 635. It is not necessary that an adverse possession, in order to be available, should commence under an effectual deed. Though the possessor claim under written evidence of title, and on producing that evidence it prove to be defective, yet the character of his possession, as adverse, is not affected by the defect of his title. The possession will be adverse if had and continued under claim and color of title, however groundless the supposed title may prove to be.

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[1] Hammond v. Zehner, 21 N. Y. 118; Little v. Downing, 37 N. Hamp. 355; Hoag v. Wallace, 28 Ib. 547; Gage v. Gage, 30 Ib. 420; Tappan v. Tappan, 31 Ib. 41; Campbell v. Campbell, 13 Ib. 483; Smith v. Hosmer, 7 Ib. 436; Towle v. Ayer, 8 Ib. 57; Hale v. Glidden, 10 Ib. 397; Woods v. Banks, 14 Ib. 101.

[2] Smith v. Chapin, 31 Conn. 530.

* In an action for breaking and entering the plaintiff's close, proof of the peaceable possession of it for more than twenty years before the alleged trespass was committed is *prima facie* a justification, and the defendant may give in evidence admissions of his title by the plaintiff and those under whom the plaintiff claims (Gilbert v. Felton, 5 Gray, 406).

The fact of possession and the *quo animo* it was commenced and continued are the only tests.[1]* Entry and possession under a claim of right through mistake as to the dividing line, is an adverse possession.[2] But in order to make the possession adverse where there is no claim of title founded on a written instrument, there must be a *pedis possessio*—an actual occupancy or a substantial inclosure of the lands, definite, notorious, and certain. In Becker v. Van Valkenburgh,[3] which was an action for cutting and carrying away a quantity of timber, the single point was whether the premises in question were held by the defendant adversely. It ap-

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[1] Hammond v. Zehner, 21 N. Y. 118.

[2] French v. Pearce, 8 Conn. 439. [3] 29 Barb. 319.

* A., having contracted to purchase land of B., paid part of the consideration, and then, without having acquired title, gave the land to his son C., who took possession. It was held, that C.'s possession was adverse both as to A. and B., and that declarations by A., after the gift to his son, that he did not hold adversely to B. were not admissible in an action of trespass brought by B. against C. (Hunter v. Parsons, 2 Bailey, 59).

Grantees of land cannot, by any act of their own, gain such possession as will entitle them to maintain trespass against persons in the adverse possession of the premises (Sigerson v. Hornsby, 14 Mo. 71).

Hallas v. Bell, 53 Barb. 247, which was an action for trespass on land, was an appeal from an order made at the circuit granting a new trial. The question was whether a small strip or gore of land, on which the trespass complained of was alleged to have been committed, was covered by the plaintiff's deed, and the jury found that it was not, but that it had been conveyed to the defendant by the same grantor by a deed of a subsequent date. The new trial was granted, upon the sole ground that it appeared from the evidence that the plaintiff was in the actual possession of said strip or gore, and had it inclosed, and was cultivating the same, and claiming it as part of her lot under her deed when the defendant took his conveyance of the adjoining lot. This, it was maintained, rendered the defendant's deed to that portion of his lot embraced within this gore void as against the plaintiff's deed, under the statute concerning the conveyance of lands adversely possessed, which is as follows: "Every grant of lands shall be absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor" (3 N. Y. Rev. Sts. 5th ed. p. 30, § 167). The Supreme Court, however, reversed the order granting a new trial, on the ground that the "claim" to the land possessed must be "under a title," or it will not affect the subsequent grant, otherwise valid, of the disputed territory. Johnson, J., who delivered the opinion of the court, referred to Crary v. Goodman, 22 N. Y. R. 170, where the New York Court of Appeals held, that in order to avoid a subsequent grant under the foregoing statute the prior possession must be under claim of some specific title; that the title under which the prior possession is claimed to be held must cover the premises; and that if the lines under the first grant are erroneously located, so as to embrace more land than is actually covered by such grant, the subsequent grant of the land contiguous to the first is not affected as to that portion thus erroneously included within the lines by the first grantee, though actually occupied and claimed by him under his grant.

peared that he lived on the land, claiming to own it, cultivating a part and cutting from it his firewood and timber. He had maintained a fence on the south and west sides of the premises, and on the east and southeast was a ledge of rocks from 200 to 400 feet high. It was held, that this ledge completed the inclosure as much as if a fence had been constructed along it, and that the evidence tended to establish an adverse possession in the defendant.

§ 636. It has been held that when a party who has a deed embracing land to which his grantor had a good title, and other lands to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into the part which he could not lawfully convey, he has no adverse possession of the latter as against the true owner. The doctrine of the case is plainly, that an entry by the grantee into one of several lots, all conveyed to him in the same deed, would give him constructive legal possession of all the lots thus conveyed as against his grantor, and as against a person subsequently entering any of said lots without right; yet that such constructive possession of a lot on which he did not actually enter, would not constitute such an adverse possession as would give title to the land by twenty years' continuance, as against a third person who should afterwards show that he was the real owner of such last mentioned lot.[1] *

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[1] Bailey v. Carleton, 12 N. Hamp. 9.

* Littleton, § 417, says: "If a man hath cause to enter into any lands or tenements in diverse townes in one same county, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into which he hath right to enter within all the townes of the same countie; by such entrie, he shall have as good a possession and seizin of all the lands and tenements whereof he hath title of entrie, as if he had entered in deed into every parcell."

Sir Edward Coke says, that this general rule must be understood as limited to lands in the same county, "For if the lands lie in several counties, there must be several actions, and consequently several entries. So, if three men disseize me severally of three several acres of land, being all in one county, and I enter into one acre, in the name of all three acres, this is good for no more but for that acre which I entered into, because each disseizor is a several tenant of the freehold, and as I must have several actions against them for recovery of the land, so my entry must be several." He also says: "If I enfeoff one, of

§ 637. If a proprietor has possessed and used, during a period of twenty years or more, a portion of the hydraulic property belonging to another proprietor, not by license or favor, but adversely and in derogation, of the rights of such other proprietor, the law, upon considerations of policy, and for the purpose of quieting a long possession, will presume a grant from the proprietor thus intruded upon, to the other, and will preclude the party, who has thus acquiesced, from asserting the right which he otherwise would have had.[1] But the omission of one of the proprietors to make use of the right which belongs to him, and which is to be exercised

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one acre of ground upon condition, and at another time I enfeoff the same man, of another acre in the same county, upon condition also, and both the conditions are broken, an entry into one in the name of both, is not sufficient, for that I have no right to the land, nor action to recover the same, but a bare title, and therefore several entries must be made into the same, in respect to the several conditions. But an entry into one part of the land, in the name of all the land subject to one condition, is good, although the parcels be separate, and in several towns" (Coke, Litt. 252, *b*).

An actual adverse possession continued during the statutory period, by one having no color of title, will divest the true owner of his title, even when he is in possession of a portion of the land covered by his title in such manner that he would have constructive possession of the residue, except for his actual disseizin by the adverse holder (Jakeway v. Barrett, 38 Vt. 316; per Poland, Ch. J.)

Open exclusive possession of land by a purchaser whose deed is not recorded, is equivalent to notice of his title to subsequent purchasers; but such notice would not continue, after such possession had ceased, and after the vendor had re-entered and remained some time in open, exclusive, and peaceable possession (Doe, J., in Carpenter v. Cummings, 40 N. Hamp. 158).

A mere trespasser who enters upon land without any pretense of title, cannot by surveying the land, and claiming it to the boundaries of such survey, extend his possession beyond his actual inclosure. Such a wrong-doer would have no right of action against other trespassers on the same tract outside of his inclosure. To maintain an action against them, there must be actual possession of a part of the tract, with color of title to the whole (Rannels v. Rannels, 52 Mo. 108). "Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer for a trespass on the remainder of the land, would be a sufficient color of title under the statute of limitations as against the real owner" (Ib. per Adams, J.)

A defective conveyance or a conveyance from one having no title, if *bona fide* taken, may be used in connection with adverse possession of a part of a tract in the name of the whole, so as to acquire title under the statute of limitations (Chapman v. Templeton, 53 Mo. 463).

A person may under a deed only giving color of title to a tract of land take possession by cutting timber thereon, and if such possession be invaded, he may maintain trespass or forcible entry and detainer. But where he has color of title to only a portion of the tract, he cannot take possession of the remainder in this way, and for such acts he will be liable as a trespasser (Ware v. Johnson, 55 Mo. 500).

[1] Townsend v. McDonald, 12 N. Y. 381; s. c. 14 Barb. 460; Belknap v. Trimble, 3 Paige, 577; Smith v. Adams, 6 Ib. 435; Baldwin v. Calkins, 10 Wend. 167; Sackrider v. Beers, 10 Johns. 241.

on his own land, however long such omission may be continued, will not prejudice him or confer any right upon the adjoining proprietor.[1] The abutting of a mill dam upon the opposite shore, will give to the owner of the mills, after twenty years, nothing more than an easement. And this will confer upon a person who has acquired it, no right to maintain an action of trespass, for a breach of the close, against the one having title to the land.[2]

§ 638. The fact that land is covered with water at every tide, does not take away the power of a person to disseize the proprietor. The possession may not be so perfect in all respects, and at all times, as of higher land, but this does not preclude an exclusive and adverse occupation. The causes which will prevent the actual use of the land, when the water is upon it, by the one who is in possession, will exclude another from obtaining the possession during the same time. Rights in, and perfect titles to, such property, have been obtained by disseizin.[3]

§ 639. When a party is once dispossessed, it is not every entry upon the premises, without permission, that will disturb the adverse possession. He may tread upon his own soil, and still be as much out of possession of it there as elsewhere. He must assert his claim to the land; perform some act that would reinstate him in possession, before he can regain what is lost. It is evident, therefore, that an entry by stealth, under circumstances that go to show that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of exclusive possession in another.[4]*

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[1] Bealey v. Shaw, 6 East, 208; Crooker v. Bragg, 10 Wend. 260; Butz v. Ihrie, 1 Rawle, 218.

[2] Trask v. Ford, 39 Maine, 437; Thompson v. Androscoggin Bridge, 5 Greenlf. 62.

[3] Clancey v. Hondlette, 39 Maine, 451; Sparhawk v. Bullard, 1 Metc. 95; Thornton v. Foss, 26 Maine, 402.

[4] Burrows v. Gallup, 32 Conn. 493.

* In an action for trespass to land, adverse possession, though for less than twenty years, will be good against one who claims by no higher title (Currier v.

3. *Right established by custom.*

§ 640. A custom is a usage which obtains the force of law, and is, in truth, the binding law within a particular district, or at a particular place, of the persons and things which it concerns. It must be reasonable, and this is a question for the court. A custom is not unreasonable, merely because it is contrary to a particular maxim of the common law, nor because it is prejudicial to the interests of a private individual, if it be for the benefit of the commonwealth. But a custom injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason. If alleged to be void because inconvenient in its enjoyment, and therefore unreasonable, the judges must look to the probabilities of the case, and be satisfied that the inconvenience is real, general, and extensive, before they hold a custom bad upon that ground which a jury has found to exist, and to have been enjoyed beyond the time of legal memory. In Knowles v. Dow,[1] the custom alleged was, that the inhabitants of Hampton had been in the habit of hauling sea weed and flats weed upon the plaintiff's close, and there depositing it, and afterward of carrying it away at their pleasure; and it was decided that the custom was not

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Gale, 9 Allen, 522). And actual adverse possession will defeat a prior constructive possession (Davis v. White, 27 Vt. 751; Ralph v. Bayley, 11 Ib. 521; Stevens v. Hollister, 18 Ib. 294). Occupancy and improvement of land, open, notorious, and comporting with the ordinary management of a farm, for more than a quarter of a century prior to the commencement of an action of trespass *quare clausum*, uninterrupted except by counter verbal assertions of title, have been held sufficient proof of disseizin to carry title (Beal v. Gordon, 55 Maine, 482).

The statute of Missouri does not change the rule at common law, that the owner of land cannot maintain an action of trespass *quare clausum* against one who held adverse possession of the premises at the time of the act complained of (Cochran v. Whitesides, 34 Mo. 417).

In Maine, where, in an action of trespass *quare clausum*, it appears that the defendant has been in the possession of the premises, which he is not charged with having entered unlawfully, more than six years, he is entitled under the statute, ch. 145, to betterments; and in such case, trespass cannot be maintained (Cressey v. Bradford, 45 Maine, 16; citing Chadbourne v. Straw, 22 Maine, 450; Paine v. Marr, 35 Maine, 181).

In Arkansas, where the defendant gets possession of the land "without force by disseizin," he is entitled to notice to quit (Thorn v. Reed, 1 Pike, 480).

When two or three disseize another of land to their own use, the disseizors are joint tenants (Putney v. Dresser, 2 Metc. 583).

[1] 2 Fost. 387.

void as being unreasonable. A custom to erect a *hoarding* (which is a fence inclosing a house in process of erection while builders are at work), so, as to obstruct part of the highway, is not unreasonable—the hoarding being necessary for the protection of the public.[1] But sand blown by the wind from the sea shore upon the plaintiff's close, and there deposited, cannot be taken from the close to be used as manure, by virtue of a custom, for the reason that sand is a part of the soil, and there is no mode of ascertaining what is sand blown there from the sea shore, and what the original soil.[2]

§ 641. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom.[3] Although the custom must be proved as alleged, yet if the right proved be greater than that claimed, it would seem not to be a variance, notwithstanding the *nisi prius* ruling to the contrary in Wilson v. Page.[4] In that case, the defendant pleaded a custom for the tenants of a particular copyhold tenement, to cut turf, and offered to prove a general usage for all the copyholders of the manor at large, to cut turf, without showing the particular usage; and Lord Kenyon held that he was confined to proof of the custom pleaded. But in Milward v. Hibbert,[5] in which the defendant pleaded a certain custom of trade at London, it was held that there was evidence of the custom laid, though it was proved that such custom also prevailed in other English ports. So, likewise, in Coolidge v. Learned,[6] it was held that the use of ground for sixty years, as a public landing place, would support a plea that the ground was a landing place for the inhabitants of Watertown.

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[1] Bradbee v. Christ's Hospital, 4 Man. & Gr. 714.

[2] Blewitt v. Tregonning, 3 Ad. & E. 554.

[3] Rex v. Joliffe, 2 Barn. & Cress. 54; Gray v. Bond, 2 Brod. & Bing. 667.

[4] 4 Esp. 71.

[5] 3 Ad. & E. N. S. 120.

[6] 8 Pick. 504.

4. *Title acquired by levy of execution.*

§ 642. In Massachusetts, the levy of an execution under the statute vests an actual seizin in the creditor, and ousts the debtor, so that the creditor may enter and retain possession as against the debtor, or may maintain trespass against him, or maintain a real action counting on his own seizin. But the consequence of the creditor being seized by force of the levy, and delivery of seizin by the officer, follows only in case the land was liable to the extent, and belonged to the debtor at the time of the levy. The levy may be considered as between the parties as divesting the seizin of the debtor and giving seizin to the creditor, but has no effect to disseize any other person who is the true owner unless accompanied with such acts as would amount to an actual ouster.[1]* In one respect the levy of an execution, if returned and recorded, may have the same effect as a deed recorded in ascertaining the extent of a disseizin. If a party, without claim of title, does acts amounting to an actual ouster, it will ordinarily operate as a disseizin only to the extent of such actual ouster. But if he enter and do the same acts under color of a deed recorded, such deed being evidence of his intent, may qualify the act of ouster and operate as a disseizin of the whole parcel expressed in the deed. The levy of an execution being in this respect a like matter of record may have a like effect.[2] Where land is conveyed for a valuable consideration, with intent to defraud the creditors of the grantor, but without knowledge on the part of the grantee of the fraudulent intent, a levy on the land by a creditor confers upon him no legal title or right of possession, and for acts of ownership

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[1] Chapman v. Gray, 15 Mass. 439; Allen v. Thayer, 17 Ib. 299; Gookin v. Whittier, 4 Greenlf. 16; Bartlett v. Perkins, 13 Maine, 87.

[2] Gore v. Brazier, 3 Mass. 523; Bott v. Burnell, 9 Ib. 96; Blood v. Wood, 1 Metc. 528.

* The extent of an execution upon the land of a stranger will not oust him, but the extent and every act done under it is a trespass (Warren v. Cochran, 10 Post. 379; citing Shepard v. Pratt, 15 Pick. 32).

upon such land under such levy, the creditor is liable in an action of trespass at the suit of the grantee.[1]

§ 643. The object of the provisions of the statute of Massachusetts,[2] requiring an action to be commenced by the creditor within a year from the return of an execution on which a levy has been made, was to put a limitation on the right of parties to interfere with and create a cloud on the title of persons who might be in possession of premises holding them by conveyance valid on their face. This reason has no application to cases where the defendants are mere trespassers showing no title to the premises in controversy. In Clark v. Brown,[3] the action was for entering on land and cutting trees. It appeared that the premises in question were formerly owned by a corporation, which conveyed the same to trustees to wind up its affairs, after which the plaintiff attached the same in a suit against the corporation and levied his execution thereon, and the execution was returned and recorded. Subsequently the defendants committed the alleged trespass. The only objection made to the validity of the plaintiff's title under his attachment and levy was, that no action to recover possession of the premises was commenced by him within one year from the return of the execution on which the levy was made. It was held, that as the defendants offered no evidence of title, or of any right to enter on the premises derived from those in whom the record title was vested at the time the levy was made, they were mere wrong-doers; and that as against them, in the absence of any proof that the possession of the estate had been retained by the grantees of the corporation subsequently to the levy claiming title thereto, the plaintiff by his levy acquired the right of possession.

5. *Right of grantee of equitable estate.*

§ 644. The grantee in possession of an equitable estate in land, or his assigns, may maintain an action for trespass

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[1] Davis v. Tibbetts, 39 Maine, 279.

[2] Sts. of 1844, ch. 107, § 4.

[3] 3 Allen, 509.

thereon. Stevens v. Palmer[1] was an action of trespass for breaking and entering the plaintiff's close. It was proved that in 1785 W. gave a warranty deed of certain land which formerly belonged to the town of S., bounded on the west by the Connecticut river, to M. B. and others, by which a certain tract, including the *locus in quo*, was conveyed to them in trust to and for the use of the inhabitants of the first parish in S. and their heirs forever as a burying ground. It was proved that more than sixty years previous, the parish had made provision for fencing the burying ground, and that more than forty years before, the parish had built a fence on the top of the river bank, and then inclosed the burying yard. That part of the land which comprised the shore and bank of the river was not adapted for a cemetery, and was never so used, and in 1842 the parish conveyed it to the plaintiff. It was held, that admitting that the legal estate was in the immediate grantees, and that the parish had only an equitable estate, yet being in possession of the land, and having conveyed it to the plaintiff, he might well maintain the action. H. conveyed one-third part of certain land, without specifying the grantee, "for the use of a school house, if the neighboring inhabitants see cause to build a school house thereon." A school house was built on the land, but it was removed about the year 1800. It appeared that the inhabitants of the district, soon after the school house was removed, voluntarily met and built a wall in front of the land; that some years later the people residing in the vicinity associated as a school district, and as such assumed the ownership and management of said land, and that in 1831, A., as agent of the district, leased said land for the term of ten years to B. B. held over after the expiration of the ten years, and a school district duly constituted in 1834 authorized C. to enter on said land and take possession of the same in behalf of said district. C. having done so, B. brought an action of trespass against him. It was held that although no legal estate passed

[1] 10 Metc. 32.

by the deed of H., yet that a trust was created which it was the duty of the court to protect, and that the court would, if necessary, appoint a trustee to take the legal estate from the heirs of H., who would be bound to convey to him the legal title to the premises. It was also held, that the lease was admissible in evidence against the plaintiff, and that he would be estopped to deny that A. was duly appointed agent by the school district, or that the said district had a good title to the premises demised.[1] *

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[1] Bailey v. Kilburn, 10 Metc. 176.

* The legal title must be obtained before an action of trespass can be maintained against the grantee of the equitable estate. In Buck v. Gilson, 37 Vt. 653, which was an action of trespass *quare clausum*, the plaintiff claimed title by virtue of the levy of an execution in his favor against the defendant upon the land. The defendant claimed that the land belonged to his wife, and was therefore not liable to attachment or levy by his creditors. It appeared that the land was conveyed solely to the wife, so that the legal title was in her and not in her husband. But the plaintiff contended that the defendant had in fact an interest in the land, because he was legally holden for a note given for money borrowed to pay for the land. He had signed the note with his wife for the money so obtained, and had joined with his wife in a mortgage of the premises in question, and also in a mortgage with her and her brother and stepmother of certain premises belonging to her to secure the payment of the note. The court, in affirming the judgment of the court below, which decided that the plaintiff could not maintain the action, said: "The fact that the payment of the note was wholly secured by mortgage of these premises, the title to which was in the wife alone, and of other premises belonging wholly to the wife and her relatives, in which the husband had no interest, shows quite clearly that it was regarded as a transaction of the wife, and not one for the benefit of the husband, and that it was not expected that he would pay the note or have any interest in the premises. He paid nothing whatever toward the premises, and the mere fact that his name was on the note given for money to pay in part for the land, when it does not appear that any reliance was, or could be placed upon him, and the note was secured wholly by mortgage of her lands and those of her relatives, is not enough to show that he had any real or equitable interest in the premises that could be taken by his creditors. But if this were otherwise, and it were shown that he paid the whole consideration, and the deed was taken to his wife for the purpose of keeping it out of the reach of his creditors, the plaintiff did not by his levy acquire the legal title, so that he could maintain either ejectment or *quare clausum* upon it. If the defendant was the real owner of the land, and the title held by his wife was merely in trust for him, his interest was liable to be taken by his creditors by levy. But a levy and set-off of his equitable estate would convey to the creditor only the equitable estate, and the proper course must be taken to obtain the legal title before an action at law can be supported upon the title. As the legal title was never in the defendant, the case stands differently from what it would if the defendant had once been the legal owner and had conveyed it away in fraud of his creditors. In such case the creditor may treat the deed from him as void, and the legal title as remaining in him. As the legal title was never in the defendant, if the deed to his wife was merely in trust for him, and was made so fraudulently as to his creditors, it could not have the effect to convey the legal title to the defendant" (citing Dewey v. Long, 25 Vt. 564).

6. *Dedication of land to public use.*

§ 645. To constitute a dedication of land for a street or highway there must be an intention to make the dedication, and an acceptance. The latter is usually indicated by acts, such as taking charge of and repairing the highway by the proper authorities.[1] The acts and declarations of the owner of the land should be deliberate, unequivocal and decisive. If they do not plainly show the intention to permanently abandon the property to the use of the public, they are insufficient to establish a dedication.

§ 646. It is not necessary that there should be any formal act of acceptance by the public authorities; but it may be indicated by common use under circumstances showing a clear intent to accept and enjoy as such the easement proposed to be dedicated. Throwing open land in a village and fencing it on each side, and causing the way or avenue to be designated as public on a map of the village, are acts tending strongly to show a design, presently, or at some future period, to dedicate and devote it to the public use. These acts, however, are not conclusive to establish a present dedication, binding on the owner of the land. One may fence off a strip of his own land for the purpose of a passage way, opening on a public street, or he may lay out a street through it, with the view of subdividing his land bounded upon it into village lots, intending, upon the sale of such lots, to dedicate the street to the use of the public. But in such cases, though the public may have occasionally, or, indeed, at all times, used the open way in passing to and from the inclosure of an adjoining proprietor, it could scarcely be pretended that the land had thereby become burdened with an irrevocable public servitude.[2] An action was brought to stay by injunction the commission of repeated trespasses by the defendant in removing a fence upon the plaintiff's land. The defendant

[1] Gentleman v. Soule, 32 Ill. 271.

[2] Holdane v. Trustees of the Village of Cold Spring, 21 N. Y. 474; s. c. 23 Barb. 103.

justified, on the ground that the land upon which the fence was placed had been dedicated by the plaintiff to the public. The strip of land to which the controversy related was sixty feet wide, extending from one highway to another, in Newburgh. The title to the soil was in the plaintiff, and both the parties had other lands adjoining it. The plaintiff erected fences on it adjoining the defendant's land, so as to prevent his using it as a road. The defendant repeatedly tore down the fences, and thus asserted a right to use the road as a public highway. If the defendant had not the justification which he claimed by virtue of a dedication of the land to public use, the plaintiff's action was well brought. The acts of the defendant were not wanton trespasses, which the repeated infliction of damages would be adequate to punish and to suppress. He asserted a perpetual public easement in the land for himself and all others, which assertion, if not restrained, might in time afford the vindication of such a claim. The existence of a highway over the land would, of course, be destructive of its value to the owner, and, therefore, the use of the land by the defendant or others for that purpose, and the removal of fences for that object, were acts substantially destructive of the inheritance or of the entire value of the property to the owner. In a deed of a part of the land to the plaintiff, the intention was expressed of permitting the use of the premises either as a public or a private road. The plaintiff had at one time instituted proceedings to have a public road laid out across it, but afterward discontinued the proceedings. Subsequently, the plaintiff laid the land out as a road, graded and worked it, and fenced it on both sides. When the road was first opened, gates were placed at each end. The period within which the plaintiff's conduct was alleged to have afforded sufficient evidence of the dedication of his property to the public extended over two years. During that time, no gates were standing on the road, and it was used and traveled by the public generally, on foot and with vehicles, with the plaintiff's knowledge. The work of grading the road was then going on; and after that was completed, and

shortly before the commencement of the suit, the gates, or one of them, was replaced. It was held that the facts did not make out an irrevocable dedication of the road by the plaintiff to public use, and that, consequently, the defendant had failed to justify his removal of the fences.[1]

§ 647. Land may be dedicated as a public highway by an immediate act of dedication, and it will become a highway in fact and in law, whenever it is laid out as such by the constituted authorities who are charged with the duty of laying out highways. This would be an acceptance of the dedication by those who are empowered to act for the public in that behalf. But an individual cannot by a simple act of dedication impose upon the public the burdens and responsibilities of maintaining a highway.[2] *

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[1] Carpenter v. Gwynn, 35 Barb. 395.

[2] The Trustees of Jordan v. Otis, 37 Barb. 50.

* "The doctrine of the dedication of property by the owner to public uses rests upon the principle of the common law, that whenever a person has made representations, or pursued a line of conduct with a view to lead or induce others to adopt a particular course of action, and such representations or conduct have produced that effect, they shall be held to be binding and conclusive against him, and he shall not afterwards be permitted to retract or repudiate them, to the injury of those who have been induced thus to act.

"This doctrine, so far from proceeding on the ground that such enjoyment was adverse and in hostility to the rights of the owner, supposes that it was with his assent. It has therefore been uniformly held, that where a title by dedication is set up, the use by the public must be shown to have been with the assent of the owner of the land. For without evidence of such assent, it would not appear that it was the intention of the owner that his land should be devoted to that use; and independently of such an intention he ought not be precluded from re-asserting his original rights in the land. Hence, the question in such cases, is always as to the intention of the owner in permitting the public to use his land for the purpose for which it is claimed to have been dedicated.

"The length of such enjoyment is a circumstance which constitutes proper, and usually very important evidence from which the assent and intention of the owner may be inferred; and it may also tend to show whether the accommodation of the public, and the rights of individuals might be injuriously affected by an interruption of the use. But when it is shown that the owner of the property has devoted it to the use of the public by laying or leaving it out for that purpose, and that these consequences would result to the public and to individuals from such interruption, the question whether he ought to be permitted to reclaim his original rights in the land, should not depend on whether he has permitted the public to use it for a longer or shorter period of time. Hence, it has been decided that the right of the public, in these cases, does not depend upon any particular length of possession.

"This view of the subject, furnishes an explanation of what is meant by the courts, when they speak of the length of time during which it is necessary that land should be used by the public as a highway, in order to gain a right to it

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In Felch v. Gilman,[1] the question was whether the plaintiff could sustain trespass *quare clausum fregit* against the defendants for going upon his lands to repair the highway, upon the ground that the selectmen of the town had not filed a certificate with the town clerk of the opening of the road. The road had been fenced by the plaintiff at the time it was laid out, he had accepted his damages therefor, and the town had made the road and kept it in repair. It had been traveled by the public twelve or thirteen years, and this without any objection from the plaintiff. It was held that as the road had in fact been recognized by the town as a public highway, they were bound to keep it in repair; and that as the plaintiff had acquiesced in treating it as a public highway, it was then too late for him to object that the town had not the right to repair it. In New York, it has been held that where land is dedicated to the public, express acceptance by the public authorities is not requisite, nor user for a length of time sufficient to create a title by prescription; but that there must be an acceptance or user; and that user for a short time, express and unequivocal, treating the strip of land as a street or highway is sufficient.[2]* The

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by dedication for that purpose; and shows that it was not intended to lay down an absolute rule of law which required in every case, a particular and invariable period of time during which there must be such use in order to acquire such right; but only that it should be for such length of time that, under the circumstances, it should satisfy the minds of the jurors that it was with the assent of the owner of the land, and that the rights of the public and others would be injuriously affected by permitting the owner to resume his original right to exclude the public therefrom. Each case, in this respect, depends on its own circumstances; and it was only with reference to the particular cases before them, that the courts have spoken of the time during which the use of the public had been permitted to be continued" (Storrs, J., delivering the opinion in Noyes v. Ward, 19 Conn. 250).

[1] 22 Vt. 38.

[2] Bissell v. N. Y. Cent. R. R. Co. 26 Barb. 630; approving Clements v. The Village of West Troy, 10 How. Pr. R. 199; but see The City of Oswego v. The Oswego Canal Co. 2 Seld. 257.

* A road opened by an individual, and used by the public less than twenty years, is not a highway, within the meaning of the highway acts of New York, unless it has been laid out as such by the commissioners of highways or other public officers, upon whom the duties of commissioners of highways are devolved by law (The Trustees of Jordan v. Otis, 37 Barb. 50, per Morgan, J., citing The City of Oswego v. The Oswego Canal Co. *supra*).

In The State v. Bradbury, 40 Maine R. 154, it was held that a way by dedication

leaving a strip of land uninclosed between the owner's house or store and the highway, will not constitute a dedication of the land to the public use. But the public may, by using it for the ordinary purposes of a highway, acquire a right to so use it, by adverse possession. There can however in such case, be no constructive possession of the public beyond the

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of the owner of the land did not become a public highway without user for twenty years, or an acceptance on the part of the town; and that repairs made upon it by a surveyor of highways did not constitute such acceptance, for want of authority to bind the town (and see Kelly's Case, 8 Gratt. 632; Hyde v. Jamaica, 27 Vt. 443; The People v. Lawson, 17 Johns. 277).

A road cannot be imposed upon the public authorities by the act of the owner of the lands through which it passes. Such a road does not become a public highway because it is used as such by the public, until the proper authorities proceed to lay it out as such, in the mode pointed out by the statutes of the State. Whatever rights individuals may acquire to pass over it, or adjoining owners may claim in respect to the dedication, the commissioners of highways cannot be called upon to repair it as a public highway, nor can they exercise any legal control over it, until they have accepted it in the mode prescribed by statute, and thereby made it a legal public highway. Nor can they sue the owner for shutting it up, having no legal control over it until they have taken proper steps to constitute it a public highway subject to their supervision and control as public officers (The Trustees of Jordan v. Otis, *supra*).

Hart v. Connor, 25 Conn. 331, was an action of trespass for entering upon and digging up the soil of the plaintiff's land. The acts complained of were done under the authority of one Noble, who had been the owner of the *locus in quo*, which together with other adjoining land he conveyed to the plaintiff, reserving the right to open a highway, three rods wide, from the north to the south line of said land, not to be laid further west than certain designated points. The plaintiff claimed that the right of opening a highway under the reservation, must be exercised in a "reasonable manner according to the views of the jury as to all the surrounding circumstances and the situation of the premises." It was held that the court below gave the plaintiff all he ought to claim when the jury were instructed that Noble had full right under said reservation to exercise his own judgment fairly, and to open, or elect to open, a highway within the given monuments over said premises wherever he judged best, provided he did not act wantonly and oppressively in so doing. It appeared that previous to the opening of the road for which the action was brought, Noble had elected to open a road under the reservation, in another place, and had commenced laying it out in such place; and the plaintiff contended that his former election was conclusive upon him to prevent any other laying out or opening of a road under the reservation. It was held that if the first election had been a legal exercise of the power reserved, the effect claimed for it would have followed; but that as it was not a legal exercise of the power, and was not acquiesced in by the plaintiff, it had no effect to prevent another election; and that if the plaintiff had acquiesced in the unauthorized location, Noble might perhaps have been estopped from making another selection.

In Bissell v. The N. Y. Cent. R. R. Co. 23 N. Y. 61; reversing s. c. 26 Barb. 631, it was held that although as regarded the public generally, a street did not become a public highway until there had been an acceptance or user, yet as between grantor and grantee, the conveyance of a lot bounded on a piece of ground laid out upon a map as a street, but which was not in fact a public street or highway, carried the grant to the middle of the proposed street.

limits which are defined by the user upon the land, or by other marks or boundaries marking the extent of the claim.[1]

§ 648. Although the owner of land, in a city or village, may show by his acts an intention to dedicate a street or square or other plot of ground to the public use, no sufficient or valid reason can be assigned against a change of purpose and a subsequent resumption of the possession, unless the public accommodation and private rights are to be materially affected by an interruption of the enjoyment. If, however, private rights have been acquired with reference to such dedication, and such an interest secured, with the assent and concurrence of the owner, as would render it fraudulent in him to resume his rights, the dedication becomes irrevocable.[2] * Where the owner of land opens a way with the intention to dedicate it to the public use as a street, and building lots have been sold and built upon bounded on it, with the understanding on the part of the purchasers that the land was permanently devoted to public use; or if the public accommodation will be seriously impaired or affected by an interruption of the use or enjoyment of the subject of the

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[1] Morse v. Ranno, 32 Vt. 600.

[2] Cincinnati v. White, 6 Peters, 431; Haynes v. Thomas, 7 Ind. 38.

* Mr. Angell (Highways, § 168), says, that though a dedication cannot be revoked by the donor, the highway itself may be relinquished or discontinued by the public; or, according to some authorities, may be lost by long continued non-user, or by adverse possession for twenty years; though, according to other authorities, no lapse of time or cessation of user will deprive the public of the right of passage over a road which has once been a highway, whenever they please to resume it. The latter doctrine is sustained by the earlier decisions of the common law, and by Simmons v. Cornell, 1 R. I. 519, and some other modern authorities. But the later decisions in England and the United States seem generally to favor the opposite doctrine. There is no ground for making a distinction between a highway by dedication, and one laid out in any other way by the laws in force upon that subject, or acquired by any process or means whatever. Where the road is legally laid out and is matter of record, it is no more a public highway than as though the right has been acquired by the public by dedication. Nor are the public rights any greater in the one case than in the other, or any different. Nor is there any more inconsistency in presuming a record of the discontinuance of the highway to be lost, than there is in presuming a lost deed or release (Webber v. Chapman, 42 N. H. 326).

Where a highway, originally laid out six rods wide, was encroached upon by fences for a period of thirty years, so as to make it but four rods wide, it was held that the land taken by the encroachment ceased to be a highway (Peckham v. Henderson, 27 Barb. 207; Walker v. Caywood, 31 N. Y. 51, *contra*).

dedication, the owner will be precluded from reclaiming his land. But where nothing has been done except to open a street or way, upon the owner's land, connecting with the public street of a village, and terminating upon such land, and no private rights have been acquired, and the circumstances do not manifest a clear and decided purpose of permanently abandoning the property to the public use, though the public may have enjoyed free and indiscriminate passage over it to and from the premises of an adjoining proprietor, such land is not thereby charged with a perpetual public burden.[1]

7. *The taking of private property for public use.*

§ 649. The right to take private property for public purposes does not depend upon any express provision in the charter of government, but is an inherent attribute of sovereignty existing in every independent State.* Private interests must yield to public wants. This is what is meant by the right of eminent domain. But the exercise of this prerogative is confined to cases of public necessity or convenience. By necessity is not understood absolute physical necessity, but so great a public benefit that the want is a public inconvenience.[2] To justify the taking, however, the exigency must be evident and imperious.[3] No person's property can be taken from him without his consent, unless it is actually needed for public use;[4] and the determination of the ques-

[1] Holdane v. Trustees of Village of Cold Spring, 21 N. Y. 474; Lee v. The Village of Sandy Hill, 40 N. Y. 442.

[2] Com. v. Inhabs. of Cambridge, 7 Mass. 157.

[3] Le Coul v. Police Jury, 20 La. An. 308.

[4] Nesbitt v. Trumbo, 39 Ill. 110; Crear v. Crossly, 40 Ib. 175; Osborn v. Hart, 24 Wis. 89; Bankhead v. Brown, 25 Iowa, 540; Memphis Freight Co. v. Memphis, 4 Cold. Tenn. 419.

* In New York the right of eminent domain has never depended on written constitutions, although by those of 1821 and 1846, its exercise is declared to be limited upon the condition of making just compensation (Const. of N. Y. of 1821, art. 7, § 7; Ib. of 1846, art. 1, § 6). The constitution of 1777 contained no similar provision; and yet, I apprehend, no one, from the foundation of the government, ever doubted the existence of the right from the silence of the constitution on the subject (Heyward agst. The Mayor of New York, 7 N. Y. R. 314; 8 Barb. 486.

tion as to what constitutes a public use belongs to the courts.[1] * If taken for any other cause than common convenience and necessity, the proceedings are irregular, and may be quashed.[2] It has been held that if the authorities of a town lay out a road, not because necessity and convenience require it, but for other purposes which may be injurious to an individual, they will be liable to respond in damages therefor.[3]

§ 650. Private property cannot lawfully be taken for public use without compensation.[4] Although the principle of compensation does not seem to have been carried so far as to make an officer who enters upon private property, by virtue of legislative authority specially given for a public purpose, a trespasser if he enters before the property is paid for, yet compensation ought at least to be provided before the

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[1] Tyler v. Beacher, 44 Vt. 649. [2] Com. v. Sawin, 2 Pick. 547.

[3] The Third Turnpike v. Champney, 2 N. H. 199.

[4] Avery v. Fox, 1 Abb. U. S. 246.

* There may be such an interruption to the common and necessary use of property as will constitute a taking for public use, although the owner's title to the land is not divested (Pumpelly v. Green Bay Co. 13 Wall. 166). A commander of militia cannot lawfully cause them to encamp on the land of an individual without the owner's consent, and if he does so, he is liable as a trespasser (Brigham v. Edmands, 7 Gray, 539). Bigelow, J.: "Such exclusive occupation of land necessarily includes the possession, for the time being, of all the crops and other property on the premises, the damage to which, occasioned by a large body of men assembled for the purpose of being there exercised, according to the statute, 'in the whole routine of camp and field duty,' would not be very slight or immaterial. Nor is it to be overlooked, if this right exists, that there is no limit to its exercise, by which to restrain an officer from annually designating the same premises, and occupying them for the same purposes for any number of successive years. The statement of such a claim is sufficient to refute it. This, therefore, is not a case where there is a right to an incidental, temporary or occasional use of private property, rendered necessary in the performance of a public duty, and where the beneficial possession of the owner is not substantially interfered with, as is the case in entering on land for the purpose of making surveys for highways or railroads, or in perambulating the boundaries of towns. But it is a claim to an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage. Such a right cannot be exercised except under the authority of the legislature, expressed in clear and distinct terms, or by necessary implication, and with suitable provisions for compensation to the persons whose property may be so appropriated or injured."

The extension of the boundaries of a city, does not constitute the taking of private property for public use (Wade v. Richmond, 18 Gratt. 583).

property is taken. * It is manifestly the duty of the legislature to make provision for compensation whenever it authorizes an interference with private right. Perhaps in certain cases the exercise of the power might be judicially restrained until an opportunity was given to the party injured to seek and obtain compensation. But it is doubtful whether, notwithstanding a statute clearly and expressly directed the taking of private property for a necessary public object, it would not still be a nullity, and the officer who undertook to execute it a trespasser, if a provision for compensation did not constitute part of the act itself.[1] †

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[1] Rogers v. Bradshaw, 20 Johns. 735; s. c. Ib. 103.

* In Pennsylvania, the compensation need not have been ascertained and paid when private property is taken for public use, but an adequate remedy must have been provided by which the owner can obtain compensation without unreasonable delay (Commonwealth v. Pittsburgh &c. R. R. Co. 58 Penn. St. R. 26; Const. of Pa. art. 9, § 10).

In New Hampshire, the statute must provide for the seasonable assessment of damages and their prompt payment (Ash v. Cummings, 50 N. Hamp. 591). In Tennessee and Texas, it is sufficient if provision be made for future payment (Anderson v. Turbeville, 6 Cold. Tenn. 150; Smith v. Taylor, 34 Texas, 589); but the statute must provide for the payment of the compensation within a reasonable time (Buffalo Bayou &c. R. R. Co. v. Ferris, 26 Texas, 588).

In Georgia, in taking private property for public use, provision must be made for just compensation, excepting in urgent and extraordinary cases (Loughbridge v. Harris, 42 Geo. 500).

In Indiana, private property cannot be taken for public use until compensation is first assessed and tendered (Graham v. The Connersville & New Castle Junction R. R. Co. 36 Ind. 463).

In Wisconsin, a railroad company which enters upon and appropriates land to its own use, without making compensation therefor, or having its value ascertained as provided by law, and tendering the amount, is liable in trespass for the actual damages, whether the owner of the land has taken measures to have the value assessed or not (Loop v. Chamberlain, 20 Wis. 135). In Indiana, in a similar case, the owner may maintain an action against the company to recover possession of the land (Graham v. Columbus &c. R. R. Co. 27 Ind. 260).

In California, where land is taken for a public highway, the right of way will not vest in the public until payment or tender to the land owner of the amount awarded for his damages (Brady v. Bronson, 45 Cal. 640, and cases cited.

In Kansas, until the payment of the money or its deposit, a railroad company obtains no right to land taken for its road, unless it be the right to make a survey (Missouri, Kansas & Texas R. R. Co. v. Ward, 10 Kansas, 352); and proceedings to procure a condemnation of the right of way are not a bar to an action previously commenced, nor will they cure past trespasses (Ib.; Const. of Kansas, art. 12, § 4; Atchison, Topeka & Santa Fe R. R. Co. v. Weaver, 10 Kansas, 344).

† Comins v. Bradbury, 10 Maine, 447, was an action of trespass against the agent of the State for locating a State road across the plaintiff's land. It was insisted by the defendant that the action ought not to be sustained, inasmuch as the plaintiff might have full justice done him upon petition to the legislature. To which the court replied, that this could not have been the mode by which to

§ 651. A statute which directs the taking of private

obtain the indemnity contemplated by the constitution; that it was of too precarious and uncertain a character; that compensation must be made or provided for when the property was taken, and that it was upon that condition alone that such taking was authorized.

In Maine, it has been held that a school district, in taking land for a school house which the owner refuses to sell, must first pay or tender the appraised damages, and it will be no justification that the tender was made after an action of trespass brought against the building committee for taking the land (Storer v. Hobbs, 52 Maine, 144. Appleton, C. J.: "Assuming the owners of the land to have refused to sell or to have asked an unreasonable price for the lot in controversy, still the district had no right to enter upon, or take the lot, except on payment or tender of such damages as the municipal officers of the town should appraise. But the district, without such payment, proceeded to erect a school house on the plaintiff's land, in which the defendant, by his own admission, participated, and by so doing became a trespasser. The tender of the damages appraised by the selectmen having been made after the school house was erected and this suit commenced, can afford no justification. It should have been made before the lot was taken. No valid reason is disclosed why it was not done. The title of one of the plaintiffs was on record, and so far as thereby appeared, he was the owner of the whole estate. *Prima facie*, a tender to him would have sufficed."

An Indian having the right to the actual and separate occupancy of lands upon a reservation until the amount he is entitled to receive for his improvements has been awarded, may maintain an action for trespass upon such lands, notwithstanding a band of Indians belonging to the tribe have forcibly prevented the arbitrators from making the appraisal and award. Blacksmith agst. Fellows, 7 N. Y. 401, was an action for assault and battery and breach of the plaintiff's close, brought by a native Indian of the Seneca nation. The facts of the case, as detailed by Edmonds, J., who delivered the opinion of the New York Court of Appeals, were substantially as follows: There was formerly a dispute between the States of New York and Massachusetts as to a large tract of land, of which the *locus in quo* was a part. In 1786 the dispute was settled by a cession from Massachusetts to New York of the government sovereignty and jurisdiction of the land in controversy, and by a cession from New York to Massachusetts of the right of preemption of the soil from the native Indians, and all other right or title of New York to the same. The land was then occupied and owned by a tribe of Indians, and all that Massachusetts acquired by a cession to her was the exclusive right of buying from the Indians when they should choose to sell. This right was duly vested in Ogden and Fellows by the State of Massachusetts. But before Ogden and Fellows could enjoy any benefit from that grant from Massachusetts, it was necessary for them to acquire the Indian right. A conveyance from the chiefs of the tribe was executed to them, with the assent of an officer of Massachusetts and a commissioner on the part of the United States, of the whole of what was known as the Buffalo and Tonawanda reservations, it being agreed that the amount to be paid for the improvements thereon should be determined by arbitrators. Ogden and Fellows were to have possession of the forest lands within one month, and of the improved lands within two years after the report of the arbitrators should be filed in the war office, provided that the amounts awarded for improvements should, on the surrender of the possession, be paid to the President of the United States, to be distributed among the owners of the improvements in the sums awarded to each of the arbitrators. This indenture was incorporated into and formed part of a treaty made at the same time between the United States and the same chiefs. Arbitrators were afterward appointed, agreeably to the terms of the treaty and indenture. But they were unable to award as to the amount to be paid to each individual for his improvements on the Tonawanda tract, for the reason that that portion of the nation which was in possession of that tract refused to let them perform their

property for public use must be strictly construed,[1] and the mode pointed out by the statute for ascertaining and paying the compensation must be followed, or the proceedings will be void, and all persons acting under color of them trespassers.[2] Where a statute made it the duty of a plank-road company to give notice of its intention to take the land of individuals for its road, and to endeavor to agree with the occupiers upon the damages, or upon men to assess them, or if either party upon due notice refused to join in the choice of men for that purpose, then a justice of the peace where the land lay was to choose them; but the property was not to be taken until the assessed value was tendered or paid, or adequate security given to the owners for the payment thereof; and the land was taken without any effort to adjust the compensation, and without any tender or payment of or security given for the same; it was held, that the company and all who acted by its authority in entering upon and taking possession of the plaintiff's land were trespassers at common law.[3]

§ 652. The right of eminent domain implies the right in the sovereign power to determine the time and occasion, and as to what particular property it will be exercised.[4] The meaning of this is, that where the use for which the property is desired is in its nature public, the legislature are the supreme and final judges of the question whether the public necessity or benefit is such as to call for the exercise of the

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duty in this respect, and removed them by force from the tract when they went there, as they did twice, for the purpose of making their examinations and award. At the end of the two years after filing the report in the war office, and upon the payment to the President of the United States of the aggregate sum awarded by the arbitrators, Fellows, as the survivor of his joint tenant, Ogden, entered by force and ejected the plaintiff from the improvements which he possessed. Those improvements, consisting of a dam and saw mill, had been made by the plaintiff and seven other native Indians twenty years previous, and he was in the actual occupation of them when the defendant entered and turned him out. A judgment having been rendered for the plaintiff in the Supreme Court, it was affirmed in the Court of Appeals.

[1] New York &c. R. R. Co. v. Kip, 46 N. Y. 546; Hannibal Bridge Co. v. Shaubacker, 49 Mo. 555; Trumpler v. Bemerly, 39 Cal. 490.

[2] Stanford v. Worn, 27 Cal. 171. [3] Brown v. Powell, 25 Penn. St. R. 239.

[4] Heyward v. The Mayor, 7 N. Y. 314.

power; whether the time is a fitting one; what particular property may be taken, and in what manner in respect to the instrumentalities to be employed for the purpose—whether State officers, individuals, or corporations. All these are purely matters of discretion, within the exclusive cognizance and jurisdiction of the legislature.[1] But no power exists in the legislature, or elsewhere, to take private property without the consent of the owner for public use, with or without compensation, except by due process of law, by which is meant the judgment of law pronounced after the matter has been judicially ascertained.[2] A person cannot lawfully be deprived of his property without his consent by mere legislation.[3]

§ 653. Private property may be taken for public improvements, with their incidental and reasonable conveniences and appurtenances, notwithstanding the work is done by individuals or a corporation who are to derive a pecuniary benefit therefrom, if the legislature deem it for the public interest;[4] and the public benefit contemplated may be confined to a particular community.[5]*

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[1] Matter of Townsend, 39 N. Y. 171.

[2] Const. of U. S. art. 5; Const. of N. Y. of 1846, art. 1, § 6.

[3] Stewart v. Wallis, 30 Barb. 344.

[4] Matter of Townsend, *supra*; Bloodgood v. Mohawk & Hudson River R. R. Co. 18 Wend. 9; Ash v. Cummings, 50 N. Hamp. 591; Loughbridge v. Harris, 42 Geo. 500, *contra*.

[5] Bloomfield &c. Natural Gas Light Co. v. Richardson, 63 Barb. 437.

* The act of New York of 1817 in relation to the construction of canals was considered in the Court of Errors and in the Court of Chancery. In the case of Rogers v. Bradshaw, 20 Johns. 735, it was held, that a statute having for its object a great improvement, and vesting in the officers concerned in its construction very extensive powers, should receive a liberal construction. And it was decided that the agents of the State might enter upon and appropriate any lands adjacent to the line of the canal which were necessary to be taken, and that the commissioners were to determine in their discretion as to the necessity of such appropriation; and if they acted in good faith and with sound common sense, it was impossible they should be trespassers. In Jerome v. Ross, 7 Johns. Ch. R. 330, it was held, by the chancellor, that all the acts on this subject must be considered together, and that the commissioners had large powers in the expenditure of the public moneys, and discretionary authority to pay for the temporary use of lands and the appropriation of materials.

In Rogers v. Bradshaw, *supra*, the case came before the Supreme Court on a *certiorari* founded upon a justice's judgment. It appeared by the return of the justice that Bradshaw sued Rogers and Magee in trespass for entering, in June,

§ 654. Although private property cannot be lawfully taken for public use, without due notice to the owner of the

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1821, upon his land and cutting down timber. The defendants justified under the several acts of New York relative to the canals. The act of 1816 (Sess. 39, ch. 237) made it the duty of the commissioners to cause those parts of the territory of the State which might be upon or contiguous to the probable courses and ranges of the canal to be explored and examined for the purpose of fixing the most eligible routes; and they were to cause all necessary surveys and levels to be taken, and to adopt and cause to be executed proper plans for the construction and formation of the canals. Next came the act of 1817 (Sess. 40, ch. 262), continuing the powers conferred upon the commissioners by the former act, and increasing them. It was declared to be lawful for the canal commissioners, and each of them, by themselves and agents, to enter upon and use, all and singular, any lands, waters, and streams necessary for the prosecution of the improvements intended by the act, and to make all such canals, locks, dams, and other works and devices as they might think proper for making said improvements, doing, nevertheless, no unnecessary damage. By the act of 1820 (Sess. 43, ch. 202), it was declared that in all cases in which it should be deemed necessary by the principal engineer in laying out the line of the canals, or any work connected therewith, to discontinue or alter any part of a public road or highway on account of its interfering with a proper location or construction of either of the canals, the engineer should be authorized to make such discontinuance or alteration, provided that the canal commissioners, before they obstructed the passage or any part of a highway then legally established, should open, and reasonably work, in order to render it passable, such part of the said highway as might be newly laid by the engineer. The alleged trespass was committed by the defendants in the construction of a canal, the cutting of the timber complained of being necessary to complete a road which they had made in place of part of a turnpike road taken for the canal. It was proved that the route of the canal at the place in question was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed was unavoidably encroached on by the track or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced; that the land on which the entry was made was a necessary, if not the only course for the road, and was the least expensive and best for the accommodation of the public; that the chief engineer approved the road as staked out, and it was staked out by his direction; and that the two defendants, under the authority of the canal commissioners, were putting the ground in the form of a turnpike when the action of trespass was brought. Upon these facts, the justice gave judgment for the defendants. The Supreme Court, in reversing the judgment of the justice, stated that the land of the plaintiff was not entered upon for the prosecution of canal improvements, but was taken as a substitute for part of the turnpike road, which had been broken up, and taken for the canal, and therefore the case did not come within the powers given to the canal commissioners by the act of 1817. It was further stated, that the case did not come within the powers granted by the act of 1820, because a turnpike was not a public road or highway within the meaning of the act, and because the act contained no provision for compensation to the owner of the land so taken. The views of the Supreme Court will more fully appear from the following extract from the opinion, which was delivered by Chief Justice Spencer:

"It has been already observed that the plaintiff's land was not entered upon for any purpose immediately connected with the canal, but was taken as a substitute for part of a turnpike road, which was broken up and taken for the canal: and without some legislative authority independently of the act of the 40th session, ch. 262 (act of 1817), the trespass now complained of cannot be justified. This must have been the sense of the legislature, and probably of the canal commissioners, in the enactment of the act of the 43d session, ch. 202, sec.

property, yet if he be not known and cannot be ascertained,

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21 (act of 1820). The first objection is, that the act last referred to applies only to a public road or highway, and that the turnpike road is not a public road or highway, but the property of the turnpike corporation. It is undoubtedly true that there is a material and manifest distinction between a public road and highway, and a turnpike road. The former is open and public for the passage of every person, without any toll or other imposition, whereas the latter is private property, subject to be traveled over on first paying an equivalent for its use prescribed by the legislature. It is impossible to extend the provision relative to a public road and highway to embrace a turnpike road, without doing violence to the expressed and declared intention of the legislature. The act under consideration contains no provision to compensate at any time those whose lands may be taken as a substitute for a public road or highway, altered or discontinued by the principal engineer for the damages they sustain. This is directly opposed to the fifth article of the amendments of the Constitution of the United States, which forbids the taking of private property for public use without just compensation. The same inhibition to the power of the legislature is contained in the late amendments to the Constitution of this State. I do not rely on either as having a binding constitutional force upon the act under consideration. The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative. But they are both declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice" (referring to People v. Platt, 17 Johns. 215).

The chancellor in delivering the opinion of the Court of Errors, which was unanimous in reversing the judgment of the Supreme Court, said: "It is very certain, according to the testimony, that the improvement of the canal at the place specified could not be prosecuted without the road; and if so, the road was necessary for the improvement. Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements; and if they had even erred in judgment as to the extent, or the greater or less degree of that necessity, they could not be responsible as trespassers, unless they had acted in bad faith, or with such egregious indiscretion as to amount to it. In this case, however, there is no color or pretense for any such suggestion. It was shown upon the trial before the justice that the land taken was almost the only course for the road, and was the least expensive and best for the accommodation of the public. Upon the very straitened construction set up on the part of the defendant in error, it might truly be said that if the course of the canal met a house or barn, or barrack or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land of the same owner without committing a trespass upon the land. It might just as well be said in such a case, as it has been said in this, that the new ground taken for the occupation of the building was not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal. Every interpretation which leads to an absurdity, or to embarrass or defeat the purposes of the statute, is to be avoided. If the commissioners under the act of 1817 had no power to make a substituted road on the neighboring ground in place of that part of the turnpike they had broken up, what was to be done? They could not go on with their work, nor could the public travel without a road. The line of the canal must have either been diverted from its course, and perhaps with great and lasting public inconvenience to avoid touching the turnpike, or else the progress of the canal must have been suspended until an opportunity was given for an application to the legislature for new powers.

"In the opinion of the Supreme Court, this provision (act of 1820) does not apply to a turnpike road, because it is private property, and not a public road or highway, within the meaning of the act. Here, I think also, the construction

a general public notice to all persons interested will be suf-

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is too limited for the object and the subject-matter of the provision. A turnpike is a public road or highway in the popular and ordinary sense of the words, and in that sense the legislature are to be presumed to have employed them.

"But the court below consider the absence of any provision in the act of 1820 for compensation to the owner of the land for damages sustained by such an alteration of the road, as a still more serious difficulty in the application of the statute to the case. It appears to me to be a sufficient answer to this objection, that the act of 1817 had provided the remedy for compensation for every injury committed by the commissioners in the execution of their powers; and when new powers are added (though I apprehend the act of 1820 did not, on this point, confer any power not before existing) the same remedy would apply. All statutes which are *in pari materia* are to be taken together as if they were one law; and in many instances a remedy provided by one statute will be extended to cases arising on the same subject-matter under a subsequent statute. The act of 1820 was only a specification of the course of duty of the commissioners in a particular case; and it would have been quite unnecessary and quite idle to have provided that the general remedy for all damages occasioned by the exercise of any part of the whole mass of undefined power given by the act of 1817, should apply to a portion of that power exerted in the particular manner provided for by the act of 1820" (see 2 Hill, 347).

Wheelock v. Young, 4 Wend. 647, was an action of trespass for carting from the plaintiff's land cobble stones for the construction of such portion of a canal as passed through the plaintiff's farm, under the act of New York of 1817, authorizing the agents of the State to enter on the lands of individuals and take materials for the construction of the canals. At the trial at the circuit, the court charged that the foregoing act did not justify the entry on the lands of the plaintiff and taking the stone. 1st. Because the act provided no means of compensation for materials taken in the construction of the works authorized by it. 2d. That the act was unconstitutional and void in appropriating private property to public purposes without compensation. A verdict having been found for the plaintiff under the foregoing charge, the Supreme Court said: "The cases settle the right of the commissioners to enter upon private property and appropriate to public use without being trespassers, which is all that is necessary to the defendant's justification in this case; and they seem to obviate the difficulty of the learned judge at the circuit. The language of the constitution is, 'nor shall private property be taken for public use without just compensation.' Any law which should authorize private property to be taken for public use, and should, at the same time, direct that *no compensation* should be allowed for it, would be unconstitutional; but a law which authorizes such appropriation, and merely omits to provide the mode of making such compensation, is not unconstitutional. In relation to our canals, the legislature have not been unmindful of their duty. The means of compensation have been provided, and there is no provision in the constitution that compensation shall *precede* the appropriation of private property. The act of 1817 authorizes the entry upon and appropriation of any lands necessary for the purpose of constructing the canals. Land includes everything beneath and above the surface. The commissioners might take the whole; of course they might take part. They might take gravel for embankments, or stone or timber for any necessary purpose in the prosecution of the work. They are to make 'all such canals, feeders, dykes, locks, dams and other works and devices as they may think proper.' They could not do all this without materials, and it might happen that the owners of materials most convenient might refuse to sell. Were the commissioners, then, to stop their work, because the owners of stone and timber refused to sell? Certainly not. They were to take them, 'doing nevertheless no unnecessary damage.' The legislature knew that some damage must necessarily be done to the adjacent lands. They must have contemplated the taking of materials, and a temporary appropriation of land; otherwise such a caution was unnecessary. For in re-

ficient.* Hildreth v. City of Lowell[1] was an action for breaking and entering the plaintiff's close and constructing a drain through it. By a city ordinance it was provided that before a drain or common sewer should be located through private lands, notice in writing should be given to the owners of the land though which it should be laid; and the plaintiff contended that the location of the drain through his land was illegal, because notice was not given according to the requirements of the ordinance. It did not appear to whom the land now owned by the plaintiff, did in fact belong when the proceedings relative to the location of the drain took place, or that any of the officers of the city knew of the existing state of the title therein. One conveyance

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gard to the lands appropriated for the canals themselves, such lands were of course to be rendered useless for every purpose except for canals. The contemplated necessary damage must therefore be upon other lands than those appropriated for the immediate track of the canals."

In Palmer v. Aldridge, 16 Barb. 131, the action was brought for taking down and injuring a fence belonging to the plaintiff. The defendant pleaded that the premises in question were the property of the State, being a part of the lands appropriated for the Erie canal, and that he had, by permission of the superintendent of repairs, before that time deposited a quantity of stone upon the said premises; that the plaintiff had wrongfully erected the fence upon the towing path and around the stone; and that in order to remove the stone, the defendant had taken down the fence and removed it, doing no unnecessary damage thereto. The plaintiff replied, denying that the premises were the property of the State, and alleging that it was immaterial who was the owner of the land, inasmuch as he was at the time of the commission of the said trespasses, and for a long time, had been in the actual possession of the same; that the stone were so deposited for the private use of the defendant; that before they were so deposited, the plaintiff had forbidden the defendant to deposit them there; that the superintendent of repairs had no authority to give the defendant permission to deposit the stone there; and that he inclosed the land with a fence for the purpose of cultivating it. It was proved on the trial that the plaintiff had been in possession of the land nearly twenty years; that he plowed it, but did not plant it, because he could not get timber to fence it, and it lay uninclosed until after the stone were placed upon it; and that one of the former owners of the land had a barn on the spot where the stone was laid. Gridley, J., in delivering the opinion of the General Term of the Supreme Court, remarked that, assuming that the plaintiff had peaceable and exclusive possession of the premises, such possession would probably give him a right of action against a wrong-doer; but that as the regulations of the canal board, which would alone show whether a superintendent of repairs upon canals had authority to confer upon another the right to deposit stone upon lands appropriated for the Erie canal, were not inserted in the case, there must, for that reason, be a new trial.

[1] 11 Gray, 345.

* In Tennessee, where private property is taken for public use, notice of the proceedings need not be given to the owner; but he must have notice of the assessment of compensation (Anderson v. Turbeville, 6 Cold. Tenn. 150).

was made under such circumstances that it was afterwards declared to be illegal and void, and different parties preferred their respective claims to the estate. In the then existing uncertainty concerning the ownership, public notice to all persons interested, seeming to be the only safe and effectual, and indeed the only practicable means by which the proprietors of the land could be apprised of the intended action of the city authorities in the location of the drain, it was held sufficient.

§ 655. Highway commissioners are liable as trespassers if they are misled as to the correct line of the road in attempting to open it;[1] and where, in an action of trespass against an overseer of highways, the defendant sets up an order from the commissioners to open a road, it will not constitute a defense unless it be shown that the road was legally laid out.[2]* But if a court has jurisdiction to open a road, a surveyor will be justified in executing the order of the court requiring him to open it though such order be irregularly made.[3]

§ 656. Persons contracting with a town to construct a road may adopt every suitable means in furtherance of the object, provided full opportunity is given to the owner of the land over which the road passes to take from it such things as belong to him; and they may necessarily enter upon the adjoining land, doing as little damage as possible.[4]†

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[1] Guptail v. Teft, 16 Ill. 365; Beckwith v. Beckwith, 22 Ohio, N. S. 180.

[2] Beyer v. Tanner, 29 Ill. 135; Barnard v. Haworth, 9 Ind. 103.

[3] Yeager v. Carpenter, 8 Leigh, 454.

[4] Dovaston v. Payne, 2 H. Blk. 527; Stackpole v. Healey, 16 Mass. 33; Cool v. Crommet, 13 Maine, 250; Wight v. Phillips, 36 Ib. 551.

* In an action of trespass against a road supervisor for prostrating the plaintiff's fences and felling his timber, the answer did not set up that there was any highway, either in law or in fact, where the alleged trespass was committed; but the defense was based upon the ground that the map of the roads furnished by the town clerk showing a road in the *locus in quo* was a sufficient justification, within the rule that a ministerial officer is not responsible for the issuing of process or executing the same, so long as the authority under which the process is awarded had jurisdiction over the subject-matter. But it was held that the map was in no just or legal sense *a process*, and that unless there was a road *de facto* or *de jure* in the *locus in quo*, the plaintiff was entitled to recover (Campbell v. Kennedy, 34 Iowa, 494).

† In Cool v. Crommet, *supra*, the main facts of the case were embodied in

It is a common principle that when the law gives a right, it at the same time impliedly gives what is necessary to a reasonable enjoyment of that right. Therefore, digging the soil and using the timber and other materials found within the limits of the highway, for the purpose of making and repairing the road or bridges, are incident to the easement. This incidental, and to some extent contingent right, should no doubt be taken into the account in assessing the damages of the adjoining owners.[1] * Where a highway was not altered, and its location changed to the place from which stone had been taken, until after the commissioners had taken and used them in their work, it was held that, as the stone when

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the following extract from the opinion of the court: "When it was necessary to use two yoke of oxen in scraping, while making the road, the forward cattle, in turning, would frequently pass on to the plaintiff's land. If this was caused by the voluntary acts of the defendants, it may be understood to have been necessary; for the report finds as well in reference to this part of the case, as to the fact that the cattle strayed on to the plaintiff's land, that no intention or disposition was manifested either by the defendants or any other persons in their employment to do any injury to the land adjoining the road which could be avoided. If the road could not be made without turning the forward cattle sometimes on to the land adjoining, the defendants cannot be adjudged trespassers for so doing. They were not only engaged in a lawful act, but in the discharge of a duty which they were bound to perform. The law, which justifies the act and imposes the duty, will protect them in the use of all necessary means."

In Keene v. Chapman, 25 Maine, 126, which was an action of trespass *quare clausum*, the defendant was a surveyor of highways, and as such was required by the selectmen of the town to place a road therein, then lately laid out, and running through the plaintiff's land, in a condition to be traveled. He accordingly proceeded to accomplish the work. In doing it, he took for the purpose from the plaintiff's land, lying contiguous to the way and unplanted and unin-closed, a quantity of stone, which was the trespass alleged. It was held that, as the acts complained of were authorized by the statute, ch. 25, § 72, the action did not lie; the plaintiff's remedy for compensation being against the inhabitants of the town, as provided for in the same section of the statute.

[1] Jackson v. Hathaway, 15 Johns. 447; Peck v. Smith, 1 Conn. 103; Felch v. Gilman, 22 Vt. 38.

* In New Hampshire, even the right of the public authorities to remove gravel, sand, rocks, or other materials, from the traveled part of any highway, without damage or injury to the adjoining land, to any other part of the highway, for the purpose of repairing and grading the same, depends on the provisions of the statute specially conferring this power upon surveyors of highways (Rev. Sts. of N. Hamp. ch. 55, sec. 15; Comp. St. p. 147, sec. 16). In the same State it was held, after a learned examination of the subject, that the right to use the trees necessarily cut from the land, in constructing the highway, or for the purpose of repairing it, was not acquired by the laying out of the highway; but that the only right acquired in relation to trees growing upon such land, was the right of cutting down and removing to a convenient distance, for the use of the land owner, such and so many of them as it might be necessary to remove in order to make or repair the road in a proper manner (Baker v. Shephard, 4 Fost. 208).

taken, clearly belonged to the plaintiff, a subsequent appropriation of the land from which they had been taken, for any purpose, could not operate to divest the plaintiff of his title to the stone previously taken and sold.[1]

§ 657. If an individual undertake, without lawful authority, to reconstruct, in parts not previously used, a highway, he will be liable to the owner of the soil in trespass. The statute has intrusted such work to an officer, to be legally chosen and to be under oath in the discharge of his duties. To his judgment and discretion is committed an important trust. He is to see that a proper road is constructed for the public, and that the rights of individual proprietors of the land are not unnecessarily invaded. This power cannot be exercised by a private individual according to his own opinion of what is fit and proper; and no number of citizens can confer upon him any such power, unless in the mode prescribed by law. Hunt v. Rich[2] was an action of trespass for a breach of the plaintiff's close, with aggravation, in tearing down and destroying his fence, his fruit and other trees, digging up the bank, and carrying away the soil and earth. The defendant justified under the authority of the town. It was admitted that the proceedings of the town touching the authority conferred on the defendant were irregular, and that they did not conform to the statute. But it was insisted that, as the town was bound to keep all their ways in repair, and an inhabitant of the town was therefore exposed to loss in case of any neglect therein, the defendant might have been informally appointed an agent for the purpose of making the road and repairing the same, and might do all that was necessary to prevent the town from incurring any liability. A verdict for the plaintiff was, however, sustained.*

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[1] Higgins v. Reynolds, 31 N. Y. 151. [2] 38 Maine, 195.

* A different view seems to have been taken in Morse v. Weymouth, 28 Vt. 824, in which it appeared that the defendant drew several loads of small stones from his fields and dumped them in the highway upon a side hill next to the plaintiff's land; that some of the stones rolled down against the plaintiff's fence, and some of them rolled through the fence into his fields. The following instruction of the judge before whom the cause was tried was held correct, that:

§ 658. A highway, like a grant from an individual, must be defined with reasonable certainty. The public should have the means of knowing how far they may travel without becoming trespassers, and the individual to what extent his land may be occupied by others. Where, therefore, a survey consisted of a line extending in length, but without breadth or any limits bounding its surface, it was held not competent to establish the existence of a highway.[1] If a road or way be established by prescription or user, as most of the highways in England are, the public use defines the extent of the easement; and so of roads by express or implied dedication.* But the highways in the United States have generally been established by public authority, and the evidence of their extent and boundaries is contained in the public records.[2] The same rules apply to the laying out of a highway that are observed as to metes and bounds in conveyances of land, monuments governing its location, rather than courses and distances; for the reason that, while there can be no mistake in the monuments actually set up, there always will be more or less error in courses and distances.[3]

§ 659. A statute which forbids the laying out of roads through buildings without the owner's consent should be liberally construed, so as to effectuate the obvious intent of it, which is to protect the permanent buildings and fixtures

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"If the road was unsafe at this point, by reason of its being narrow with a declivity on the lower side, and the placing of the stones there was a proper method of repairing the road, and was done by the defendant for that purpose, and in a proper and reasonable manner, and was approved by the highway surveyor or selectmen, the defendant would not be liable to the plaintiff; and that for the two loads of stone placed there before any application to the surveyor, if they were placed there properly for the necessary repair of the road, the defendant would not be liable if it was subsequently approved by the surveyor."

[1] Beardslee v. French, 7 Conn. 125. [2] Walker v. Caywood, 31 N. Y. 51.

[3] Miller v. Silsby, 8 N. Hamp. 474.

* A grant will be presumed from lapse of time against the State or sovereign as well as against individuals (1 Greenl. Ev. § 45; Mayor of Kingston v. Horner, Cowp. 102; Crooker v. Pendleton, 23 Maine, 339; Bow v. Allenstown, 34 N. Hamp. 351). And the same doctrine applies with equal force and for the same reasons to public highways (Rex v. Montague, 4 B. & C. 604; Beardslee v. French, 7 Conn. 125; Comm'rs of Georgetown v. Taylor, 2 Bay, 282; Fox v. Hart, 11 Ohio, 414; Rowan's Ex'rs v. Portland, 8 B. Mon. 232; Alves v. Henderson, 16 Ib. 131; Knight v. Heaton, 22 Vt. 480; Webber v. Chapman, 42 N. Hamp. 326; Johnson v. Ireland, 11 East, 270; Hillary v. Waller, 12 Vesey, 139, 265).

of the occupant over whose land a road is contemplated. But the court, in construing such a statute, should also guard against abuses of the protection thus afforded, and see that it is not perverted to ends not intended by the legislature. The erection or removal of a building, after an application for a highway, for the purpose of defeating it, would present a case not within the mischief intended to be guarded against. It would be the fault of the party himself that the road passed through his building, not the operation of the law.[1] *

[1] Carris v. The Comm'rs of Waterloo, 2 Hill, 443.

* The act of New York (2 Rev. L. 270) to regulate highways does not authorize the commissioners of highways to lay out a highway through buildings, mills, or manufactories, or fixtures, yards, &c., appurtenant to them, without the owner's consent, and if they do so, they are liable as trespassers. Clark v. Phelps, 4 Cowen, 190, was an action against commissioners of highways for opening a road through the plaintiff's land, whereon the plaintiff had a saw mill, fulling mill and carding machine. It was proved that the defendants tore down the plaintiff's corn crib; plowed and scraped twelve or fifteen rods through his mill yard; built a bridge across a brook, so as to impair his water privilege; plowed and scraped close to his dwelling, and cut up his door yard with wagons and teams in hauling stone and timber for the bridge. The road cut off part of the plaintiff's tenter bars, used by him in connection with his fulling mill. At the trial at the circuit, the plaintiff was not permitted to prove that the road was laid out through his mill yards so as to deprive him of the beneficial use of his mills. The only question of fact submitted to the jury was whether the road did not run through the plaintiff's garden occupied as such for four years before the road was laid out. The Supreme Court, in granting a new trial, said: "Was it intended that the ground immediately adjoining mills and manufactories, indispensably necessary for the enjoyment and use of those establishments, might be converted into a road, and leave the owner to his damages to be assessed under the act? Can the commissioners take from a manufactory the adjoining ground which is actually used and occupied by the various machinery and their appendants essential to such use, and in the absence of which the business cannot be carried on without loss or great inconvenience? I apprehend not. Grounds used in this manner may be said to be improved for those particular purposes; but they are not improved or cultivated land, within the meaning of the act. If this exposition of the statute be correct, then the defendants had not authority to lay out the road in the manner they have done. The corn crib was a necessary appendant to the dwelling. The string of tenter bars appurtenent to the fulling mill, fixed two feet in the ground, for the purpose of hanging cloth, was necessary to be placed in the manner stated in the case. The road cuts off a portion of these bars and the corn crib. It seems, however, that it was worked and traveled so as not to interfere with the former. The plaintiff also offered to prove that the road includes so much of the yards of the saw mill and fulling mill as to deprive the plaintiff of their beneficial use. This was overruled. In the preceding particulars, it appears to me that the ground was appropriated in such a manner as not to fall within the description intended by the act, and that the commissioners ought not to have included such parts in the road laid out" (see 3 Hill, 460; Ib. 608).

The language of the New York Revised Statutes (5th ed. vol. 3, p. 395) is, "nor shall any such road be laid out through any buildings or any fixtures or erections for the purpose of trade or manufacture, or any yards or inclosures necessary to the use and enjoyment thereof, without the consent of the owner."

§ 660. Where a highway is altered by being straightened and the straightened road is opened in fact for travel, it is a public highway to all intents by acquiescence of the authority of the town, which has the control and is liable for the sufficiency of the highways within its limits. It is not such a deviation as constitutes a new highway, but is really the old highway with such slight deviations as do not destroy its identity, and therefore the town is bound by the deviation, and the public, who find this avenue for travel open and no other, are at liberty to use it. The former highway is in fact and in law discontinued, and the public have no more right to use the old highway than any other of the adjoining land, which is only when the highway becomes dangerous and impassable.[1]

§ 661. The law, by imposing upon the town the duty of making and maintaining the highway, by implication gives to it everything necessary to the performance of that duty. By virtue of this right the town may make such embankments and excavations upon, and annex such structures to the land over which the highway is laid as may be necessary to the construction of a suitable path for the public travel. As the town is bound to maintain and preserve such embankments, excavations, and structures, so far as they are necessary to the public safety and convenience in the use of the highway, it acquires or retains an interest or ownership in them, as an indispensable requisite to the performance of this duty; and as the highway may exist for an indefinite time, the interest and ownership may be permanent. This interest of the town in the roadway, bridges, &c., constructed by it for the highway, is said to be qualified, because the materials generally are annexed to, or are a part of the land of another, who will have the entire right to the land whenever the highway ceases to exist, and also because of the public use to which such roadway, bridges, &c., are subjected, and for which they were constructed. But while the high-

[1] Closson v. Hamblet, 27 Vt. 728.

way exists, the land owner has no ownership in the highway or bridges as such.[1] *

§ 662. Although the taking of land for a highway does not give to the public an unlimited use, and the legislature has no power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement;[2] yet the right of the public to highways is not confined to their use for the sole purpose of travel. Many things may be done therein for the promotion of the

[1] Hooksett v. Amoskeag Manuf. Co. 44 N. Hamp. 105.

[2] Williams v. The N. Y. Cent. R. R. Co. 16 N. Y. 97; s. c. 18 Barb. 322.

* In Rhode Island, the statute (Rev. Sts. ch. 44, § 17) provides that upon the laying out and establishment of a highway everything upon the land which shall in any way straiten, hinder, or incommode the travel may be removed therefrom, as buildings, fences, trees, or other thing whatsoever. This power is vested in the surveyor of highways, who is appointed by law to keep the way in repair for the convenience of the public. He may therefore remove trees if they in any way interfere with the travel; but the right of removal gives him no property in the trees. In Tucker v. Eldred, 6 R. I. 404, the court remarked that "this right the law would imply without the statute, since upon the passing of the easement to the public, everything reasonably necessary to its enjoyment passes with it. There seems to be no difference in this respect, certainly no material difference, between a public and a private way. In the one case the easement is for the benefit of the general public, in the other for that of an individual. In neither case does any property in the land or its incidents pass from the owner of the soil, and the individual in the one case, and the public in the other, are to make and maintain the way in proper condition for travel at his or their own expense. If the way may be made cheaper with timber than with earth, it must be provided by them; and if they will take that which is another's for this purpose, they do it at their peril. It is said, indeed, that in the assessment of damages for the laying out, the use of the wood is made an item of those damages. The damages for which the statute provides are 'the damages which the owners of the land shall sustain by means of such highway passing through their lands,' that is, the damages which they may suffer from the right of the public continually to pass over their lands, the adaptation of the soil to that passage, the removal of everything therefrom which may interfere with the travel, and the fact that they must, by such use, be deprived to a great extent of the profit of the soil, the growth of timber thereon being one source of profit. These damages are necessarily assessed before the land is entered upon for the purpose of making the way, and therefore cannot be for all the injury which may be actually done by the surveyor or other person in making the way and opening it for travel. The assessment can only be for such damages as necessarily will be done to the owner of the land in order that the public might be enabled conveniently to pass over the land. The use of the timber in the construction of the way is certainly not reasonably necessary to the passage of the public, though the removal of it from the path would be. Until such necessity is shown, no reason is shown why the value of the timber should be an item of damages to be awarded to the owner of the land. The same reason is equally conclusive against the right of a surveyor of highways, in the course of repairing or amending the same, from doing more in relation to the timber growing within the lines of the highway than to cut down and remove it so that it shall not impede the travel."

public convenience and health; such as laying water pipes, constructing drains and sewers, and making reservoirs.* In West v. Bancroft,[1] the question was as to the right of the public to put a reservoir or cistern into the earth within the limits of the highway, for the purpose of retaining water to be used in sprinkling the streets and extinguishing fires. At the trial of the cause in the county court, the judge charged the jury that such act would not constitute a trespass for which the owner of the fee could recover, even though the land might revert to him in case the highway should be discontinued; and judgment having been rendered for the defendant, it was affirmed by the Supreme Court.

§ 663. A plank-road company when it has taken all the steps necessary to authorize it to use a common highway for

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[1] 32 Vt. 367.

* When a sewer is constructed through a street already opened to the public, it takes nothing away from the owner of the adjoining land. He suffers no detriment and no injury; and should the law provide a mode of awarding him compensation, it would be a nugatory provision, for he parts with nothing of value (Kelsey v. King, 32 Barb. 410). "It has been suggested that the opening and constructing of a sewer in a public street would conflict with the right claimed and freely exercised by the owners of the fee in cities, of making vaults under the sidewalks. The question, however, still occurs, who have the superior right, the public or the owner of the fee? For if the right of drainage is incident to the use of a street, then certainly the construction and occupation of vaults below the surface, and within the line of the street, can be justified only when the public uses are not impaired or invaded. When completed, they may offer no impediment to the public travel. They may be secure against the superincumbent weight. But they cannot be constructed or repaired without creating a chasm or opening in the street, dangerous and detrimental for the time being, which the municipal authorities would have power to prevent" (Ibid).

Plant v. The Long Island R. R. Co. 10 Barb. 26, was an action by the lessee of premises on Atlantic street, in Brooklyn, over which the defendants had a franchise for a railroad, and under which they had constructed a tunnel for their railway, having been authorized to do so by an ordinance of the common council. The plaintiff put in issue the right to tunnel the street, and claimed damages for the injury to his business, which was that of a merchant. The General Term of the Supreme Court held that he was not entitled to recover. Edwards, J., said: "Although a highway in the country is, as a general rule, needed for no other purpose than as a place of passage and repassage; yet the case is different as to a street in a populous commercial city. There are many uses to which streets in large cities are usually appropriated for the promotion of health, trade, commerce, and public convenience, such as the construction of drains, sewers, and the laying of water and gas pipes. These are servitudes which are highly beneficial to the public, and in no way injurious to the private rights of individuals. They do not interfere with the surface of the street. They in no manner impair the right of free passage and repassage, neither are they injurious to the adjoining property; on the contrary, they are directly or indirectly advantageous."

its plank-road, does not acquire the same exclusive right to the land over which such highway passes, and to its use and occupation while engaged in constructing its road, that it does to the lands of individuals acquired for the same purpose. It can have no greater right in the highway than the public possess, and that, not for the purpose of excluding the public, or interrupting their enjoyment of the way, but for the purpose of aiding and facilitating travel and the transportation of property. As a necessary incident, the corporation has authority to grade its track by excavation* and embankment, and to take possession to enable it to do so, and to lay down and secure the plank. Still its right is not exclusive until the road is finished, and until that is done the public are entitled to free passage, and the corporation is bound so to exercise its rights as not unnecessarily to interfere with this right of the public. During this time, the rights and duties of the corporation toward the public are analogous to those of public officers repairing streets and highways. While exercising its own rights, it owes a duty to the public also, and cannot lawfully place and continue dangerous obstructions in parts of the highway where persons of ordinary prudence do, or will be likely, to travel, without some guard or notice to warn them of their danger.

§ 664. Where a sidewalk in a city is constructed by an individual at his own expense, the materials of which it is composed are his private property, for the removal of which trespass will lie.* In an action of trespass for taking and carrying away certain curb-stones, it appeared that the plaintiff in the year 1820, with the consent of the city authorities of Portland, constructed at his own expense a sidewalk in front of his premises, in which he placed the curb-stones; and that, in 1865, the city, in causing a culvert to be placed under the outer edge of the sidewalk, took up

* The common council of a city cannot, by virtue of their authority in relation to sidewalks, compel the owner of the adjoining land to erect a railing on the inner side of the sidewalk, for the safety of the public travel, such railing not being a part of the sidewalk (Williams v. Brace, 5 Conn. 190).

the plaintiff's curb-stones, and sold them, substituting others; and that the defendant assisted in carrying the curb-stones away. It was held that the plaintiff was entitled to recover.[1] *

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[1] Muzzey v. Davis, 54 Maine, 361.

* In Muzzey v. Davis, *supra*, the court commented upon the facts and law of the case as follows: "The case finds that the curb-stones in controversy were originally the property of the plaintiff. It is a fundamental principle of law, that he can be divested of that property only by his own consent, or by due process of law. The only question then involved in the case is one of fact. Has he ever consented to part with his property? His ownership having been admitted, the burden of showing a change rests upon the defendant. How, and when was this accomplished? It is suggested that by voluntarily putting his materials into a sidewalk, they became annexed to and a part of the realty. This may be so; but it does not necessarily follow that his property is gone. The defendant does not claim title in himself as the owner of the land. Nor does the case show that any person other than the plaintiff is the owner. On the other hand, it does show that the plaintiff was owner of a lot of land on High and Danforth streets, and constructed the sidewalk in front of his premises. In such case, in the absence of all proof to the contrary, the legal presumption is, that he owns to the middle of the street, and that he built the sidewalk upon his own land. By such an act, he surely does not part with any title to his property. It is further suggested that the plaintiff dedicated his property to the public. But where is the proof of this? It is true the case finds that with the stones he built a sidewalk, which it is to be expected the public would use. But he built it in front of his own premises, and might well have done so for his own convenience, or to gratify his own taste. There is nothing in the case to show that he might not have taken it up any time he chose; and it is not to be presumed that he dedicated it to the public, unless the circumstances lead to that conclusion. The fact that it was in the street would undoubtedly authorize the inference of a grant of the property itself. But if we should infer a dedication, it can only be a dedication of the use for the purpose of passing over it; and before that dedication could become complete, there must be proof of an acceptance. There is, however, no such proof in this case. It does not appear that any repairs had ever been made by the city, or that the city had exercised over it any acts of ownership whatever, up to the time of the alleged trespass. But if it were otherwise, and perhaps in any event, so long as the walk was in the street, the city would undoubtedly be bound to keep it safe and convenient for travelers. This, of course, would give them the right to repair, with all its incidents. It may be conceded that the city had the right not only of repairing, but to make changes in the location of the materials, taking from one place and using them for repairs in another. But it is to be borne in mind that the act complained of was not one of repair, nor were the materials taken and used for the purposes of repair. They were simply taken away and sold, an act which the city could not authorize, even in the case of a legally located street. The utmost limit to which they could go would be to take materials and perform such acts as may be necessary for repairs. If any objection had been made to the repairing of the walk by the city, or if the alleged trespass had grown out of any acts incident to, or done for the purpose of repairing, another and a very different question would have arisen, as to which we now do not indicate any opinion. When such a question arises, the argument of defendant's counsel, drawn from inconvenience, will be entitled to great weight; but it has no applicability to the case before us, as we view it. Another suggestion entitled to consideration, and which appears to be decisive of the case is, that if there was a dedication to the public, the act of the defendant was not only inconsistent with the right of use which the public had, but was entirely subversive

§ 665. An action of trespass *quare clausum* cannot be maintained against a street commissioner acting within the scope of his authority, who is duly authorized to construct a street, upon petition in legal form, by a city council, under a charter which gives to that body exclusive authority and power to lay out any new street, and to estimate damages, and in other respects to be governed by the same rules and restrictions as are by law provided for regulating the laying out of public highways and repairing streets.[1] Mussey v. Cummings[2] was an action of trespass for tearing down and removing a shop belonging to the plaintiff, on Commercial street, in the city of Portland. It appeared that the city council had exclusive authority and power to lay out and alter streets; and it was admitted, for the purposes of the trial, that Commercial street was duly laid out, and that the building taken down by the defendants was standing within the limits of that street. The committee for laying out Commercial street and estimating the damages, used the following language in their report: "It being understood, in our estimation of damages, that the owners of the buildings standing on the line taken for said street as aforesaid should have the right of removing the same, provided the same is done as soon as said removal is necessary for the purpose of making said street." This report was accepted by the city council. The commissioner of streets, who was one Webb, was authorized and directed to cause the buildings on Commercial street to be removed forthwith, "or as soon as it may be necessary for the purpose of making said street, provided the owners neglect or refuse to remove the same." It was held that in the estimation of damages sustained by the plaintiff, the removal of his building was a privilege which he could waive or enjoy, but that he was not entitled

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of it. If done by authority, it would operate as a legal discontinuance of it. If done without authority, it was no less an actual discontinuance, and when the rights of the public cease, the property would revert to the original owner" (citing Adams v. Emerson, 6 Pick. 57).

[1] Gay v. Bradstreet, 49 Maine, 580. [2] 34 Maine, 74.

to further notice; that it was the duty of Webb to cause the building to be removed at the time it was done; but that as he afterward sold it, assuming to act as commissioner of streets and in behalf of the city, it was such an abuse of authority as made him a trespasser *ab initio* and liable to the plaintiff for the value of the building.

§ 666. When a municipal corporation makes a public improvement, under an act of the legislature, in a circumspect and careful manner, it is not liable for consequential damages caused thereby to property in the vicinity of such improvement which is not taken therefor.* Owing to the great increase of the population of the United States, and the rapidity with which new cities have sprung into existence, and the older ones outgrown their original limits, private property has, within a few years, been injuriously affected in numerous instances, by the excavation or filling up of ground in the construction or improvement of streets. It would seem as though, on general principles, the owners of property sustaining injury from this cause were entitled to compensation. But, in New York, where the authorities of a city, for the purpose of grading and leveling a street, dug away a bank on the site of the street which was the natural support of another's land, and a portion of his premises fell into the street, it was held that it was not a taking of private property for public use within the meaning of the Constitution, but that it was *damnum absque injuria*.[1] The learned author of Sedgwick on Damages,[2] in alluding to this case, says: "It appears to me the decision is an unfortunate one, although sound, perhaps, on a strict construction of the

[1] Radcliff's Ex'rs v. Mayor of Brooklyn, 4 N. Y. 195. [2] P. 112.

* The courts of California have decided that an act which directs that the expense of grading a street shall be assessed on property fronting on such street is not unconstitutional in not providing for just compensation (Emery v. San Francisco Gas Co. 28 Cal. 345; Walsh v. Mathews, 29 Ib. 123; Chambers v. Satterlee, 40 Ib. 497). The contrary has been held in Illinois, where it is said that the constitutional method of making such an improvement is to assess and charge upon each lot the special benefits it will derive from the improvement, and pay the residue of the expense by taxation (Chicago v. Larned, 34 Ill. 203).

constitutional clause. But it is to be regretted that the court felt itself bound to apply a strict, instead of a liberal interpretation. The tendency of our legislation in matters of public improvement is undoubtedly to sacrifice the individual to the community; and we cannot attach too much importance to those provisions of our fundamental law which are framed to protect private property against encroachments, which, though sanctioned by legislative enactment, are, in truth, often dictated by private interests." * In Alexander v. The City of Milwaukee,[1] the plaintiff sought to recover damages alleged to have been sustained in consequence of the city of Milwaukee making the harbor improvement known as the "straight cut." It appeared that the plaintiff owned a lot bordering upon the Milwaukee river, near the shore of lake Michigan, and also two lots situated on an island in that river, upon which he had a dock, ship-yard, and other valuable improvements, and it was alleged that the waves and waters of the lake were driven by the wind through a channel made by the city into the river and upon his lots, so as to wash them away, or to render them insecure, dangerous, and unfit for use. The case presented the question whether the plaintiff could recover for such consequential damages, the work on the harbor improvement having been done by the city in a proper manner, and it was held that he could not.†

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[1] 16 Wis. 247.

* By one section of an act commissioners were authorized "to cause the present and future streets, &c., and other public places to be paved, &c., and ground or soil thereof to be raised, lowered, or altered, from time to time, and in such manner as they should think fit." By other sections power was given to the commissioners to notify the owners or occupiers of houses situate in streets built upon, but not paved or flagged, requiring them to pave and flag the same, and in case of their neglecting to do so, the commissioners were authorized to pave and flag the same, and to recover the expenses from the owners or occupiers, and to declare streets so paved to be highways, and to take upon themselves the future paving of such streets; but no authority was given them to alter the level of the streets. The commissioners gave the notice required by the latter sections, and, upon the neglect of the owners or occupiers, did the work themselves. Instead, however, of merely paving the street, they cut down a bank, and greatly lowered the street opposite the plaintiff's houses. It was held that they were liable as trespassers (Brown v. Clegg, 6 Eng. L. & Eq. R. 334).

† In this case the court said: "We would not be understood as asserting the

§ 667. The power vested in the common council of a city to lay out or alter streets whenever in their opinion the safety or convenience of the inhabitants should require it, is judicial in its nature, and a *certiorari* will lie to remove the proceedings.[1]

§ 668. The taking of private property without the consent of the owner, ostensibly for public use, but at the instigation and for the emolument of individuals, upon their promise to pay a portion of the expense, would be grossly improper. In New Hampshire, such a proceeding has been held illegal, and a note given therein void for want of

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doctrine that there must be an actual taking or appropriation of the property itself in order to entitle the owner to compensation for damage done him. The city might so build a bridge, or open a street, or excavate a canal along or upon a lot, only appropriating a small portion of it, or perhaps none of the land itself, and yet entirely destroy the value of the property for all purposes. In such a case it would seem very hard that the owner can only recover compensation for the property actually taken, without reference to the injury done to the remainder." In the same case, Paine, J., said: "I concede that the infliction of such damages, where no portion of the property of the plaintiff is actually taken or occupied for public uses, does not come within the letter of the constitutional provision prohibiting the taking of private property for public use without compensation. Yet, as a matter of justice, the right of the owner to such damage is as clear as his right to compensation where his property is actually taken; and to deny it, though not a violation of the letter, yet is entirely out of harmony with the spirit of that constitutional provision."

In New Jersey, in Tinsman v. The Belvidere Delaware R. R. Co. 2 Dutcher, 148, a distinction is made between the liability of a municipal corporation and a private corporation or individual, holding that, in the former case, as the damage results for the public good, the rule is more restricted than when done for private benefit (see, also, The Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433).

In Ohio, a municipal corporation is placed upon the same grounds as an individual, and held liable for any consequential damages, whether its agents act with due skill and caution in the exercise of corporate authority or not (Crawford v. The Village of Delaware, 7 Ohio, 459; Rhodes v. City of Cleveland, 10 Ib. 159; McCombs v. The Town Council of Akron, 15 Ib. 474; s. c. 18 Ib. 229. See, to the same effect, Baron v. The Mayor and City Council of Baltimore, referred to by Putnam, J., in Stetson v. Faxon, 19 Pick. 147–158; Goodale v. The City of Milwaukee, 5 Wis. 32). In Alexander v. The City of Milwaukee, *supra*, the court lent its sanction to the foregoing as follows: "As an original question, there is much justice and equity in the principle of the Ohio cases. But the law seems to be too well settled the other way to permit us to follow them."

Where a city takes private property for a street, without following the directions in its charter, it is liable for the value of the property taken (Soulard v. St. Louis, 36 Mo. 546).

[1] Parks v. Boston, 8 Pick. 217; Dwight v. Springfield, 4 Gray, 107; Preble v. Portland, 45 Maine, 241.

consideration.[1] * In an early case in Massachusetts, the Supreme Court said: "We do not decide that a bond entered into by an individual for the ease of the inhabitants of a town, or to induce them to withhold opposition to a road prayed for, is illegal, but only say that such a bargain should not be a basis of an adjudication in favor of the road.[2] †

[1] Guernsey v. Edwards, 6 Fost. 224; Dudley v. Cilley, 5 N. H. 558; Dudley v. Butler, 10 Ib. 281; Third Turnpike Co. v. Champney, 2 Ib. 199; Knowles' Petition, 2 Fost. 361; Goodwin v. Milton, 5 Ib. 458.

[2] Com. v. Sawin, 2 Pick. 547.

* Guernsey v. Edwards, *supra*, was an action of trespass for breaking and entering the plaintiff's close and subverting and carrying away the soil. The defendants justified that they entered on the highway for the purpose of repairing it. The plaintiff contended that there was no highway legally established through the premises, and that the doings of the defendants were therefore unlawful. At the time the road in question was laid out, the title to the *locus in quo* was in one Graves, he being the mortgagor in possession, and the proper person to be notified and to whom damages should be awarded for the taking of the land. Graves was a petitioner for the road, and he acknowledged on the back of the petition service of notice of the hearing and a release of all claim to damages. It was proved that the road was laid out by the selectmen of the town, both because they thought the public good required it, and because Graves stated to them that if they would lay out the road he would make it without any expense to the town; that they might have laid out the road at the expense of the town, but that Graves having offered to make it, they took that also into consideration. The plaintiff derived her title to the premises from Graves. The court said that a laying out of a road upon such inducements was clearly illegal, and any person legally aggrieved by the same, and not surrendering his rights, would not be precluded from taking advantage of the illegality upon all proper occasions, but that as Graves was not only a petitioner for the road, but released all claim for damages, and the plaintiff bought of him after the road was laid out, the action could not be maintained.

"Every one knows that great numbers of people often feel themselves deeply interested in petitions for roads, and that such petitions are frequently prosecuted by a multitude with great warmth on the one side, and are opposed by a multitude with equal warmth on the other side. Now if in such cases the petitioners can obtain a decision in their favor, not because the public good requires it, but because they are willing, in order to gain a victory over their opponents, or to promote their own private interests, to assume some part of the expense, then may the owners of the land be made to submit to the incumbrance, and towns be made to bear the burden of the way, not for the sake of the public, but to gratify the pride of victory, or promote the private interests of their opponents, which is nothing more nor less than gross oppression" (Richardson, C. J., in Dudley v. Cilley, *supra*).

† In Com. v. Inhabs. of Cambridge, 7 Mass. 158, which was a writ of *certiorari* to the Common Pleas to remove to the Supreme Court the record of their proceedings respecting the laying out of a road, it appeared that a bond was executed by one of the petitioners to the town, to indemnify the town against one-half the expenses they might incur in consequence of the granting of the petition, and that the bond was one of the grounds upon which the adjudication of the court was prayed for. Parsons, Ch. J., in delivering the opinion of the Supreme Court, said: "Probably the transaction was had with the intention on the part of the petitioners that it might operate as evidence to the court that the damages which the town might suffer if the petitioners prevailed would be re-

§ 669. Where land taken for a plank-road is afterward devoted to a public highway, it is not such a change of the use as to justify the owner of the adjoining land in taking possession of the road opposite his premises in default of a new compensation to him; the easement so far as the public is concerned, being the same, and the servitude no more onerous in the one case than in the other.[1] And it has been held that an act authorizing a turnpike company to construct a turnpike road over a highway, and to occupy and grade the same, is constitutional, although it make no provision for compensation to the owner of the land over which the road passes.[2] *

duced to one moiety, so that the magnitude of these damages might not operate on the minds of the judges. * * * Evidence that an individual for his own private advantage will defray a part of the damage actually incurred, and which he is not obliged by law to defray, is very improper. The way prayed for ought to be of common convenience and necessity. * * * * Every individual is injured if his land is incumbered with an easement against his consent which is not required by the public necessity or convenience, although he may receive a fairly estimated compensation. But if one or more persons may take upon themselves the payment of this compensation to obtain a way for their own emolument, the owner of the land is made to submit to an incumbrance, not for the sake of the public, but for the sake of private persons or corporations who invade his rights for their own benefit, but in the name of the public."

It was held in Parks v. Boston, 8 Pick. 218, that the essential question was whether the public necessity and convenience required the laying out or alteration. If it did, it was immaterial at whose expense it was made. "A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit."

In an early case, in Vermont, where a road was laid out as a public highway at the solicitation of individuals, upon their executing to the town a bond to save it harmless from the expense of making the road, it was held that the persons giving the bond were not trespassers in making the road at a proper season of the year (Patchin v. Doolittle, 3 Vt. 457). More recently, it was decided in Maine, that proof that some of the members of a city council voted for the laying out of a street solely in consideration of a bond tendered by an individual, conditioned to indemnify the city for all costs and damages, will not be sufficient to support an action of trespass (Gay v. Bradstreet, 49 Maine, 580). Kent, J.: "We do not see how these facts, if established, could authorize a jury, or the court, to find such fraud, collusion and corruption in the city council as would require that the whole proceedings should be treated as null and void, on the ground of intentional fraud and corruption, which is the only ground on which we can be called upon to act in this form of action. We cannot nullify the solemn acts of a city government on the ground here assumed, because two or three members are now willing to declare that they voted in a particular way in consequence of a bond being filed."

[1] Heath v. Barman, 49 Barb. 496.

[2] Douglass v. Boonsborough Turnpike Co. 22 Md. 219.

* A road constructed and maintained by a turnpike company differs in no essential respect from a common highway established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate

§ 670. An easement for the purposes of a highway, does not authorize as against the proprietor of the soil, the laying down of a railroad upon the track of the highway; the use of the land for a railroad being totally different from the public right of passage for which highways are designed.[1] The construction and use of a railroad upon the land of another is an occupation of the soil both permanent and exclusive. Thus ejectment will not lie against one who exercises only an easement in the land as a highway. Yet it has been held that against a railroad corporation laying down its track and rails in a public street, ejectment will lie by the owner of the fee subject to the easement, although the track has not been used. It follows that the laying down of the track and rails of a railroad company in a public street is of itself such a possession as will, if continued adversely to the owner of the soil, in time, vest in the company a fee, and not a mere right of way or easement by prescription. In this respect, the construction and operating of a railroad upon the land of another, accompanied by a claim of title, is an act of the same character as the building and occupying of a house under similar circumstances. It is an assertion of the right of *remaining* upon the soil, and not merely of passing over it. When therefore a railroad

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from the same supreme power, acting through the legislature, the courts, or other depositaries of authority designated by the laws. Both are called into existence and supported to subserve, in exactly the same way, the public necessities and convenience; and both alike are intended to endure for an indefinite period, and so long as convenience requires or necessity exists. The funds for making and repairing them are indeed drawn from different sources, and in different modes—the one from travelers by a toll—the other from the community by a tax; and the turnpike company is permitted to take, for the benefit of its stockholders, the contingent profits in compensation for the contingent losses of the enterprise. But still the public interest in the road, and the burden upon the land, are essentially the same in both (State v. Maine, 27 Conn. 641). In Com. v. Wilkinson, 16 Pick. 175, Shaw, C. J. said: "We think a turnpike road is a public highway established by public authority, and is to be regarded as a public easement. The only difference between this and a common highway, is, that instead of being made at the public expense in the first instance, it is authorized and laid out by the public authority and made at the expense of individuals in the first instance, and the cost of construction and maintenance, is re-imbursed by a toll levied by public authority for the purpose."

[1] Starr v. Camden and Atlantic R. R. Co. 4 Zab. 592; Morris and Essex R. R. Co. v. City of Newark, 2 Stockton Ch. R. 352, *contra*.

company constructs, maintains, and operates their road upon a highway, without compensation to those entitled to the reversion of the land, they may maintain successive actions for damages resulting from such occupation, as a continuing nuisance.*

* In New York, before the law as stated in the text was authoritatively settled by the Court of Appeals, the Supreme Court in several sections of the State, maintained substantially that where land is used for a public street or highway, the title for the time being is in the people of the State, and if the legislature authorizes the construction of a railroad on the highway or street, and the owner of the land sustains loss in consequence of its reasonable and proper construction, it is *damnum absque injuria*. Corey v. Buffalo, Corning & N. Y. R. R. Co. 23 Barb. 482, was an action for raising an embankment in front of the plaintiff's premises, and obstructing the access to the same, by constructing a railroad through a public street in a village. The judge charged the jury that if the defendants, in constructing their railroad through the street, had restored the street to its former state, or to such state as not unnecessarily to impair its usefulness, the plaintiff was not entitled to recover; that in determining this question, they were to allow the defendants such use and occupancy of the street as should be necessary for the construction and maintenance of their road in a proper manner within the rule stated; and that if the defendants did not restore the street to its former state, or to such a state as not unnecessarily to impair its usefulness, and that by reason thereof the plaintiff had been injured, he was entitled to recover. The last mentioned proposition was explained by the judge to mean that if the defendants in constructing and maintaining their railroad in a proper manner, failed to restore the street to its former state, they would be exempt from liability provided that in so doing, they impaired its usefulness no more than was necessary to such construction and maintenance. It was held that this instruction was unobjectionable.

Williams v. N. Y. Cent. R. R. Co. 18 Barb. 222, which we shall presently see was afterward reversed by the New York Court of Appeals, involved the inquiry in the Supreme Court, whether the location of a railway track along a public street in Syracuse, was lawful. It was contended, or at least that was the gravamen of the action, that the grant to the company of the right in question was void, on the ground that neither the legislature, nor the common council of Syracuse, could constitutionally allow the taking of private property for public use without compensation. The argument was that the railroad was a misappropriation of the highway to purposes not contemplated or justified by the original dedication; that as to the defendants, the plaintiff and other land owners bordering the street, were restored to their primary rights of fee in the highway, and should therefore have been compensated in damages for the right of way as required by the constitution. Hubbard, J., in delivering the judgment of the Special Term, which was afterward affirmed by the General Term of the Supreme Court said: "This argument, it seems to me, has not the merit of plausibility. It assumes that the use of a highway by a railroad in common with the public is a perversion of the intent of dedication. But this is plainly fallacious. It is now well settled, that railroads are so far public uses that private property may be taken in their construction; and it would be in accordance with this doctrine to say, that they are *quasi* public highways, because it is the great facility which they afford to travel and transportation which stamps them with their public character. In other words, railroads are but the introduction of a new motive power for the more convenient and expeditious transaction of the business and furtherance of the objects of common highways. There is therefore no incompatibility. On the contrary, a railroad is simply an improved mode of using a highway. How then can it be said that

§ 671. In New York it is well established, that the appropriation of a highway by a railroad company, which enters upon and occupies such highway with the track of its road, is the imposition of an additional burden upon and taking of the property of the owner of the fee, within the meaning of the constitutional provision which forbids such taking without compensation; and that the company can derive no title under acts of the legislature and the license of municipal authorities, without the consent of the owner of the fee or the appraisal and payment of his damages in the

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the easement is prevented by such use? It may be stated as a rule that a purchaser of land adjoining a public road takes it subject to every advantageous or disadvantageous enjoyment or use of it in a public manner, and compatible with the just rights of all. The plaintiff may be suffering some of the disadvantages of dwelling in a populous town. He may be incommoded by the noise and confusion of the engines and cars passing his abode; access to his house, may be rendered more dangerous, and the use of the street by private carriages more hazardous, and perhaps the general or market value of his land bordering the street may have been impaired. But these annoyances and injuries are such as an individual is frequently compelled to suffer without redress, because they are of minor importance compared with the general good which springs from the cause of which he complains."

But a great deal purporting to have been held by the New York Supreme Court on this subject will be found upon examination to be only the *dicta* of judges. Adams v. The Saratoga and Washington R. R. Co. 11 Barb. 414, was an action of ejectment to recover portions of a street in the village of Whitehall, upon which the defendants had constructed their railroad track. The party under whom the plaintiff claimed had originally dedicated the street to the use of the public, laying out lots on each side, all of which he had sold and conveyed to different persons. The plaintiff's claim rested upon the ground that the title of the purchasers of these lots extended to the center of the street. The court however rejected this claim, and held that the plaintiff had no title whatever to the land occupied by the defendant's road. This was sufficient to dispose of the case, and whatever further was said, was strictly *obiter*. And the same is true, as to the case of Milhau v. Sharp, 15 Barb. 193.

The Brooklyn City Railroad Cases, 33 Barb. 420, and 35 Ib. 364, were between two companies, and the principle to be educed from them is, that each company as against the other must be considered as exercising a public use, subject to the imposition, by the public, of any additional use consistent therewith. The opinions expressed respecting the right of private owners of the soil, who were not parties nor in any way interested, have not the force of authority. In Mason v. The Brooklyn City and Newtown R. R. Co. 35 Barb. 374, it does not appear that the defendants had appropriated the plaintiff's land, or that he owned the fee of the street. The ground of his action was, that the proposed railway would be specially injurious to him as an owner of adjacent property. The case is therefore to be classed with Fletcher v. The Auburn and Syracuse R. R. Co. 25 Wend. 462, and Chapman v. The Albany and Schenectady R. R. Co. 10 Barb. 360. The People v. Kerr, 37 Barb. 357, affi'd 27 N. Y. 188, was decided, so far as the private plaintiffs were concerned, upon the ground that they had no property whatever in the streets, the fee being held to be in the corporation of New York.

mode provided by law.[1]* In The Trustees of the Presby-

[1] Davis v. The Mayor &c. of N. Y. 14 N. Y. 506; Williams v. The N. Y. Cent. R. R. Co. 16 Ib. 97; Mahon v. The Utica and Schenectady R. R. Co. 1 Lal. Sup. 156; Mahon v. The N. Y. Cent. R. R. Co. 24 N. Y. 658; Carpenter v. The Oswego and Syracuse R. R. Co. Ib. 655; Wager v. The Troy Union R. R. Co. 25 N. Y. 526.

* "It may be said that the use of the road as a common highway is not subverted; that a man may still drive his own carriage upon it. Without pausing to notice the fallacy of this argument, and the impracticability of the enjoyment of such a right, where railroad trains are passing and repassing every half hour, let us look at the subject in another point of view. The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation; because it will not be pretended that every man would have a right to go and lay down his timbers and his iron rails, and make a railroad upon a highway. Here, then, are two easements—one vested in the public, the other in the railroad company. These easements are property, and that of the railroad company is valuable. How was it acquired? It has cost the company nothing. The theory must be that it was carved out, and is a part of the public easement, and is therefore the gift of the public. This would do, if it was given solely at the expense of the public. But it is manifest that it is at the joint expense of the public and the owner of the fee. The argument is, that, as he has consented to the laying out of a highway upon his land, therefore he has consented to the building of a railroad upon it; although one of these benefits his land, renders access to it easy, and enhances its price, while the other makes access to it both difficult and dangerous, and renders it comparatively valueless. Were the transaction between individuals, every one would see at once the injustice of the conclusion attempted to be drawn. It is the public interest supposed to be involved which begets the difficulty, and it is for this reason that the constitution interferes for the protection of individual rights, and provides that private property shall not be taken for public use, without compensation" (Selden, J., delivering the opinion of the New York Court of Appeals, in Williams v. The N. Y. Cent. R. R. Co. 16 N. Y. R. 97).

Williams v. The N. Y. Cent. R. R. Co. *supra*, was a suit in equity to obtain a perpetual injunction restraining the defendants from continuing to use and occupy, with their railway, a portion of a certain highway or street in the then village of Syracuse, known as Washington street, and to recover damages for its past occupation. Washington street was gratuitously dedicated to the use of the public by the plaintiff and others through whose land it was laid; and the railroad company constructed their railway upon it, without making any compensation to the plaintiff, and without his consent. At the time the track was laid, the plaintiff owned a large number of lots fronting upon the street, a portion of which he afterward sold, with a reservation of his claim against the railroad company for damages. The damages which had accrued both upon the sold and unsold portions of the premises were claimed in this suit. The defendants, in justification of their occupation of the street, proved that their charter declared that their road might "intersect" and be built upon any highway, and and that this right was confirmed by the general railroad act of 1850. They also showed the express consent of the municipal authorities of the village as well as of the city of Syracuse to such occupation. The question therefore was, whether the State and municipal authorities combined could confer upon the railroad company the right to construct their road upon this street, without obtaining the consent of the plaintiff, or making him compensation. It was clear that if the railway encroached in any degree upon the plaintiff's proprietary rights, then the constitutional inhibition, which forbids the taking of private property for public use, "without just compensation," applied to the case. It was conceded

terian Soc. in Waterloo v. The Auburn and Rochester R. R.

that by the dedication the public acquired no more than the ordinary easement or right to use the premises as a highway; and that the plaintiff continued the owner in fee in respect to the unsold lots to the center of the street, subject to this easement. But it was contended that the taking and use of the street, by the railroad company, did not encroach upon the reserved rights of the plaintiff, for the reason that the use of a street for the purposes of a railroad was only one of the modes of enjoying the public easement. The court held that the defendants, in constructing their road upon the street, without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were guilty of an unwarrantable intrusion and trespass upon his property, and that he was entitled to relief; that although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and could, of course, recover his damages as incidental to the equitable relief; that there might be a doubt as to his right to recover, in this suit, the damages upon the lots which were sold, because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit would, in effect, deprive the defendants of the right to have them assessed by a jury, but as this question had not been raised, it was unnecessary to consider it.

In Wager v. Troy Union R. R. Co. 25 N. Y. R. 526, the question again arose, whether the taking and use of a public street or highway for railroad purposes is a new use of the public easement in the street, so as to be within the authority or control of the legislature, without respect to any private rights in the street. Smith, J., in delivering the opinion of the court, which was a reiteration of the decisions in Williams v. N. Y. Cent. R. R. Co. 16 N. Y. 97; Carpenter v. Oswego and Syracuse R. R. Co. 24 N. Y. R. 655, and Mahon v. N. Y. Cent. R. R. Co. Ib. 658, said: "It is quite apparent that the use by the public of a highway, and the use thereof by a railroad company, are essentially different. In the one case, every person is at liberty to travel over the highway in any place or part thereof, but he has no exclusive right of occupation of any part thereof, except while he is temporarily passing over it. It would be trespass for him to occupy part of the highway exclusively for any longer period of time than was necessary for that purpose and the stoppages incident thereto. But a railroad company takes exclusive and permanent possession of a street or highway. It lays down its rails upon, or imbeds them in, the soil, and thus appropriates a portion of the street to its exclusive use, and for its own particular modes of conveyance. In the one case, all persons may travel on the street or highway, in their own common modes of conveyance. In the other, no one can travel on or over the rails laid down, except the railroad company, and with their cars specially adapted to the tracks. In one case, the use is general, and open alike to all. In the other, it is peculiar and exclusive. It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With a single track, and particularly if the cars used upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property, or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement, and would not affect the principle that the use of a street for the purpose of a railroad, imposed upon it, is a new burden."

In The Ohio and Lexington R. R. Co. v. Applegate, 8 Dana, 289, Robertson, C. J., discussed the general subject very elaborately, and in a variety of aspects. The only points involved in the case, however, were whether the railroad was a purpresture, or such an interference with the incorporated rights or easements appurtenant to the plaintiff's lots, situated upon the street, as constituted a private nuisance. The fee of the land over which the street was laid was regarded as being not in the plaintiffs, but in the corporation of Louisville. The Chief

Co.,[1] the question arose whether a railroad company could lawfully construct their road across a highway without either a gift or purchase of the soil over which it passed, or an assessment of the owner's damages, the act incorporating the company providing that whenever it should be necessary to cross any highway, it should be lawful for the company to construct their road across or upon the same, but that they should restore the highway thus intersected to its former state of usefulness. The defense was founded upon the supposition that the act afforded full authority to the defendants to lay out the track of their road over the highway in question, without first making any compensation therefor. It was, however, held otherwise, and that the plaintiff was entitled to recover. Similar decisions have been rendered in relation to public streets.[2] *

Justice, in one part of his opinion, said: "Although, therefore, an ordinary public way may be discontinued, or applied to some other public purpose than that for which it was first established, without any legal liability for pecuniary compensation to the local public, or to any owner of adjoining lands, because neither such public nor such proprietor had any right of property in the way, or any other legal interest in it than that which was common to all the people; and though, also, the mayor and council holding the legal title to the streets of Louisville in trust, chiefly for public purposes, might regrade and improve those streets, or authorize the public use of them in any mode consistent with the objects to which they were first dedicated, without obtaining the consent of the owners of lots therein; nevertheless, there may be no constitutional authority for closing or discontinuing any one of the streets, or even for applying it to any public or private use incompatible with any one of the ends for which such street was established, without first obtaining the consent of the owners of lots thereon, or without making just compensation to them." The foregoing quotation shows not only that the plaintiffs had no title to the soil, but that they were seeking redress for being deprived of their easement in the street, and that this was the point under consideration by the court. This, and other cases of the same class, establish the position that a railroad in a populous town is not a nuisance *per se*, and that when a railroad company has acquired title to the land upon which its road is located, such company, being in the exercise of a lawful right, is not liable unless guilty of some misconduct.

[1] 3 Hill, 567.

[2] Ford v. Chicago & North Western R. R. Co. 14 Wis. 609; approving Williams v. Cent. R. R. Co. 16 N. Y. 97; and Inhabs. of Springfield v. Conn. River R. R. Co. 4 Cush. 63; Haynes v. Thomas, 7 Ind. 38; Tate v. Ohio & Missi. R. R. Ib. 479; Protzman v. Indianapolis & Cincinnati R. R. Co. 9 Ib. 467; New Alb. & Salem R. R. Co. v. O'Daily, 12 Ib. 551, *contra*; Lackland v. North Mo. R. R. Co. 31 Mo. 180; Southern Pacific R. R. Co. v. Reed, 41 Cal. 256; Schurmeier v. St. Paul & Pacific R. R. Co. 10 Min. 82; Harrington v. St. Paul & Sioux City R. R. Co. 17 Ib. 215; Hinchman v. Paterson Horse R. R. Co. 2 Green, N. J. 75, *contra*.

* As the new and additional servitude or burden which constitutes the taking or appropriation consists principally, if not entirely, in the permanent and exclusive use and occupation of the soil of the highway or street, it is obvious that the reason of the rule is the same whether the railroad is operated with steam or

§ 672. The grant to a railroad company of a right of way over a street will not justify the erection by the company of obstructions which are inconsistent with its use as a street.[1] Where a city ordinance authorized the construction of a railroad on a street, in front of the plaintiff's lot, and the company built their track on an embankment four and a half feet high in the center of the street, the steep sides of which prevented all ingress and egress from one side of the street to the other, it was held that the plaintiff was entitled to maintain an action for the injury thereby done to his lot.[2] * But, although the owners of adjoining lots have the right of free access to their lands and buildings from the street, as the same was and would have continued to be, according to the

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only with horse power. Craig v. Rochester City & Brighton R. R. Co. 39 N. Y. 404, was a motion to dissolve an injunction restraining the defendant from constructing a horse railroad through the streets of the city of Rochester, opposite the plaintiff's premises, no compensation having been made to him therefor. The defendants contended that such a railroad was only a mode of exercising the public right of passage, and not such an additional or further appropriation as entitled the owners of the land adjoining to pecuniary remuneration. The court below having denied the motion, the judgment was affirmed by the Court of Appeals, Mason, J., dissenting; s. c. 39 Barb. 494.

In Jersey City, &c. R. R. Co. v. Jersey City, &c. R. R. Co. 20 N. J. Eq. 61, it was held that there was a manifest distinction in the rule, and that, although the laying of a horse railroad in a street did not entitle the owner of the adjoining lot to compensation, yet that it was otherwise as to a road operated by steam. It has been held in Missouri that the appropriation of a street for a railroad, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes, and that damage to adjoining property resulting therefrom is *damnum absque injuria* (Porter v. North Mo. R. R. Co. 33 Mo. 128).

The legislature has power to pass an act for closing streets in the city of New York, through such local officers or municipal board or organization as it may choose; and although one public way to property be closed, yet if there is another left, the property owner sustains no actionable damage (Coster v. Mayor, &c. 43 N. Y. 399; Fearing v. Irwin, 55 Ib. 486).

[1] Lackland v. North Mo. R. R. Co. 31 Mo. 180.

[2] Com. v. Erie & N. E. R. R. 27 Penn. St. R. 339.

* A railroad company was authorized, by its charter, to enter upon and use all such land as should be necessary, it paying the damages which, if they could not be agreed upon, were to be ascertained by three freeholders. The railroad was not to be opened across the land of any person until the damages assessed had been paid or secured. The company was authorized to construct their road across any highway when it became necessary, but were to do so in such a way as not to impair it. In an action charging that the company, by excavating for their railroad in the land adjoining the plaintiff's, had impaired the foundation of his building, and raised an embankment in front of said building higher than the street, thereby rendering the building untenantable, the company set up in justification that they had paid all the damages caused by the construction of the road to the owners of the land over which it passed. It was held that the plaintiff was entitled to recover (Bradley v. N. Y. & New Haven R. R. Co. 21 Conn. 294).

mode of its original use by the public, and there can be no change of such mode and adaptation of the street to new vehicles and methods of carriage and transportation which shall materially impair such right, unless by the consent of the owners, or upon the payment of compensation to them, yet a railroad may be laid in a street, without compensation to the owners of property thereon, where no private right of such owners is thereby infringed.[1] * The mere consequential disadvantages of a street railroad to a particular locality, cannot be the subject of a private action.[2] †

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[1] Cincinnati, &c. R. R. Co. v. Cumminsville, 14 Ohio St. R. 523.

[2] Carson v. Cent. R. R. Co. 35 Cal. 325.

* Hobart v. Milwaukee City R. R. Co. 27 Wis. 194, was an action to restrain the defendants from building and operating the second track of a horse railroad along a portion of a street which the plaintiff claimed to own in fee adjoining his lot. There was a store upon the lot used by the plaintiff as a wholesale merchant, into and from which many heavy articles had to be received and taken by wagons and drays, which were loaded and unloaded in the street in front of the store. The custom was, to back the wagons or drays up to the curbstone, and discharge or receive freight to and from the store across the sidewalk. The laying of the rails and running of the cars in the street as contemplated would prevent this custom. It was held that it was not an appropriation of the street to a new use requiring compensation to be made therefor to the plaintiff, and that, therefore, he was not entitled to the relief asked.

An action lies as well for damage to adjoining property by stopping or impeding the travel on, to, or from a street or highway, as any other damage that can be done to property, although the property injured may not be touched by the obstruction (Little Miami R. R. Co. v. Naylor, 2 Ohio, N. S. 235; McLauchlin v. R. R. Co. 5 Rich. 583, *contra*).

In Chicago, the municipal corporation has a title to the streets in fee simple (Moses v. Pittsburgh, Fort Wayne & Chicago R. R. Co. 21 Ill. 516); and it may allow a railroad to be laid down in them (Murphy v. City of Chicago, 29 Ill. 279).

In Iowa, the local governments of cities are invested both with the fee of the soil of the streets and exclusive control of the same, and may authorize the construction of a railroad therein. Milburn v. City of Cedar Rapids, 12 Iowa, 246, was an appeal from an order of the District Court refusing an injunction to restrain the construction of a railroad along and upon a public street. It appeared that the city council of Cedar Rapids passed an ordinance granting the right of way to a railroad company through and across any of the streets of the city; that, under a written permit issued by the mayor, the railroad company was proceeding to construct their road bed on Jefferson street in said city, both by making excavations and raising embankments; and that the company were about to lay down their iron rails upon the same. It was claimed that the railroad would be an undue interference with the proprietary rights of the complainants, who claimed the fee of the soil to the center of the street, unless the right of way had been obtained and compensation made in the mode prescribed by law, which had not been done; that the permission to do so by virtue of a city ordinance was nugatory, being a grant without authority of law; and that such a use of a street was inconsistent with the objects and purposes of its dedication. It was held, however, that the city council acted within the scope of its powers in granting the right to construct the railway, and the order of the court below refusing an injunction was, therefore, affirmed.

† The owner of an adjoining lot is entitled to damages for any obstruction of

§ 673. Where the fee of the streets is in a municipal corporation, they are not the private property of the corporation in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose without making compensation to the city for such use; the fee in such case being in trust for the public use of all the people of the State, and not as the corporate property of the city.[1] *

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the street by earth, timber, or rails, substantially affecting the use of it by him as an appurtenance to his premises; but not in respect of noise, smoke, or other discomforts arising from the ordinary use of the railroad by the company (Parrot v. The Cincinnati &c. R. R. Co. 10 Ohio St. R. 624; Atchinson and Nebraska R. R. Co. v. Garside, 10 Kansas, 552; Porter v. North Mo. R. R. Co. 33 Mo. 128); except upon proof of negligence, unskilfulness, or malice (Phila. & Reading R. R. Co. v. Yerger, 73 Penn. St. R. 121).

The construction of an additional track to a previously existing street railroad, is in the nature of an original enterprise, requiring the consent of or compensation to property owners (Roberts v. Easton, 19 Ohio St. R. 78; Southern Pacific R. R. Co. v. Reed, 41 Cal. 256).

The purchase of a turnpike by a railway company, and making erections thereon, does not excuse them for answering for such consequential damages as may arise to the adjacent owners by reason of such erections (Mahon v. Utica & Schenectady R. R. Co. Hill & Denio, 156).

Where a railroad company, which has a grant from the legislature, constructs its road along a navigable river in which the tide ebbs and flows, the owner of the land adjoining the river is not entitled to compensation. In Gould agst. The Hudson River R. R. Co. 6 N. Y. 522, the plaintiff owned a farm on the east bank of the Hudson river, which had a front on the river of two thousand feet. The river was navigable there for ships of the largest tonnage, and the tide ebbed and flowed more than forty miles higher up the river. The defendants were authorized by the legislature to construct a railroad from New York to Albany, through the counties bordering on the east shore of the river, and to enter upon any land or water for the purpose of constructing their road; but all real estate thus entered upon, if not voluntarily granted or purchased at a price agreed upon, was to be appraised in the manner pointed out by the statute, and the damages paid by the company to the owner. Pursuant to the authority thus given, the defendants entered upon the river in front of, and adjacent to, the plaintiff's farm, between ordinary high and low water marks, and constructed a line of solid embankment along the whole front of his farm, so raised that its surface was about five feet above the ordinary high water mark of the river, and formed a complete barrier to the passage of boats through the same, to and fro between his farm and the channel of the river, and he was deprived of all means of getting from his farm to the river with vessels for the purpose of removing produce. The question was, whether by act of legislature the plaintiff could be deprived of, or injured in, his riparian ownership on the bank of a navigable river without his consent, and without receiving any compensation therefor. It was held that as none of the plaintiff's land was actually taken by the defendants, he was not entitled to recover. Edmonds, J., dissenting.

[1] People v. Kerr, 27 N. Y. 188; City of Clinton v. The Cedar Rapids and Missouri River R. R. Co. 24 Iowa, 455.

* In Iowa, a railroad company has a right under the statute to construct their road through the streets of a city without the consent of the city authorities or the payment to the city of damages (City of Clinton v. Cedar Rapids & Mo.

§ 674. The shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. But though equity might estop an owner standing by and permitting the company to expend money by laying a track upon the land essential to the use of its line of railroad from regaining the possession, it would not estop him from recovering the damages to which he is entitled for the use of his land, and enforcing his claim in all proper modes.[1] *

River R. R. Co. 24 Iowa R. 455; Chicago &c. R. R. Co. v. Mayor of Newton, 36 Iowa, 299). In City of Clinton v. Cedar Rapids & Mo. River R. R. Co. *supra*, the city of Clinton had by ordinance declared that no railroad company should be permitted to construct its track across any alley, street, or avenue in the city. Notwithstanding this, the defendants, without any authority from the city, commenced the construction of their railroad through the streets. The District Court having restrained the defendants from such use of the streets, they appealed to the Supreme Court, which, reversing the judgment of the court below, held that under the general right of way act of Iowa, a railroad company, subject to equitable control to prevent the abuse of the power, had the right, so far as reasonably necessary, to use the streets in a city.

Although a street railroad company is entitled to use the street in a manner in some respects different from the ordinary public use, and to some extent modifying the rights of other travelers, yet the use of the street is granted to them only in common with others, and their franchise does not give them the control of the highway. That control remains in the municipal authorities, who have the power to direct the manner in which the franchise of the railway corporation is to be exercised, and to make such needful repairs or improvements in the street as may from time to time become necessary, even though a serious interruption to the use of the railroad.

The State of New York has not delegated to railroad corporations the right to take property held in trust for public use, except to the limited extent specified in the statute, and the right to take lands held in trust to be used as a public park or common is not within the statutory grant (Matter of Boston and Albany R. R. Co. 53 N. Y. 574).

[1] McAuley v. Western Vt. R. R. Co. 33 Vt. 311; Duke of Leeds v. Earl of Amherst, 2 Phill. Ch. Cas. 117, 123; Harrisburg v. Craugle, 3 Watts & Serg. 460; Western Pennsylv. R. R. Co. v. Johnston, 59 Penn. St. R. 290.

* Troy and Boston R. R. Co. v. Potter, 42 Vt. 265, was an action of trespass to recover the damages sustained by the plaintiffs in consequence of the defendant's entering upon the line of the railroad, of which the plaintiffs were the lessees, where said road crossed the farm of the defendant, and cutting and taking away the grass growing upon the said road, the plaintiffs being at the time in possession and using the same. The defendant claimed the right to do the acts complained of, on the ground that after the said road had been surveyed and

§ 675. Under a grant of power by act of legislature to lay out a railroad between certain *termini* where the precise course and direction are not prescribed, but are left to the corporation to be located between the *termini*, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, that is, to take the road-bed of such highway as the track of their railroad.[1] *

established across the defendant's farm, in settling the question of land damages between himself and the company, it was agreed that he was to have such right, and that he understood at the time that this right was taken into consideration in fixing the amount of such damages; and in aid of this claim he insisted that the company, in taking the land under their charter, did not cause a certificate of the survey of their road to be recorded in the town clerk's office in the town where the land lay, as required by their charter, and for that reason got no title or right to the land. It was held that as the defendant agreed upon his compensation and permitted the company to take possession of the land and construct their road thereon, it was too late for him to take advantage of the omission of the company, especially since, as president, it was his duty to see that the survey was recorded.

[1] Inhabs. of Springfield v. Conn. River R. R. Co. 4 Cush. 63.

* Although where an act incorporating a railroad company authorizes the road to be constructed where numerous highways are known to intervene, which must necessarily be crossed at different points, the power to cross them is implied, yet it does not follow that this can be done without compensation to the owners of the soil (Starr v. Camden & Atlantic R. R. Co. 4 Zab. 592).

In New York, since the statute of 1851 in relation to railroad companies, they cannot lawfully enter upon, occupy, or cross a turnpike or plank-road without making, or becoming liable to make, just compensation. Ellicottville &c. Plank Road Co. v. Buffalo &c. R. R. Co. 20 Barb. 644, was an action of trespass for entering upon a plank-road, tearing up the plank and grading, and depositing materials for the railroad within the bounds of the plank-road; and for an injunction to restrain the railroad company from proceeding with the construction of their road on and across the plank-road until they had procured the damages to be assessed and paid. It was proved that the plank-road company was incorporated and organized in 1850, and that they built their road in 1851; and that prior to the trespasses the plank-road company had, in accordance with the statute, caused their road to be inspected, had erected toll gates thereon, and were in the actual use and enjoyment of the same. It was held, that the plaintiffs were entitled to recover. Formerly, in New York, a railroad company could only acquire a right to construct their railroad across a turnpike or plank-road by agreement. The statute authorizing a railroad company to acquire the title to real estate wanted for the road, was not deemed applicable to cases where the *title* to the real estate was not to be taken, but only a partial privilege of using it, which did not divest the owners of their title, but only occasioned them some damage which the railroad company had no power to compel them to surrender. By the fifth subdivision of the twenty-eighth section of the act of New York of 1850, it is provided, that every corporation formed under that act shall have power to construct their road across, along, and upon any stream of water, water-course, street, highway, plank-road, turnpike, or canal which the route of its road shall intersect or touch; but the company shall restore the stream or water-course, street, highway, plank-road or turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness. By the fourth section of the act of 1851, a railroad company which shall occupy or cross a turnpike or plank-road is made liable to pay such

§ 676. Although the charter of a street railroad company does not deprive ordinary travelers of the right to pass over the whole highway, including that part on which the rails are laid, so long as they do not unreasonably interfere with the passage of the cars, yet the grant is inconsistent with the use of the track by other similar corporations without authority of the railroad company or of the legislature.[1] * But as a street railroad company has no interest in or control over the part of the street not occupied by its road, except such as is common to the public, it cannot restrain by injunction another company from laying a railroad through the same street.[2] †

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turnpike or plank-road company all damages which it may sustain by reason of such occupancy or crossing, the damages to be ascertained and paid in the same manner as is provided by law for the assessment and payment of damages in cases of taking private property for the use of railroad companies.

[1] Metropolitan R. R. Co. v. Quincy R. R. Co. 12 Allen, 262; Jersey City &c. R. R. Co. v. Jersey City &c. R. R. Co. 20 N. J. Eq. 61.

[2] N. Y. and Harlem R. R. Co. v. The Forty-second &c. R. R. Co. 50 Barb. 285; affi'd Ib. 309; s. c. 32 How. 481.

* In Northern R. R. v. Concord & Claremont R. R. 7 Fost. 183, it was held, that the easement of a railroad in the land over which it was laid out, received by a lease from the State, might be taken from it for the use and benefit of another railroad, upon the appraisal and payment of damages, in the same manner as in the case of a turnpike corporation, a toll bridge, or a ferry, the railroad for whose use it was taken, as well as that from which it was taken, being regarded as public highways.

A railroad may be crossed by a common highway on the same grade with the railroad track without compensation to the railroad company. The property of the railroad is not taken away in such case from the proprietors, who are still allowed to use it for all the purposes for which it was acquired from the original owner. The railroad company may be compelled to make the necessary excavations or embankments for taking the highway across the railroad, the disturbance of the surface of the ground which renders such work necessary having been effected by the railroad itself (Alb. Northern R. R. Co. v. Brownell, 24 N. Y. 345).

† "A railroad company, in taking land, does not act as the agent or representative of the State, nor with a special reference to the benefit of the public, as is the case when roads or other public improvements are made under the immediate direction and superintendence of the State and for the general accommodation or benefit of the community, but under a special grant of power, deemed to be acquired from the State for a valuable consideration, and for the promotion of their own direct and private advantage. * * * The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other, it is merely derivative; is special, if not exclusive in its character; and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled" (Storrs, J., in Bradley v. N. Y. & New Haven R. R. Co. 21 Conn. 294).

Where the charter of a railroad company merely designates in general terms

§ 677. Even where the right which a railroad company acquires to land is a mere easement, the company may do any act upon the land conducive to those public uses for which their charter was granted;* and any entry by the landowner, or any act done by him upon the land which

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the route of the road, leaving its exact location to be determined by the company, the company, after once locating their road, cannot relocate it, or use a street or highway for that purpose (Little Miami R. R. Co. v. Naylor, 2 Ohio, N. S. 235; Morehead v. Little Miami R. R. Co. 17 Ohio, 349). But when a railroad company has located its road across a public highway, and has acquired a right to construct it there at a certain grade, without any restriction as to the number of tracks or the place where they shall be laid, the company may lawfully put down and maintain upon any part of the premises within the limits of the location such number of tracks as are essential to the convenient transaction of its business, and may make any necessary alteration in the grade of the highway provided the highway is kept so as to be safe and convenient for the public (Com. v. Hartford & New Haven R. R. Co. 14 Gray, 379).

* In New Hampshire, a railroad company acquires only a right of way in land taken for the construction of its road (Blake v. Rich, 34 N. Hamp. 282; Dearborn v. The Boston, Concord & Montreal R. R. 4 Fost. 179). In Vermont, where the charter of a railroad company provided that the company, upon complying with the conditions on which they might take land for the use of their road, should be "seized and possessed of the land," this did not make them owners of the fee, but only gave them a right of way (Quimby v. Vt. Cent. R. R. Co. 23 Vt. 387). The land, however, becomes so far the property of the company that their right is exclusive in its use and possession during its existence, the owner or occupant of the adjoining land retaining no right to its use or occupation for pasturage or otherwise (Hurd v. Rutland & Burlington R. R. Co. 25 Vt. 116; Troy & Boston R. R. Co. v. Potter, 42 Vt. 265).

A railway company may lay side tracks, for the purpose of facilitating its business operations or to meet its necessities, over any land which it may purchase and own in fee, or over which it may obtain the consent of the owner to lay a track, if no public interest or private right is affected. The object of the statute requiring a formal location and acceptance and recording of the line of way, is that the rights of individuals in their lands, and the rights of the public in the highways and otherwise, may be protected and secured. Therefore, a private person who has no right and interest in the land, and who sets up no claim of right in any form to interfere, cannot lawfully interpose to prevent the company from proceeding in their work of laying down a side track over land of their own, or over which they have the license or consent of the owner to lay their rails (Bangor, Oldtown and Milford R. R. Co. v. Smith, 47 Maine, 34).

A railroad company does not take the land of the highway as real estate of individuals is taken; nor does it acquire the right to take all materials in or upon the highway to be used for the railroad, as in that case. It cannot dig up the earth or gravel on the highway to build or repair its road. If the company acquires any right within the limits of the highway beyond the space actually occupied by its road-bed, it is only such as is indispensable to the full enjoyment of the right to lay the track, and to use it beneficially. The company acquires perhaps no proper easement in the soil, or, if any, it is qualified and limited to the special purpose of laying and maintaining the railroad (Bangor, Oldtown & Milford R. R. Co. v. Smith, *supra*).

Under a charter empowering a railroad company to alter and grade the public and other roads crossing their railroad, so as not to impede the travel on such roads, the company cannot lawfully change the route of any road (Warren R. R. Co. v. The State, 5 Dutcher, 353).

tends in the least to impair the structure of the road, to endanger the running of trains, to lessen the safety or comfort of the passengers, or generally to embarrass the use of the road for the purposes for which it was built, or the power of the railroad company to keep it in repair, will be deemed wrongful. In a case in Vermont, the land upon which the alleged trespass was committed was originally a part of the farm owned by the defendant which the plaintiffs took under their charter, the damages having been duly appraised and paid. The defendant claimed the right to enter with his servants, oxen and cart, through the plaintiffs' fence, upon the strip of land lying between the fence and the railroad track, and to cut and carry away the turf. He also claimed the right to take up a length of fence on each side of the road on his farm, and to make a farm crossing for his own convenience, without the consent of the plaintiffs, at a different place from the crossing made by the plaintiffs. It was held that the foregoing acts were unjustifiable, and that the plaintiffs were entitled to recover.[1]

§ 678. A railroad company which has taken land for the construction of their road pursuant to statute, may employ the whole or any portion of the earth, stone and gravel excavated on one portion of the line, for the construction of any other portion; but the company cannot apply the materials thus obtained to any other use. In an action against a railroad company, it appeared that the defendants entered upon the plaintiff's land under an arrangement whereby they had a right to construct and use the track of their branch road thereon, and hold the same as long as it should be used for railroad purposes. It was held that this arrangement amounted only to a permissive license, and gave the defendants no right to the soil or the stone contained therein, for any other purpose than the construction and use of their track.* The court

[1] Conn. & Passumpsic R. R. Co. v. Holton, 32 Vt. 43.

* A railroad company does not acquire an absolute right to use the land taken, irrespective of title and interest remaining in the individual, but a right of way, and the right to adapt the soil and land within its limits to the ordinary

remarked that "they might undoubtedly have used the stone excavated on the plaintiff's land in grading this branch track, for the construction of the necessary culverts and bridges thereon; but the material for those purposes having been procured in another place, a mere license to construct and use the track and hold the land, could give the defendants no right to appropriate this stone to a similar use elsewhere. The stone excavated from the plaintiff's land in grading the branch track, so far as not actually used in the construction of that track, belonged to the plaintiff, and could not be removed by the defendants without his permission."[1] *

8. *Demolishing building to stop the spread of fire.*

§ 679. It is lawful to tear down a house in a town in order to stop the spread of a fire, when it will certainly take fire, and so communicate the fire to other houses;[2] and a plea of necessity is a good defense, without the averment that the defendant resided or owned property in the city, or that his own property was in danger.[3] † In Parsons v. Pettengell,[4]

uses and necessities of such a way. It is not lawful for a railroad company to take lands outside the limits of its way for the purpose of removing earth, timber, rock or other materials therefrom, for the construction of its road (N. Y. & Canada R. R. Co. v. Gunnison, 3 Thompson & Cook, 632).

[1] Chapin v. The Sullivan R. R. 39 N. Hamp. 564.

[2] Beach v. Trudgain, 2 Gratt. 219; Surocco v. Geary, 3 Cal. 69.

[3] Am. Print Works v. Lawrence, 3 Zabr. 590; s. c. Ib. 9.

[4] 11 Allen, 507.

* Although if a railroad company use the adjoining land without the consent of the owner, they are trespassers, yet the company have a right to blast a ledge of rocks through which the railroad passes. If the company fail to remove the stones thrown by blasting upon the adjoining land within a reasonable time, they are liable for the damage thereby sustained. But case is the proper remedy, and not trespass (Sabin v. Vt. Cent. R. R. Co. 25 Vt. 363; Dodge v. County Commrs. 3 Metc. 380).

Where rocks are blasted by a contractor, under the authority of a railway company, upon the proposed line of its road, the company is liable jointly with the contractor for damage done by fragments of stone to adjoining premises, although there is no proof of want of care (Carman v. Steubenville & Indiana R. R. Co. 4 Ohio, N. S. 399).

In New Hampshire, the right of the public authorities to remove gravel, sand, rocks or other materials from the traveled part of any highway, without damage or injury to the adjoining land, to any other part of the highway, for the purpose of repairing and grading the same, depends upon the statute specially conferring this power upon surveyors of highways (Blake v. Rich, 34 N. Hamp. 282; Rev. Sts. of N. Hamp. ch. 55, § 15).

† In McDonald v. City of Red Wing, 13 Minn. 38, it was held that a city

which was an action for wrongfully demolishing the plaintiff's house, in order to stay a fire, at the trial in the Superior Court the jury were instructed that the fact that the house and furniture were in imminent peril would not diminish the damages to which the plaintiff was entitled. This instruction was afterward qualified in its application to the building, by stating that if it was so far on fire at the time it was blown up as to make its destruction inevitable, it might be considered as already destroyed, and the defendants would not be answerable; and that if it was partially burned, but not to such an extent, the amount of injury which it had received should be deducted from its value; bnt that unless the house or furniture was actually on fire at the time, nothing was to be deducted from their full value on account of any peril to which they were exposed. This ruling would include the case of a building or furniture so surrounded by fire as to make their preservation, or even access to them, for more than a moment impossible, while they were yet not actually burning. The defendants asked that the jury should be instructed that they were "liable for the destruction of such personal property of the plaintiff, if any, as might have been saved if they had not interfered, and for no more." It was held that the request of the defendants was the true rule.*

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was not liable for the destruction of a building to stop the spread of fire, without some express statute imposing the liability, whether the building was destroyed under the direction of the city officers or not. The court referred to the case of Russell v. Mayor of New York, 2 Denio, 461, in which it was charged that the property of the plaintiff, consisting of merchandise which was destroyed by order of the mayor and aldermen, by the blowing up of a building containing the same in the great fire of December, 1835, had been taken by the city for public use. As the plaintiff had no interest or estate in the building, his action could not be brought under the statute providing compensation for buildings destroyed for the purpose of arresting fires. Bronson, J., said: "It is true that the statute has to some extent charged the damages of those whose property may be destroyed, upon the corporation. It is sufficient to say that the statute gives a right where none would have existed without it, and points out the remedy; and where that is done, the statute remedy can alone be pursued. If the case of the plaintiff has not been provided for by the statute, it is either his misfortune, or he must take such remedy as may be found in the common law, and that will not charge the defendants with the consequence of an act which they neither did nor authorized to be done." And see Am. Print Works v. Lawrence, *supra;* Surocco v. Geary, 3 Cal. 69.

* In The Thames Steamboat Co. v. Housatonic R. R. Co. 24 Conn. 40, it ap-

§ 680. When a statute empowers three fire wards to destroy a building, in order to stay the progress of a fire, upon their joint responsibility acting together, one of them cannot act alone without making himself liable. In Parsons v. Pettengell,[1] the defendants sought to remove their case from the operation of this principle by showing that it was impossible to procure the concurrent action of three fire wards, they being separated by the fire; and they contended that as the necessity for the destruction of the house was immediate and pressing, the one who was in a position to act, must be regarded as entitled to act alone. But it was held that as one fire ward was not intrusted by law with any peculiar authority over the subject, he would in such a case be no more than any other citizen; and that inasmuch as the act of the defendants in blowing up the plaintiff's house was without his consent and not directed by any three fire wards, or by any of the other persons named in the statute, it was wrongful, and the plaintiff was entitled to such damages as he had sustained therefrom.

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peared that the plaintiffs' steamboat was moored by means of cables, alongside of the defendants' wharf in Bridgeport, upon which the defendants had an old wooden shed; that on the night of the 21st of July, the boat took fire, and before the fire had so far progressed as to endanger the buildings upon the wharf, and while she was in such a condition that the fire might have been extinguished, she was cut loose from the wharf by the defendants' watchman, and drifting out was consumed. After the boat had drifted away from the wharf, a person in the defendants' employ as superintendent, on hearing it proposed to haul her alongside of the wharf again, said it should not be done. It did not appear what the duty of the watchman was; nor did it appear that the defendants had any property to be watched at the place except the wooden shed which was upon the wharf. It was insisted however by the plaintiffs, that as watchman, he had an unlimited discretion to do everything he might think necessary, in order to secure the plaintiffs' property from injury in any emergency like the one in question; and that as he exercised this discretion in an unreasonable manner by cutting the boat loose, when there was a reasonable probability that she might have been saved, and especially when there was no reasonable ground to apprehend danger to the defendants' property from her burning at the wharf, the wind at the time being in a direction to drive the fire from the wharf and the building that was upon it, the defendants were liable. The Superior Court however, before which the action was brought, nonsuited the plaintiffs, and the case being taken to the Supreme Court, the judgment below was affirmed.

Where during the late rebellion, Confederate soldiers, acting under the command of an officer, burnt down a court house, it was held that they were liable to an action therefor, at the suit of the county (Christian County Court v. Rankin, 2 Duvall, 502).

[1] 11 Allen, 507; and see Ruggles v. Inhabs. of Nantucket, 11 Cush. 433.

9. *Right to remove unlawful obstructions from land.*

§ 681. If a person erect a building upon land belonging to another without permission, the owner of the land may lawfully tear down the building for the purpose of ejecting the intruder; and the fact that the latter was at the time in the building, will not be any ground for maintaining an action of trespass against the owner of the land.[1] So likewise, a commoner may pull down a building wrongfully erected on the common which prevents his exercising his right as fully as he otherwise might, provided he does no unnecessary damage.[2] It seems however, that a commoner will not be justified, if there were persons in the house at the time. Accordingly, a plea by the defendant, a commoner, to a declaration in trespass for pulling down a house which stated that the defendant and his family were actually present and residing in the house at the time, that the house, interrupted his enjoyment of the common, and that he therefore pulled it down, was held ill.[3] Where a house is built partly on the land of another, the owner of the land has only a right to remove the part which enroaches on his premises,[4] notwithstanding the greater part may be situated thereon.[5] *

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[1] Davison v. Wilson, 11 Q. B. 890; 17 L. J. Q. B. 196; Burling v. Reed, 19 L. J. Q. B. 291.

[2] Davies v. Williams, 15 Jur. 752; 20 L. J. Q. B. 330; Jones v. Jones, 1 Hurl. & Colt. 1, *contra*.

[3] Perry v. Fitzhowe, 12 L. J. N. S. 239; 10 Jur. 799.

[4] Beers v. St. John, 16 Conn. 322. [5] Bolling v. Whittle, 1 Ala. 268.

* In Prince v. Case, 10 Conn. 375, the grantor of the defendant gave to the father of the plaintiff, since deceased, permission to dig a cellar and build and occupy a house on the grantor's farm. The defendant afterward brought an action of ejectment against the present plaintiff to recover the seizin and possession of the land occupied by the house, with the house itself, and obtaining judgment, the sheriff put the defendant in possession. More than a year after possession taken under the ejectment having elapsed without the removal of the house by the plaintiff, the defendant took it down, and thereby destroyed it as such, but did not take away the materials, which was the wrong complained of. The Supreme Court in closing an elaborate opinion, in which it was held that the plaintiff was not entitled to recover, said: "It is not shown that the defendant has been guilty of any wanton destruction of the property, or of any unnecessary injury in taking it down. If not, and he had a right to remove it, it is not easy to see upon what principle he can be liable for any damages. Had he interfered with an attempt of the plaintiff to remove the building, a different question would have arisen. But as the plaintiff neglected for so

§ 682. When the owner of a shade tree finds a horse fastened to it, he may lawfully remove the horse to a place of safety.[1] * So, where a person places a horse and cart before my house, and thereby prevents my driving up to it, I have a right to lead the horse away, or whip him to make him move along.[2] And if a person's goods are placed on my land, or his cattle or sheep come there, I may lawfully remove them.[3] It has been held that railway companies have a right at common law to distrain engines and carriages encumbering their railway.[4]

§ 683. Where a party can maintain an action for a nuisance, he may enter and abate it, even if it cause but nominal damage to him.† Although, in general, an erection

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long a period to make this attempt, the defendant was justified in removing it himself."

Where the owner of the fee of a highway gives another leave to put his house upon the highway, to remain there a specified time, and the owner of the land, after the time has expired, removes soil from around the house, and thereby endangers its safety, he is not liable to an action therefor. Mason v. Holt, 1 Allen, 45, Hoar, J. : "We are to see upon what right the plaintiff's action, which is tort for breaking and entering the close, can be supported. His only right was obviously that which he acquired from the defendant. In regard to this there was a difference in the evidence. If that offered by the plaintiff were true, we should incline to think that the permission to place the building on the defendant's land without any time limited, and without any payment of rent, or other valuable consideration, would amount to no more than a mere license revocable at the defendant's pleasure, and actually revoked by him. But if the defendant's evidence were correct, and the agreement by parol, that the plaintiff might occupy the land for six months made him a tenant at will, then the tenancy at will had expired by its own limitation; the plaintiff had no right to hold possession after that time; and the only other facts proved, were repeated notices from the defendant to remove, and a promise by the plaintiff to do so, as soon as he could get another location. The plaintiff then at the expiration of the six months, became a tenant at sufferance, and had no title upon which he could maintain this action."

[1] Gilman v. Emery, 54 Maine, 460. [2] Slater v. Swann, 2 Str. 872.

[3] Rea v. Sheward, 2 M. & W. 424; Crane v. Mason, Wright R. 333; Grier v. Ward, 23 Geo. 145.

[4] Ambergate &c. R. R. Co. v. Mid. R. R. Co. 2 El. & Bl. 793.

* In Gilman v. Emery, *supra*, the defendant found a horse hitched to one of his shade trees. He unhitched him and led him a few feet, and hitched him to a post set in the ground to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it, but for the fact that his horse afterward broke loose from the post and injured his wagon. But there was no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ did not charge him with negligence, but with trespass *vi et armis* in taking and carrying away the horse and buggy.

† If the branches of a tree which overhang another's land are a nuisance, his

cannot be abated as a nuisance, unless it be such at the time, yet an erection may be a nuisance when it is causing no actual damage;[1] and the consent of a person to a nuisance cannot deprive him of the right to abate it.[2]* When a person sustains a special injury from a public nuisance, it becomes to him a private nuisance, and he may remove it to the extent necessary for the reasonable enjoyment of the

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remedy is an action for damages, in which, if he succeed, the nuisance will be abated (Hoffman v. Armstrong, 46 Barb. 337; Aiken v. Benedict, 39 Ib. 400).

In order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. It was, therefore, held that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterward unable to let his house except at a low rent (Mumford v. The Oxford, Worcester and Wolverhampton R. R. Co. 1 H. & N. 34; Simpson v. Savage, 1 C. B. N. S. 347; 26 L. J. C. P. 50). Where the roof and eaves of a building overhung the plaintiff's land and discharged rain water thereon, the land being in the possession of the plaintiff's tenants, it was held that he was entitled to recover, as the building was a permanent injury to the property, and would, if allowed to remain, impose a servitude thereon.

Persons jointly interested in land injured by a nuisance may maintain an action therefor (Bac. Abr. Joint Tenants, K.)

In proving damages, it is sufficient for the plaintiff to show that, by reason of the injurious acts of the defendant, he cannot enjoy his right in as full and ample a manner as before, or that his property is substantially impaired in value. Where the damages are consequential or affect relative rights, some damage must be proved (Cropsey v. Murphy, 1 Hilton, 126).

[1] Amoskeag Manf. Co. v. Goodale, 46 N. Hamp. 53.

[2] Pilcher v. Hart, 1 Humph. 524.

* Blackstone (3 Com. 5) says, that whatsoever unlawfully annoys or does damage to another is a nuisance, and may be abated by the party aggrieved, so that he commit no riot in the doing of it. Again (Ibid. p. 215), the learned author defines a nuisance to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments. The erection of a pig sty, lime kiln, privy, smith forge, tobacco mill, tallow furnace, and the like, so near a dwelling that the stench incommodes the family and makes the air unwholesome, are given in the books as pertinent illustrations whereby the injured party may take the remedy into his own hands.

A man who should erect a pig sty under his neighbor's window, could hardly excuse himself by showing that he intended to keep it clean and inoffensive, although the thing is useful in itself. A house in a populous town, divided for poor people to inhabit during the prevalence of an infectious disease, is a nuisance (1 Roll. Abr. 139). The law does not wait for the disease to spread. It exercises a wise forecast, and repels the evil at the threshold. It does the same thing in favor of public morals and public economy. The act of 1815, incorporating the town of Franklin, in Tennessee, gave the town power to make by-laws for the prevention of nuisances. A by-law was passed inflicting a penalty of five dollars on any person who should exhibit a stud horse in the town. The defendant having exhibited his horse, the Supreme Court held the act to be a nuisance, on the principle, as they remarked, which condemned all houses, gaming houses, brothels, booths for rope dances, mountebanks, and the like.

At common law, a private nuisance was a tort; a public or common nuisance, a criminal offense (Coe v. Schultz, 47 Barb. 64).

right of which the thing interposed would deprive him, doing no unnecessary damage.[1] As the continuance of a public nuisance is a continual erection of it, of course it is not affected by statutes of limitation.[2] *

§ 684. When a man builds a house upon his own land, with the eaves and windows above the surface of the ground projecting over the land of the adjoining proprietor, he is

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[1] James v. Hayward, Cro. Car. 184; Dimes v. Petley, 15 Q. B. 276; Davies v. Mann, 10 M. & W. 546; Mayor of Colchester v. Brooke, 7 Q. B. 339; Bateman v. Bluck, 18 Q. B. 870; 21 L. J. Q. B. 406.

[2] Peckham v. Henderson, 27 Barb. 207.

* The rule that every continuance of a nuisance is deemed to be a fresh one, and therefore a fresh action will lie, is not only true as to the party first injured, but a purchaser may sue for the continuance of a nuisance erected before his purchase was made, as an heir also may for the continuance of one erected in the lifetime of his ancestor (Beswick v. Cunden, Cro. Eliz. 402; Westbourne v. Mordant, Ib. 191; Russell and Handford's Case, 1 Leon. 273; Moore v. Browne, Dyer, 319 *b*; Gresill v. Hoddesden, Yelv. 143; Rosewell v. Pryor, 1 Ld. Raym. 713; Shalmer v. Pulteney, Ib. 276; Vedder v. Vedder, 1 Denio, 257). Where the original trespass was committed by an agent for the benefit of his principal, and the agent does not act in relation to its continuance, the principal, and not the agent, is liable for the continuing injury. In Lyman v. Dorr, 1 Aiken, 217, the plaintiff, on the 27th of January, brought an action on the case against an incorporated bridge company, to recover damages for erecting a toll-house and gate on his land, and had judgment. Afterward he brought an action of trespass against the servants and agents of the company who constructed the works, for erecting a part of the bridge itself, and the same toll-house and gate, and continuing the same down to a still later period upon his land. It was held that the first action was a bar to any claim for damages previous to the 27th of January, and that the defendants who constructed the works were not liable for their continuance after that time, no act of theirs having been shown affirming such continuance.

The wrong-doer is liable, although he has no right to enter for the purpose of removing the erection, he not being allowed to excuse himself by saying that it is not in his power to redress the wrong (Fish v. Dodge, 4 Denio, 311).

A nuisance of a permanent character having been created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shown that since the erection of the nuisance and before the damage he might have determined the tenancy and did not, such continuing of the tenancy being equivalent to a reletting. And it is no defense that he had no notice or knowledge of the existence of the nuisance (Gandy v. Jubber, 10 Jur. N. S. 652; 33 L. J. Q. B. 151).

For an injury resulting from a public nuisance no action can be maintained, unless the injury be specific and something other than what the whole neighborhood sustains (Mayhew v. Norton, 17 Pick. 357). The rule was discussed in Lansing v. Smith, 8 Cowen, 146). In the familiar illustration put on this subject, where an obstruction is placed in the highway which is a public nuisance, no action can be maintained by an individual who is merely incommoded by the obstruction. But if, in passing by, he casually run against the obstruction, and his carriage is injured or his person wounded, he sustains a direct and specific injury for which he may sue. The foundation of the right to recover in such case is the special damage, the nuisance *per se* giving no cause of action. It is analogous to an action of slander for words not actionable in themselves.

not only liable to an action for damages, but, under some circumstances, the adjoining proprietor may remove the obstruction as a nuisance. In order to justify the act of removal in such case, he must allege that the obstruction was wrongfully encumbering his premises, and that he therefore removed it, doing no unnecessary damage. If it appear that he unnecessarily destroyed it, or appropriated it to his own use, the justification fails.

§ 685. If A. interrupt or divert water from flowing to the mill of another by its ancient course, or stop the water below so as to cause it to flow back and thereby prevent the working of the mill, the owner of the mill may lawfully enter on A.'s land and remove the interruption. In Strong v. Benedict,[1] the plaintiff owned land with an oil mill upon it, and, likewise, a dam across a stream; and he claimed that the defendant tore down the dam, and thereby rendered his oil mill useless. It appeared that the defendant took up the gate at the east side of the dam and diverted the water from the plaintiff's oil mill, permitting it to run in its natural channel to the defendant's grist mill. The plaintiff and defendant claimed under a common grantor. And it being proved that the plaintiff by his grant was only entitled to the use of the stream for a fulling mill, it was held that the defendant had a right to remove the dam, doing the least possible damage; that the defendant was not required to prove that he was actually damnified by the obstruction of the water; that if no damage had in fact accrued, he was justified in abating the nuisance, and was not obliged to suspend operations until there was a deficiency of water.

§ 686. The party complaining of the injury has no right to do an unnecessary damage to the adverse party, notwithstanding the latter is in the wrong. He has not even the right to take such measures as will relieve his land in the most speedy manner, though he is not bound to exercise his

[1] 5 Conn. 210.

right of removal in the way most convenient for the wrongdoer. Great Falls Co. v. Worster [1] was an action of trespass for entering the plaintiff's close and tearing down his dam. The defendant justified the entry to abate a nuisance caused by the flowing of land by the plaintiff's dam. The dam consisted of a main part extending across the stream, and a wing dam, which was taken away by the defendant, extending up the stream at nearly a right angle with the main dam. The wing dam was supposed to be permanently secured, and could not be removed without cutting. Six feet in height of the main part of the dam was constructed by setting up posts along the top of the old dam, in the sides of which were grooves into which loose planks were fitted, but which could be removed or drawn up, so as to reduce the water to any point desired not exceeding six feet. The defendant proved that he at first attempted to reduce the water in the pond by removing these planks, but they were replaced by the plaintiffs before the water was much reduced. The defendant then cut away part of the wing dam which was rebuilt, and it was again cut away by the defendant. The court charged the jury that, if there were loose planks in the dam which the defendant might have taken away with less injury to the plaintiffs, and which would have relieved his land from water in a reasonable time, he was not justified in cutting away the wing dam. It was held that the instruction should have been general, that the defendant had a right to remove so much of the dam as would drain the water from his land in a reasonable time, doing at the same time no unnecessary injury to the plaintiff's property; and that if this was not in substance the effect of the direction which was given, it was erroneous.

§ 687. Before one enters upon another's land for the purpose of abating a nuisance, he should notify the occupier of the land of the existence of the nuisance, and call upon him to abate it, unless there be immediate danger to life from the

[1] 15 N. Hamp. 412.

continuance of the nuisance, so as to render it unsafe to wait for its removal by the occupier.[1] It is said that if the occupier was the original wrong-doer and he created the nuisance, it may be abated without notice; but that it is otherwise, if the nuisance was created by another, and the defendant succeeded to the possession of the *locus in quo* afterward.[2] There is no decided case which sanctions the abatement, by an individual, of nuisances of omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The security of lives and property may, however, sometimes require so speedy a remedy as not to allow time to call on the persons on whose property the mischief has arisen, to remedy it; and in such cases, an individual would be justified in abating a nuisance of omission without notice.[3]

§ 688. It is not lawful, at common law, to enter upon another's land to prevent an anticipated nuisance. Where, therefore, the plaintiff had erected poles on his own land, in order to build a house which, when erected, would be a nuisance to the adjoining dwelling-house of the defendant, and the latter entered upon the plaintiff's land and took the poles down to prevent the nuisance, it was held that the entry was unlawful.[4] A person whose property is endangered by a moving building, may lawfully employ whatever force is necessary to protect his property, provided there be not time for the interposition of an adequate legal remedy. But the mere prospect of future injury will not justify the destruction of the building unless it be a common nuisance.[5]

§ 689. A penalty superadded by statute for the erection or continuance of a nuisance, does not prevent the common

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[1] Perry v. Fitzhowe, 8 Q. B. 757; Jones v. Jones, 1 H. & C. 1; 3 L. J. Exch. 506.

[2] Jones v. Williams, 11 M. & W. 176; Penruddock's Case, 5 Co. 100 *b.*; Winsmore v. Greenbank, Willes, 577.

[3] Best, J., Lonsdale v. Nelson, 2 B. & C. 302.

[4] Norris v. Baker, 1 Roll. 393, Pl. 15.

[5] Graves v. Shattuck, 35 N. Hamp. 257.

law right of the public to have it indicted and removed as a nuisance; nor does it prevent its being abated in the usual way by individuals at the peril of showing that it was a nuisance, and that they did no unnecessary injury in removing it.[1]* Where an encroachment upon a highway is a

[1] Renwick v. Morris, 7 Hill, 575; s. c. 3 Ib. 621.

* It was a principle of the common law that any one might abate or remove a public nuisance, without staying to have the thing abated or removed found to be a nuisance by a jury, or in or by any preliminary legal proceeding. Of course any one who undertook, even in good faith, thus summarily to abate a public nuisance of his own motion, by his act showed that he regarded and declared the thing stated, to be a nuisance; but he nevertheless took upon himself by his act the risk of being able to show, in a proper action by the party whose interests were injuriously affected, that the thing abated was a public nuisance. It seems, however, to have been held, that in a plea justifying such abatement or removal, it was not necessary to show that the defendant did as little damage as he could. This shows the favor with which the common law regarded the summarily abating of a public nuisance (Hawk. book, 1, p. 199, § 12; James v. Hayward, Cro. Char. 184; Hart v. The Mayor of Albany, 9 Wend. 571; Wetmore v. Tracy, 14 Ib. 250; Coe v. Schultz, 47 Barb. 64).

In New York, general expressions of judges have led to the inference that every common nuisance which was indictable might be abated by any person; that indictment and abatement by individual action were concurrent remedies for all public nuisances. Blackstone (vol. 3, p. 5), in the general language he employs, seems to convey the idea that individuals may, upon their own volition, abate any and all nuisances; but he has inculcated no such doctrine. The party abating must have been aggrieved, and he cites instances in illustration. It has been well said, that "If the unqualified right exists, and any person may, of his volition and without process of law, abate a public nuisance, upon the peril only of showing in justification that the property destroyed or removed is a nuisance, and indictable as such, there can be no distinction made as to the kind or character of the nuisance. It may be a particular trade which is only obnoxious because carried on in a particular place or in a particular manner. It may be something which affects the health of the air, or renders the enjoyment of property uncomfortable, or depreciates the value of property; or it may be something which tends to a breach of the public peace—a disorderly house, a gaming house, or a hospital, as well as the obstruction of a navigable river or a public highway, or the inclosure of a common. To suffer any one, without necessity, to become the executor of this branch of the common law, without the intervention of the ordinary forms of law and a resort to the process of the courts, would tend to gross injustice, breaches of the peace and riots, and the remedy would be worse than the evil to be redressed. But if individual action in the abatement of nuisances be restricted, and the power qualified and limited as by the English cases, no serious mischief can arise, and none of which the wrong-doer has a right to complain" (Allen, J., in Harrower v. Ritson, 37 Barb. 301. And see remarks of Marvin, J., in Griffith v. McCullum, 46 Barb. 561).

In Massachusetts a person was indicted for obstructing a turnpike road by continuing buildings on it which had been previously erected. On the trial, he offered to prove that the portion of the road covered by the buildings, was not within the traveled part, and that a bank six or seven feet in height had been removed for the purpose of placing the buildings where they stood. This evidence was rejected on the ground that it afforded no excuse. Although the defendant might be justified in removing the bank as a nuisance, he would not be warranted in putting another obstruction in its place (Com. v. Wilkinson, 16

nuisance, it will justify only such a degree of abatement by a private person as will enable the public to enjoy the right of way.[1] If an individual can, with reasonable care, notwithstanding the act complained of, enjoy the right or franchise belonging to him, he is not at liberty to destroy or interfere with the property of the wrong-doer. Where, therefore, a fence encroaches upon a public highway, an individual who removes it will be a trespasser, unless it interferes with the use of the road by the public.* In Griffith v. McCullum,[2] which was an action for removing the plaintiff's fence, the defendant justified the removal, as commissioner of highways of the town, on the ground that the fence was an encroach-

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Pick. 175). Although the foregoing was a criminal prosecution, the same rule would apply to a civil case.

[1] Howard v. Robbins, 1 Lans. 63. [2] 46 Barb. 561.

* Burnham v. Hotchkiss, 14 Conn. 311, was an action of trespass *quare clausum* and *de bonis asportatis*, to which the defendants pleaded the general issue, and gave notice that they should prove that the place in which the acts were done was a public highway which was obstructed by a stone wall on which boards were placed; and that the defendants, one of whom was a surveyor, entered thereon, with authority to repair said highway, and pulled down and leveled the wall, and removed the stone and boards, as they had a right to do. At the trial, in the court below, the judge charged the jury that if the plaintiff was owner and in possession, as he claimed, the defendants were liable, unless there was a public highway there and the defendants did the acts under the authority of the surveyor to repair the same, or unless the public travel was, by reason of said wall, &c., actually obstructed, hindered or endangered; in either of which cases the defendants were justified, if they did no unnecessary damage. The verdict being for the plaintiff, the defendants excepted to this part of the charge, claiming that if the wall, &c., were over the line of the highway, they, as individuals, might enter and destroy them; and that the judge should have so charged the jury. A majority of the court, however, held that the charge was correct. Waite and Sherman, JJ., dissented, on the ground that the instruction given to the jury made the liability of the defendants depend entirely upon the question whether the incumbrances upon the highway actually obstructed, hindered, or endangered the public travel, and not upon the question whether they were a common nuisance.

Where ornamental trees, posts, and sidewalks, are so placed upon highways as to become a common nuisance, they may be lawfully removed. But on the other hand, if they are so placed as to ornament and improve the highway, rendering it more useful and convenient to the public, the removal would be unlawful. A railing may be so erected by the side of a causeway as to become highly beneficial, and no one would have a right to remove it.

The wanton and unnecessary destruction of posts and bars which obstruct a highway is a trespass. "If the plaintiff had erected posts and rails across a highway, or on the defendant's land, the defendant might legally remove them, doing no unnecessary damage; but the law admits of no wanton spoil or waste, even in such cases. It is sufficient that a person may put out of the way all impediments to the enjoyment of his rights without inflicting unnecessary injury on the rights of others (Beardslee v. French, 7 Conn. 125, citing Welch v. Nash, 8 East, 394).

ment. There was evidence tending to show that the fence was no obstruction to the use of the highway; that the make of the land was such that the public could not use it where the fence was; and it was claimed that the fence was a protection to the public, the road being upon and along a side hill. The judge refused to submit to the jury the question whether the fence did not render the highway better and more safe for the public than it would be without the fence, but ruled that all encroachments by fences upon highways were nuisances, and that the highway commissioner might, of his own motion, remove such encroachment. The General Term of the Supreme Court, in reversing the judgment on account of error in the ruling, held, that every encroachment upon a highway was not a nuisance; that if the evidence had tended to prove facts which constituted a nuisance, and the question of a nuisance had been material, it should have been submitted to the jury; and that unless the encroachment was such as to constitute a private as well as a public nuisance, the defendant was not justified in removing the fence.*

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* In New York, the statute makes a distinction between obstructing a highway and encroaching upon it by fences. Either may be a public nuisance when it is of such a character as to cause annoyance of a real and substantial nature (Peckham v. Henderson, 27 Barb. 207).

Where a person engaged in building, on a street 100 feet wide, and having a carriage way from 60 to 80 feet, accumulates his materials and extends them so far across as to leave it doubtful whether two carriages have room to pass, it is so obvious an outrage, so great a violation of common and public rights, that the obstruction may be the subject of indictment as a nuisance; and the public authorities, and any person entitled to use the street may abate the nuisance by removing the obstructions (Clark v. Kirwan, 4 E. D. Smith, 21, per Woodruff, J.)

In Griffith v. McCullum, *supra*, the court laid down the following propositions: 1. That every encroachment upon a highway is not a nuisance. 2. That that which is exclusively a common or public nuisance cannot lawfully be abated by the private act of individuals. The remedy is by indictment, unless some other remedy has been provided by statute. 3. A private nuisance may be abated by the party aggrieved. 4. A nuisance may be a public and a private nuisance. In such a case, the public may proceed by indictment to abate it, and punish its author; or those individuals to whom it is a private nuisance, by reason of its being especially inconvenient and annoying to them, or that they are in some particular way incommoded thereby, may of their own act abate it. 5. In the case of a private nuisance, the aggrieved party has an election of remedies. He may remove the nuisance, or he may have his action for the private damages sustained by him. He cannot have both remedies.

Where a person in possession of land allows workmen over whom he has control to take stone and earth therefrom and place them in an adjoining highway, he will be liable for any damage that may be caused to others by the obstruction,

Harrower v. Ritson[1] was an action for the removal of a fence which the plaintiff had erected within the line of a public highway. The judge at the Circuit instructed the jury that the defendant was entitled to the full width of the road as fenced and used, although he could pass the obstruction without serious inconvenience; and if the plaintiff put his fence in the road, the defendant had a right to remove it, doing no unnecessary damage. A verdict having been found for the defendant, the General Term of the Supreme Court granted a new trial, on the ground that the justification of the defendant was limited by the necessity of the case, and if the use of the road was not interfered with, the defendant, in removing the fence, was a trespasser.*

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as also will the workmen who actually placed the obstruction in the highway (Burgess v. Gray, 1 C. B. 578).

[1] 37 Barb. 301.

* In Harrower v. Ritson, *supra*, Morgan, J., dissenting, said: "Every portion of the road as laid out and used is dedicated to the public, and cannot be obstructed so as to interfere with the public travel over such portions, although there may be room to pass on the opposite side. There may be exceptions to this rule, but they have only been allowed in cases where the pretended obstructions were temporary, or the alleged encroachment was beneficial. It is upon this ground that ornamental trees are considered a public benefit instead of an obstruction. So, a public way may be protected by a wall which encroaches upon the side of it. Doubtless, in all these cases of alleged benefit, the question of nuisance or not must be determined by the jury, in view of all the circumstances of the case. But there is no allegation of benefit here, and by the finding of the jury, the plaintiff's fence was placed within the limits of the highway. It is now said that teams could have passed without difficulty, or at least, the jury might have found so by their verdict. But this is not the test. It requires no argument to show that an obstruction to any part of the road is a nuisance, unless it can be justified upon some ground of necessary convenience or supposed advantage. As no such ground was alleged for placing this fence permanently in the highway, all the authorities concur in pronouncing it a nuisance. There was nothing on which the jury could pass, except the single fact whether the fence was put in the highway. If it was put there without excuse, it was *per se* a nuisance. And no excuse was offered, except the untenable assumption that it did not obstruct the travel to the south of it; for, notwithstanding the obstruction in question, it is said sufficient room could have been found to go along the road on the other side. In my opinion, the fence was a public nuisance if it was placed in the highway by the plaintiff, without some good reason to justify the act, whether it left room enough for teams to pass it or not" (referring to 1 Hawk. P. C. 212, 365; 16 Vin. Abr. Tit. *Nuisance*, W; People v. Cunningham, 1 Denio, 524; Davis v. Mayor of N. Y. 14 N. Y. R. 506; 2 Mass. 143; 16 Pick. 175).

The public are entitled to the street or highway in the condition in which they placed it, and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a nuisance. As in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid

§ 690. A municipal corporation has no authority to declare that a nuisance which is not so, in fact or in law. If it possessed such a power, it could create a crime and designate the criminal, where the law recognized neither; for one who maintains a nuisance is liable to indictment.[1]* The New

injury, have a remedy by action against the author or person continuing the nuisance. No question of negligence can arise, the act being wrongful. It is as much a wrong to impair the safety of a street by undermining it as by placing objects upon it. There can be no difference in regard to the nature of the act, or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation or in him by whom the act complained of was done. In Congreve v. Morgan, 18 N. Y. 84, which was an action caused by the breaking of a flag-stone over the defendant's area, it was made a point that although the stone over the area was unsafe for the purpose of a covering, yet if it was fractured after it was laid, by the wrongful acts of others, and the injury arose from that cause, the defendants would not be liable—at least, not without proof that they had notice of its condition, and were under an obligation to repair. The decision of the court was as follows: "The liability of the defendants does not depend upon their negligence either in providing an unsuitable stone or in continuing the use of it after it had become unsuitable from any cause, but from the fact that the stone was unsafe at the time the injury occurred, and thereby occasioned the injury. When the stone became unsafe for any reason, the area was a public nuisance, in like manner as any injury or obstruction to the street would be, and the defendants who continued it were responsible for it to the public and to individuals receiving special damage from it, without negligence on their part, for the damage sustained. They were bound, at their peril, to keep the area covered in such a manner that it would be as safe as if the area had not been built. This measure of liability is essential to the public interests and the protection of the rights of individuals."

One who obstructs a highway by an erection thereon, cannot excuse himself by saying that it was the fault of the builder or contractor in not constructing it in a different manner (Hole v. Sittingbourne &c. R. R. Co. 6 H. & N. 500).

[1] Howard v. Robbins, 1 Lans. 63; Hoffman v. Schultz, 31 How. 385.

* Where the inhabitants of a town through which a turnpike road passed, for a long time enjoyed the right to pass the turnpike gate toll free, it was held that this created no right in the town in a corporate capacity to demolish the turnpike gate as a public nuisance when the right to pass was withheld (Panton Turnpike Co. v. Bishop, 11 Vt. 198). Redfield, J.: "If this right were denied any or all the inhabitants, it would give no right to the town to interfere in its corporate capacity, and demolish the plaintiffs' gate by way of abating a nuisance. Any citizen denied permission to pass as he had been accustomed to do, might, perhaps, be justified in passing forcibly, but he could, at most, only use such force as was necessary for that purpose. He could not demolish the gate to-day, because he expected some citizen of the town would wish to pass to-morrow, even although the plaintiffs insisted they should not permit such citizen to pass. Nor could the selectmen of the town do the same for the same purpose, any more than one who had been permitted to pass the gate could return and destroy it, lest it might afterwards be shut against some one having an equal right to pass" (citing Pingry v. Washburn, 1 Aiken, 264).

It is well settled, that one who claims to do an act in one right, shall not afterward be permitted to refer the act to another right and for a different object. Where, therefore, the selectmen of a town had, by a vote of the town, proceeded to demolish a turnpike gate as a public nuisance, it was held that they could not afterwards justify their proceedings under a private right to pass the gate toll free (Ib.)

York board of health, at a meeting, entered upon its records, that the premises of the plaintiff were in a condition dangerous to life and health, and a public nuisance, and ordered that the business of slaughtering animals on the said premises, be abated and discontinued. Subsequently, the board passed another ordinance declaring that the slaughtering of animals should not be permitted after a day which was specified, at any place in the city of New York south of Forty-second street; nor at any place north of that street, nor in the city of Brooklyn, without a special written permit from the board of health. The evidence tended to show that the business of slaughtering was conducted by the plaintiff with care and cleanliness, and several of his neighbors united in a petition to the board praying that his business might not be interfered with. It was also proved that the slaughtering of animals could be so regulated and conducted as not to be in any case, a nuisance, or prejudicial to the public health. Upon a motion for an injunction, the court restrained the defendants from interfering with the plaintiff's business, except for police inspection and regulation, until the hearing and disposal of the case, remarking that the board had clearly exceeded its authority when it attempted to declare anything to be a nuisance which was not such by the common law.[1]*

[1] Schuster v. Metropolitan Board of Health, 49 Barb. 450.

* In the above case the court said: "The business of slaughtering has at all times heretofore been carried on in the city of New York since the earliest period of its history. If the ordinances above referred to are binding upon its citizens, then the business heretofore lawfully exercised, restrained only by regulations conducive to the public health, must be terminated within the populous portions of the city. The ordinances are not directed to the regulation of a customary occupation, or to the mere cleansing of premises where the slaughtering of animals is carried on, nor to the temporary closing of such places until they are purified, which would be lawful as a police regulation, but to the entire suppression of the business. The business of brewing malt liquors, and of distilling spirituous liquors, may be conducted so negligently, as to be injurious to the public health from foul and unwholesome exhalations. Many other business pursuits carried on lawfully within the populous limits of the city may by neglect become an injury to the public health, and a nuisance. The wealth and prosperity of the city arises very considerably from pursuits of this and a similar character, in which our citizens have, as in other cities, lawfully engaged. The preservation of the public health requires, and the law has long sanctioned, certain ordinances for the regulation and purification of premises so occupied. The power to suppress other occupations is no more difficult than the suppression of slaughtering. The importance and extent of the power claimed to be exercised

§ 691. A house of prostitution cannot lawfully be torn down, for the reason that the use to which it is devoted is a nuisance. The remedy is, to stop such use, not to demolish the building. The property of the keeper of such a house is not put beyond the pale of the law by her criminal conduct. She still has the right to expect and rely upon the zeal and ability of the proper public officers to defend her house and furniture against the unlawful effects of any public indignation her evil practices may provoke.[1] It has been well said that "it would be an exceedingly unsafe and dangerous doctrine to establish in any community, that a dwelling-house or other property might be lawfully destroyed because, for the time being, it was devoted to a purpose which the law characterizes as a common public nuisance. Prejudice and passion would soon find occasion for its application that would prove incompatible with the preservation of good order, and the security of private rights. Pretenses and surmises of the most unfounded nature would frequently be resorted to for the purpose of justifying or excusing the execution of the extravagant designs of fanaticism or revenge. A more complete device for breaking up the tranquility of the community in which it should be permitted, could hardly be formed. Turbulence and outrage would soon become more common occurrences than they already are; resulting in the end in more serious injuries to the public morals, than those endeavored to be redressed. Cases may possibly arise where that extreme remedy should be tolerated, but they will be found to be exceedingly rare."[2] In Ely v. Supervisors of Niagara

by the defendants is indicated by the foregoing references. While the inspection and regulation of pursuits in a large city which are liable to become injurious to the public health and safety are within the police powers, lawfully delegated to and exercised by local and municipal corporations, the power to suppress such pursuits, when they have been immemorially exercised, is wholly beyond and above the police powers, and extends into the domain of legislative function. The power exercised by the defendants reaches in its possible consequences to a revolution in the customary occupations and pursuits, within the city limits, of a large number of its citizens, and to the value of property invested in such pursuits."

[1] Moody v. Board of Supervisors of Niagara County, 46 Barb. 659, affi'd 36 N. Y. 297.

[2] Daniels, J., 36 N. Y. 297.

county,[1] which was an action to recover damages for the destruction of the plaintiff's houses by a mob, it was proved that the houses that were destroyed were kept and maintained by the plaintiff as bawdy houses at the time of their destruction, and had been so kept for a long time previous thereto, and the defendant also offered to prove that they were also kept as a resort of thieves, robbers, and murderers; that such and other disorderly and wicked persons were notoriously accustomed to be received, entertained and harbored in them by the plaintiff, to the great fear, danger and apprehension of all the people of the town of Niagara, and that during the night preceding their destruction, divers of the criminal and wicked persons whom the plaintiff was accustomed to receive and harbor in them, murdered a resident and citizen of the town in the highway near the houses, while he was in the exercise of his duty as a policeman, and that the fact of such murder being publicly made known on the next morning, and the body being found on the highway close by the plaintiff's house, great exasperation, excitement and indignation were caused among all the people in the vicinity. It was held that the foregoing constituted no justification.

10. *Private property in highway.*

§ 692. Highways are regarded in our law as easements. The public acquire no more than the right of way, with the powers and privileges incident to that right, such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished, but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth,

[1] 36 N. Y. 297.

for every purpose not incompatible with the public right of way. The person in whom the fee of the road is, may maintain trespass, ejectment or waste,* and when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil.[1] As a legal consequence, he may be dispossessed and disseized, subject to the easement, as in other cases. The law will not presume the grant of a greater interest or estate than is essential to the enjoyment of the public easement. The rest is parcel of the close. The fact that the highway is fenced on each side is for the convenience of the owner, and has no necessary connection with the road.[2]

§ 693. By the common law, the soil of a highway is *prima facie* in the adjoining proprietors to the center of the road, subject to the rights of public travel and its incidents.[3] But this presumption may be rebutted by proof that the grant was to the side of the way only.[4] The foregoing rule is not artificial and of positive institution, but is founded on the supposition, in the absence of proof, that the highway was originally granted by the adjoining proprietors over their lands in equal proportion. It is not a *præsumptio juris et de jure*, but a reasonable presumption based on probability. A. owns a piece of land. A highway is laid across the middle of it. The fee remains in A. Again, A. and B. own land

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[1] Jackson v. Hathaway, 15 Johns. 447; Lord v. Wormwood, 29 Maine, 282; Read v. Leeds, 19 Conn. 182; Peck v. Smith, 1 Conn. 103; Adams v. Emerson, 6 Pick. 57; Barclay v. Howell, 6 Peters, 498; Williams v. Kenney, 14 Barb. 629; Higgins v. Reynolds, 31 N. Y. 151.

[2] Gidney v. Earl, 12 Wend. 98.

[3] 3 Selw. N. P. 728; 1 Saund. Pl. and Ev. 447; 1 Swift's Dig. 508; Goodtitle v. Alker, 1 Burr. 133; Stiles v. Curtis, 4 Day, 328; Watrous v. Southworth, 5 Conn. 305; Chatham v. Brainerd, 11 Ib. 59; Champlin v. Pendleton, 13 Ib. 23; Bangor House v. Brown, 33 Maine, 309; Hunt v. Rich, 38 Ib. 195.

[4] Smith v. Slocomb, 11 Gray, 280.

* Robbins v. Borman, 1 Pick. 122, was an action of trespass for plowing up a piece of land within the exterior lines of a turnpike road, which was part of a lot belonging to the plaintiff. The court said: "The public have only an easement in this land. The owner of the land retains his right in the soil, and may maintain trespass. If the plowing had been for the purpose of mending the road, by direction of the turnpike corporation, that would have been a good defense. The plaintiff is entitled to a verdict."

adjoining. A highway is laid wholly on A.'s land, but bounded on the land of B. Here it is clear that the fee of the way remains in A. as much as in the first case. For laying a servitude on the land of A. cannot transfer any part of the fee to B., although by laying out the road B. has become an adjoining proprietor. Take one case more. A. owns land. B. owns land adjoining on each side of it. The whole of the land of A. is laid out for a road. It cannot be said in such case that the fee is transferred from A. to B. Because the proof in respect to the laying out of the road, and the circumstance of the ownership continuing the same as at the time of the laying out, rebut the presumption that the road was laid on B.'s land or was originally the land of those under whom he claims.*

§ 694. A conveyance, bounded on a street of a city or village, would ordinarily include the soil to the center. But it would be otherwise with a like conveyance bounded on one of the streets in the upper part of the city of New York, where the right of soil is vested in the public authorities.[1] When land is conveyed as bounded by a proposed street represented on a plan, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance. If, however, he bound the grant by a highway generally, it will carry the fee to the center of the way.[2]

§ 695. If the owner of land through which a highway is

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[1] Dunham v. Williams, 37 N. Y. 251; Wager v. Troy Union R. R. Co. 25 N. Y. 526.

[2] Stevens v. Whistler, 11 East, 51; Johnson v. Anderson, 18 Maine, 76; Southerland v. Jackson, 30 Ib. 462; Palmer v. Dougherty, 33 Ib. 502.

* A. and B. owned land on opposite sides of a highway. B. inclosed a part of the highway next to his land, not required for the public travel, and held it as his own for twenty-eight years, thereby appropriating all of the highway to which he had title and a rod of it besides. It was held that the title of A. to the center of the highway remained unaffected (Watrous agst. Southworth, 5 Conn. 304).

Where the plaintiff had lands abutting on one side of a public highway called Shepherd's lane (which was *prima facie* evidence that half of the lane was his soil and freehold), it was held that he might declare generally for a trespass in the lane, and that the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in that part of the lane, which was his exclusive property (Stevens v. Whistler, *supra*; and see Pratt v. Groome, 15 East, 235).

laid conveys the land "saving and excepting the highway," the fee of the land used for the highway vests in the grantee, subject to the right of passage in the public; and the grantee can maintain trespass against a stranger for the continuance of an erection built by him on a part of the highway not used for travel, previous to the grant.[1] Where a deed, after describing the land by metes and bounds, proceeded as follows: "including all within the above mentioned bounds, excepting a road laid out through said premises by committee from court," it was held that the exception only embraced the easement or right of the public to pass over the land appropriated for the road, and not the road itself.[2]*

§ 696. When a highway is discontinued, notice need not be given to land owners. As respects them, the case is different whether a road is to be laid out or discontinued. In the one case, their property is to be taken for public use, which can only be done upon proper compensation; and in regard to the extent of such compensation they have a direct pecuniary interest, and are entitled to be heard. The condemnation of land for the use of a highway is in the nature of a judgment *inter partes*, to the validity of which notice, actual or presumptive, is indispensable. But the discontinuance of a highway, although a judgment in some sense, oper-

[1] Peck v. Smith, 1 Conn. 103, Ingersoll, Baldwin and Brainard, JJ., dissenting.

[2] Leavitt v. Towle, 8 N. Hamp. 96.

* In Leavitt v. Towle, *supra*, the court said: "Were a grant to be made of land over which a road runs, it would hardly be thought by any one that a grant of the road would convey the soil over which it passes. Had it been the intention of the defendant to reserve his right to the soil, it might easily have been so expressed; and it is difficult to conjecture any object of profit or advantage the defendant could have had in view in reserving his title to so narrow a strip through two and a half acres of land. Upon the whole, we are satisfied that the exception extends only to the easement or right of passage in the public, and that the soil over which the road passed was transferred to the plaintiff as a part of the two and a half acres, and that the exception was inserted only for the purpose of protecting the defendant from being answerable on his covenants in the deed on account of the road."

The existence of a road does not justify the inference that it is of such width as to be safe and convenient to be passed over with teams and carriages. If it did, "in many cases it would subject proprietors of lands adjoining highways to great losses without compensation, and might carry a right of way, founded in prescription, to an extent beyond the limits proved by long and continued use" (Hunt v. Rich, 38 Maine, 195).

ates *in rem* altogether. There is nothing in the nature of a judgment *inter partes*. The land owners may be interested to a greater extent than others; but the interest is of precisely the same quality as that of any other person. It is an interest of a public character in the use of the road.[1] The non-user of a highway for many years is *prima facie* evidence of a release of the right to the person over whose land the highway once ran.[2] It has been held that from adverse possession, continued uninterruptedly for twenty years or more on one side, and total non-user on the other for the same time, it is to be inferred that a highway never existed, or if it did, that it has been discontinued, or that the public right has been in some way surrendered, discharged, or relinquished.[3]*

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[1] Haynes v. Lassell, 29 Vt. 157. [2] Beardslee v. French, 7 Conn. 125.

[3] Webber v. Chapman, 42 N. Hamp. 326; Knight v. Heaton, 22 Vt. 480.

* In Vermont, it is provided by statute that the State shall not be exempt from the statute of limitations.

Where the owner of land, bounded on a highway, moves a wall, plants trees, cuts brushwood and digs up the soil of the land between his own and the traveled part of the way, it is not such an adverse or exclusive possession as will enable him to maintain trespass *quare clausum* against another for the interruption of such use (Smith v. Slocomb, 11 Gray, 280).

In Comm'rs of Georgetown v. Taylor, 2 Bay, 282, where land had been conveyed to the town of Georgetown for streets, but had never been used as such, but had been inclosed and used as a farm for more than forty years, it was held that the doctrine of non-user would apply, which would forfeit a corporate right, as well as misuser. The same was held in Ohio, in Fox v. Hart, 11 Ohio R. 414.

In Kentucky, in Rowan's Ex'rs v. Portland, 8 B. Mon. 232, where the fee of land dedicated to the public use was vested in town trustees for such use, the court said: "That the public right, as growing out of the dedication in this case, was subject to be divested and defeated by adverse possession and claim of individual right, admits, as we think, of no doubt. The dedication was not to the commonwealth as a corporate being, and invested no title or interest in it. The maxim, *nullum tempus occurrit regi*, is therefore inapplicable. And there is nothing to exempt the right, which vested really in the town and its citizens, to be upheld by them for the public, from the operation of the statute of limitations, or from the presumptions arising from adverse claim and possession, as they would apply in ordinary cases of private right or public easements."

In Knight v. Heaton, 22 Vt. 480, it was held that the inclosure and occupation of land within the limits of a highway, for twenty years, under a claim of right, made a title by prescription to the land so inclosed and occupied, as against the public. The court said: "Such a long possession is the most conclusive evidence of what was, at the date of the survey, considered its true location, as a long possession under a deed is the most satisfactory evidence of the true location of the thing granted. If it could now be shown, beyond all controversy, that the survey extended as far upon the plaintiff as now claimed, the non-user on the part of the public, and the constant use by the plaintiff, under a claim of right, is sufficient to establish a prescriptive right in cases like the present, where no statute of limitations applies. It is said, I know, in the English books upon this subject, that one cannot prescribe against the crown. But the same result is ob-

§ 697. An adjoining proprietor may have occasion to use a highway in connection with his land in a different manner from other persons. He may swing his gate or door over the way, suffer his horses or carriages to stand upon it, lay building materials upon it designed to be used on his land, and throw earth upon it as he removes the earth from his cellar. But these are all temporary acts, and are connected with the use of the way. He may spread soil upon it to make it more level, and access to it from his premises more convenient; but this is merely fitting it more perfectly for the public.[1] * The foregoing do not constitute permanent

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tained, in that class of cases, by presuming a grant." Referring to Johnson v. Ireland, 11 East, 279, in which Lord Ellenborough said: "I would presume anything capable of being presumed in order to support an enjoyment for so long a period; as Lord Kenyon once said on a similar occasion, that he would not only presume one, but one hundred grants, if necessary, to support so long an enjoyment."

In Hillary v. Waller, 12 Ves. 239, 265, Lord Eldon said: "I have heard it stated, that this (the presumption of abandonment, or of a grant from non-user) does not apply to the case of a public road. It applies more to that than to a private road. The reason given was, that there cannot be the same presumption of a surrender. If, by matter of record, the right appears vested in the public, it may be so, as there the right appears, and the surrender does not appear. But if the right does not rest upon matter of record, and the public have not enjoyed it, it is to be left to the jury to presume, and is almost conclusive, not that it was surrendered, but that it never existed; and for this special reason, one man may surrender, or, for many reasons, may not enjoy his right; but the probability is, as to the public, that some instance of enjoyment would be shown. This is much stronger than the case of a private road, if, for many years, there has been no enjoyment; for what one man may relinquish, another may be disposed to assert."

[1] O'Linda v. Lothrop, 21 Pick. 292; Underwood v. Carney, 1 Cush. 285; see *ante*, § 657.

* In O'Linda v. Lothrop, *supra*, the plaintiff claimed that the defendant had so abused his right of way in a street, the fee in the land of which belonged to the plaintiff, as to have become a trespasser. The use of the way by the defendant which was complained of consisted in placing gates and doors so near the street that, when opened, they swung over it; in suffering horses and carriages occasionally to stand in the street near his premises; in placing timber and other materials on the street preparatory to building a barn on his own land; in throwing earth out of his cellar on to the street for the purpose of removing it; and in spreading some earth on the street to make it more level and to make his own barn more accessible. A verdict having been found for the defendant in the court below, the Supreme Court, in directing judgment to be entered on the verdict, said: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use, and the acquiescence of the public, is evidence of the right. The owner of land may make such *reasonable* use of a way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down that in a populous town, where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street, and to place doors and gates in them, so as when opened to swing over

occupation, or justify any appropriation except for a reasonable time, and as connected with the use of the road as a way.[1]

§ 698. The owner of a fee of a highway may maintain trespass for the use of it for other purposes than passing and repassing. No act, however, will amount to a trespass unless the same act would be such, if committed on any other land of the plaintiff.[2] All persons have a right to pass along a public street, but not to stop and obstruct it. The crowd of passers may be so great as in itself to be an obstruction, yet so long as it is a moving crowd, whether of individuals or vehicles, it is a legal use of the street.[3] In Adams v. Rivers,[4] it was held actionable in the defendant to stand on the sidewalk of the plaintiff's lot where he lived, and employ toward him abusive language. While so engaged he was not using the highway for the purpose for which it was designed. It was not shown that he stopped on the sidewalk for a justifiable cause; on the contrary, it was rendered probable that he was there for a base and wicked object. It was therefore a trespass. "Suppose," said the court, "a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window, can there be a doubt that he is liable in trespass? The tendency of the act is to disturb the peace, to draw together a crowd

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the street. When the owner of a lot in such a situation has occasion to build, and for that purpose to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same, and to remove them within a reasonable time. It is very obvious that without this privilege it would be, in some situations, nearly or quite impracticable to build at all. If he be guilty of a wrong to any one, it is to the public, and not to the owner of the land. The spreading earth or gravel on a way with an honest intent to improve the way, and make it more convenient for public use, and thereby actually improving it, is clearly no trespass on the owner of the land. Much less is it a trespass occasionally to allow horses and carriages to stand in the street against or near a house. This is one of the appropriate uses of a highway."

[1] Codman v. Evans, 5 Allen, 308.

[2] Dubuque v. Maloney, 9 Iowa, 450; Babcock v. Lamb, 1 Cowen, 238.

[3] N. Y. & Harlem R. R. Co. v. Forty-second Street &c. R. R. Co. 50 Barb. 285; aff'd, Ib. 309.

[4] 11 Barb. 390.

and to obstruct the street. It would be no justification that the act was done in a public street. The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances by treating the intruders as trespassers." A. was in the day time on the public road carrying a gun, and accompanied by a dog. The land on both sides of the road was a cover in the actual occupancy of B. A. waved his hand to the dog, which entered the cover. A pheasant flew out across the road, and A., being on the road, fired at it and missed it. A. was convicted by two justices, under the statute,[1] of committing a trespass by being, in the day time, on land in the occupation of B. in search of game. On appeal, a case was reserved in which the question for the court was whether the evidence supported the conviction. It was held by the whole court that the road was land in the occupation of B., subject to the right of way in the public; and that as there was evidence that A. was not on the road in the exercise of the right of way, but for another purpose, namely, in search of game, he was a trespasser.[2] And the principle relative to the misuse of a highway to the prejudice of the owner of the soil, has been applied to the landing of passengers on the shore of a river at the junction of a public road, and making the spot a temporary harbor for the craft of a ferry.[3]

§ 699. The owner of land adjoining a highway has not only a right to have the whole space occupied by the highway open from the soil upward, for the free admission of light and air and an unobstructed prospect, but it is a right of appreciable value in reference to him and his grantees. In Codman v. Evans,[4] the defendant had erected a bay window, which extended over the plaintiff's land. The par-

[1] 1 & 2 Wm. 4, ch. 32, s. 30.
[2] Regina v. Pratt, 4 El. & Bl. 860.
[3] Lewis v. Jones, 1 Penn. St. R. 336.
[4] 5 Allen, 308.

ties were owners of adjoining lands, and the defendant's house stood on or near the line. He set up in justification that there was a highway over the plaintiff's land, extending to the line, and that his structure did not interfere with the use of the way. It was held that this furnished no legal defense.* In Esty v. Baker,[1] the trespass complained of consisted in the defendant placing a shaft running from the defendant's shop to a grist mill, and across the road leading to the plaintiff's factory. The shaft was underneath the bridge or platform, over which was the passage-way, but it in no respect interfered therewith. It was held that the action was maintainable, unless the defendant could disprove the title of the plaintiff to the land used as a passage-way.

11. *Private way.*

§ 700. A private way over another man's land may be derived from permission; as when the owner of the land grants to another liberty to pass over his grounds; in which

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[1] 48 Maine, 495.

* In Codman v. Evans, *supra*, it was held that evidence of an alleged custom in Boston to erect bay windows over the highway was rightly rejected at the trial in the Superior Court. Chapman, J., said: "If there be a custom in Boston to erect bay windows, balconies, and other structures over the streets, provided they do not interfere with the rights of the public, by proprietors who own the soil of the street, such a custom has no application to the case. If it be a custom to erect them over the land of other people, such a custom is illegal; and the defendant cannot justify himself in occupying his neighbor's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston. In some of our ancient highways the fee has always been in the town. Probably this is the case as to many of the streets of Boston. It does not follow from the decision of this case that the public could maintain an action like the present" (citing Homer v. Dorr, 10 Mass. 26; Waters v. Lilley, 4 Pick. 145).

A person who places fence rails on the highway is liable as a trespasser to the owner of the soil. "If a wagoner were at liberty to deposit fence rails on a highway, he would be equally at liberty to deposit ordure on it, or anything else as offensive to a family dwelling on the wayside; or he might make the spot a resting-place before their door for days or for months. The State has dedicated her highways to no such uses" (per Cur., Lewis v. Jones, 1 Penn. St. R. 336).

For the placing of stone upon land adjacent to the highway, and afterward taking the same away, the action must be brought by the person in possession of the land.

In an action for obstructing a highway, the plaintiffs are not bound to produce any record of the highway, but are entitled to recover penalties for the obstructions, upon proof that the highway has been worked and used by the people as a public highway, and regarded as such for fifteen years before the defendant obstructed it (Chapman v. Gates, 46 Barb. 313).

case, the gift or grant is special, and confined to the grantee alone; it dies with the person, and the grantee cannot assign his right.[1] But when the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment of it, it will pass with the tenement to which it is annexed. Where a person in conveying land, reserved half an acre which was used for a cemetery, with a right of way to and from it, it was held that such right of way was an easement—an interest in land—and affected the title to land.[2] *

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[1] 2 Blk. Com. 35.

[2] Alleman v. Dey, 49 Barb. 641.

* Loker v. Damon, 17 Pick. 284, was an action of trespass for breaking down the plaintiff's fence, in consequence of which cattle destroyed the plaintiff's grass. The defendant pleaded that the *locus in quo* was at the time of the alleged trespass, a town way over which all persons had a right to pass, which was obstructed by the fence, and in order to pass the defendant removed it, as he had a right to do. The trespass was charged to have been committed in November, 1832. The evidence offered in support of the plea was the order and record of the county commissioners passed at the session of the board September, 18, 1832, adjudging a new town way across the plaintiff's close, which was to be completed on or before June 1, 1833, and allowing the proprietors of the lands over which the way was to pass until November 1, 1832, for the purpose of taking off the wood, timber, trees and other property not required for the construction of the road. It was held that the place did not become an actual way for all travelers and citizens by mere force of the adjudication of the county commissioners, and that as the act charged was committed by the defendant before the road was constructed, though after the expiration of the time allowed the plaintiff to remove his property, the defendant was liable as a trespasser; but that the plaintiff was only entitled to recover the cost of replacing the fence, and not the loss of an ensuing year's crop. The court, said: "The defendants contend that this was an actual town way for the use of the citizens from the time of the adjudication, and may be pleaded as such. But we think it impossible to maintain that position. It is not the magic of a judicial decree that converts forests and morasses into actual highways. In fact many things are to be intermediately done, and this is plainly contemplated by the statute. In this case, the owners of the land over which the way was laid were allowed until the 1st day of November following, to remove from the premises any wood, timber, trees or other property not useful for the construction of the way. This being an order which the commissioners were empowered to make, would probably be deemed sufficient to protect the fences and the close, even against the town and its agents, provided there were growing crops on the soil, to the protection of which the fences and the maintenance of the close were necessary. It may well be admitted, that by force of such an order, the way is laid out to some purposes as to justify the town and its agents to enter for the purpose of making and constructing the road, and fitting it for travel. But this does not sustain a plea of its being a way for all citizens before it has been so made and constructed. So, if the town, intending not to take the whole time allowed them to make and complete the road, should finish it, and actually lay it open for travel before the time fixed by the order, it might be considered as a highway from the time it should be so in fact laid open and offered to the public. But where no agent of the town has entered for the purpose of making the road—where the time has not elapsed, allowed the town

§ 701. The uninterrupted user of an easement upon the land of another for a period of twenty years, under a claim of right, while all parties concerned are free from any disability and seized of estates in fee in possession, is *prima facie* evidence of a right to such easement, and of a grant which is lost.[1] And the use of a way originally known to be wrongful, and such as would at any time before the expiration of twenty years have enabled the owner to maintain an action of trespass, will, after the expiration of twenty years, establish a prescriptive right.[2] But user of a way, cannot prove a grant by A. to B. on a given day, unless there are other circumstances which confine the evidence to a particular time, and to the parties then interested. The evidence of such limitation forms no essential or natural part of the proof of user. If a grant be pleaded from a particular person to another, at a certain date, the party upon proof of mere user, fails to prove his case as he has stated it. The party alleging the acquirement of an easement need not prove by whom, or to whom, or when, it was granted. It is sufficient if he proves by twenty years' user, unexplained, a grant supposed to be lost, and of which nothing is known beyond what may be inferred from such user.[3] The twenty years are to be reckoned from the date of the supposed trespass.[4]

§ 702. Evidence of user of a way for various purposes for twenty years is *prima facie* evidence of a right of way for all purposes. But evidence of user for a single purpose, or for particular purposes, will not raise a presumption of a general right.[5] Evidence of the user of a way for twelve

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to make the road and lay it open for travel—we are of opinion that by mere force of the adjudication, the place cannot be pleaded as an actual way for all travelers and citizens, and that the plea in bar is not supported" (Citing Cragie v. Mellen, 6 Mass. 7).

[1] Woolrych on Ways, 19, 288; 3 Kent's Com. 442; Campbell v. Wilson, 3 East, 294; Livett v. Wilson, 3 Bing. 115; Keymer v. Summers, Bull. N. P. 74; Gilman v. Tilton, 5 N. Hamp. 233; Watkins v. Peck, 13 N. Hamp. 360; Driscoll v. Newark & Rosendale Lime & Cement Co. 37 N. Y. 637; *ante*, § 632.

[2] Sibley v. Ellis, 11 Gray, 417.

[3] French v. Marstin, 4 Fost. 440.

[4] Strout v. Berry, 7 Mass. 385.

[5] Cowling v. Higginson, 4 M. & W. 255.

years for all purposes, and for twenty years for the only purposes for which it was needed, establishes the existence of a general right.[1] A non-user for twenty years affords a presumption that the right never existed, or has been extinguished in favor of some adverse right. Although there may be exceptions to this rule in case of the non-user of certain easements, it is believed that with reference to private ways, it is of very general, if not of universal application.[2] *

§ 703. The rule that where a highway becomes obstructed and impassable from temporary causes, a traveler may lawfully go *extra viam* upon adjoining lands, is founded on the established principles of the common law, and is in accordance with settled usage.[3] In New York there are several decisions in which the rule is incidentally recognized, and treated as well established.[4] † It is a maxim of the common law,

[1] Dare v. Heathcote, 25 L. J. Exch. 245.

[2] Co. Litt. 114, *b.*; 3 Greenlf. Cruise, Tit. 31, ch. 1, § 40; Hillary v. Waller, 12 Vesey, 265; Doe v. Hilder, 2 B. & Ald. 791; Moore v. Rawson, 3 B. & C. 339; 3 Kent's Com. 448, 449; Emerson v. Wiley, 10 Pick. 310; Wright v. Freeman, 5 Har. & John. 467; Hazard v. Robinson, 3 Mason, 275; Corning v. Gould, 16 Wend. 531; Webber v. Chapman, 42 N. Hamp. 326.

[3] 2 Blk. Com. 36; Woolrych on Ways, 50, 51; Cruise Dig. 89; Henn's Case, W. Jones, 296; Absor v. French, 2 Show, 28; Taylor v. Whitehead, 2 Doug. 745; Bullard v. Harrison, 4 M. & S. 387, 393.

[4] Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Ib. 652.

* In New Hampshire, the above mentioned presumption has been held to be not merely a *præsumptio juris*, a presumption that may be rebutted; but a *præsumptio juris et de jure*—one that is entirely conclusive in law of the existence of a grant or right as the case may be, wherever by possibility a right can be acquired in any manner known to the law. This rule relates to all incorporeal hereditaments, and of course includes private ways. In Wallace v. Fletcher, 30 N. H. 434, Bell, J., in delivering the opinion of the court said: "We have already stated our impression, that by the law as generally recognized in this country, the party claiming title under such possession, is not obliged to rely merely on a presumption of a grant, but he may rest on a presumption of right, or of any grant, reservation, or record, which may be necessary to establish his title. And it seems to us that this may properly be regarded as a species of prescription established here by a course of judicial decisions, by analogy to the statute of limitations of real actions."

† It has sometimes been suggested that the statutes which impose on towns the duty of repairing public ways, and render them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would

that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person traveling on a highway is in the exercise of a public, and not a private right. If he is compelled by impassable obstructions to leave the way and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but falls within the maxim which makes public convenience and necessity paramount. It was urged in a case in Massachusetts,[1] that by permitting the traveler, in the event of the sudden and recent obstruction of the highway, to pass over the adjoining fields, private property is appropriated to public use without providing any means of compensation to the owner. The court[2] replied that if such an accidental, occasional, and temporary use of land can be regarded as an appropriation of private property to public use, entitling the owner to compensation, which may well be doubted, still the answer to this objection is obvious. The right to go *extra viam* in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed that the right to the use of land adjoining the road, was taken into consideration, and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed for the private injury which might thereby be occasioned.*

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most frequently be applicable—of obstructions occasioned by sudden and recent causes which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides, the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being confined to cases of bodily injuries and damages to property (Canning v. Williamstown, 1 Cush. 451; Harwood v. Lowell, 4 Ib. 310; Bailey v. Southborough, 6 Ib. 141).

[1] Campbell v. Race, 7 Cush. 408. [2] Per Bigelow, J.

* This was an action of trespass for breaking and entering the plaintiff's close, in which the defendant justified a right of way of necessity, on account of the adjoining highway being obstructed by snow drifts. At the trial, in the common pleas, the judge ruled that this constituted no defense, and a verdict was accordingly found for the plaintiff. The Supreme Court, in setting the verdict aside, said: "The plaintiff's counsel is under a misapprehension in supposing

§ 704. The limitations and restrictions of the right to go upon adjacent lands, in case of obstructions in the highway, can be readily inferred. Having its origin in necessity, it must be limited by that necessity. Such a right is not to be exercised from convenience merely, nor when by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon

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that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveler, in a highway, by unexpected and unforseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths, so that he cannot reach his destination without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforseen storms not unfrequently overtake the traveler and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is by turning out of the usually traveled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveler, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified on the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires that, when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, 'it is for the general good that people should be entitled to pass in another line.'"

which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed which would justify or excuse the traveler.[1]

§ 705. The rule that in case a public highway is impassable, travelers may go upon adjoining land, does not apply to a private way by grant—a deviation from the latter constituting a trespass.[2] But if a person has permission to enter on land with carts and carriages, as it is reasonable that he should have room to turn round, he will have a right to go on to the adjoining land if the road is not wide enough to turn. Where the jury found that the carting by A. over another person's land of hay, grown partly on land to which there was a right of way, and partly on land beyond, to which there was no such right of way, was a reasonable exercise by A. of his privilege, the court refused to interfere.[3] There is a distinction between a private way by grant, and one of necessity, resting upon the consideration that the one is a grant of a specific track over the close, while the other is a general right to a way over it; the one being an express specific grant, and the other a more general implied one. In the latter case, the better opinion seems to be that a passage *extra viam* may be justified where the usual track is obstructed.[4]

§ 706. It is well settled at common law, that if a man having a close to which he has no access, except over his other lands, sell that close, the grantee shall have a way to it as incident to the grant. So, on the other hand, if the grantor reserves the inaccessible close to himself and sells his other lands, a right of way will be reserved. The way in the one case, in contemplation of law, is granted by the deed, and in the other case reserved. And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to

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[1] Campbell v. Race, 7 Cush. 408.
[2] Taylor v. Whitehead, 2 Doug. 475.
[3] Williams v. James, L. R. 2 C. P. 577.
[4] Holmes v. Seely, 19 Wend. 507.

the real intention of the parties. For the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance, nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties.[1] If a way be necessary to a house, a grant or lease of a house, with its appurtenances, will carry with it the right to use the way;[2] but it is otherwise if the way is not necessary.[3] When a debtor's land, which is set off on execution, cannot be reached, excepting over other lands of the debtor, the creditor is entitled to have a right of way set off to him over such other lands. The power of setting off the estate comprehends the power of giving access to it; for without the latter the former could not be used, and so could not be a subject of appraisement, being of no value. Undoubtedly, the appraisers should consult the interest of the debtor in establishing the right of ingress and egress to and from his land set off to his creditor, and should confine themselves to what may be necessary for the use and occupation of the property.[4] *

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[1] Holmes v. Goring, 2 Bing. 76; Buckby v. Coles, 5 Taunt. 311; Morris v. Edgington, 3 Ib. 24; Howton v. Frearson, 8 Term R. 50; Clark v. Cogge, Cro. Jac. 170; Jorden v. Atwood, Owen, 121; Nichols v. Luce, 24 Pick. 102; Collins v. Prentice, 15 Conn. 39; Staple v. Heydon, 6 Mod. 4; Pinnington v. Galland, 9 Exch. 12; East Co. R. R. Co. v. Dorling, 5 C. B. N. S. 821.

[2] Morris v. Edgington, *supra;* Pearson v. Spencer, 1 B. & S. 571; Glave v. Harding, 27 L. J. Exch. 292.

[3] Phesey v. Vicary, 16 M. & W. 484; Dodd v. Burchall, 1 H. & C. 113; 31 L. J. Exch. 364; Wardle v. Brocklehurst, 29 L. J. Q. B. 145.

[4] Taylor v. Townsend, 8 Mass. 411.

* In this case, one of the charges against the defendant was that he threw down the plaintiff's fence. The defendant justified that, being the execution creditor of the plaintiff, the place where the fence stood was reserved and set off by the appraisers as a right of way, and that the fence in question having been erected across the same by the plaintiff, in order to obstruct said right of way, he, the defendant, took it down. The Supreme Court said: "The action is brought for the destruction of this fence, upon the idea that nothing can be transferred to creditors of the debtor's real estate, by the levy of executions, except what is and can be described by metes and bounds, and that the appraisers are not authorized by law to set off an easement or mere right of passage, and that the creditor can make no title under such levy. It is certain there is no express authority given by the statute to the sheriff to cause a mere easement or

§ 707. Where a right of way is implied from the necessity of the case, its location is to be determined and assigned by the grantor in a reasonable place and manner.[1] The way should be a convenient one over the adjoining close of the grantor, due regard being had to the interest of both parties. Subject to this rule, the grantor has a right to assign such way as he can best spare. If he decline or omit to do it, the grantee may select for himself, and the court will extend a liberal indulgence to the exercise of his discretion. Nothing short of evident abuse will invalidate the way thus designated. But the grantee cannot carry this privilege beyond the necessity. If, therefore, he can conveniently reach his lot by means of a close of his own subsequently purchased, the right of way will become extinguished. A distribution of land among six heirs contained the following

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right of passage to be set off in satisfaction of an execution, nor would a levy upon such an incorporeal right be good standing by itself, for it is nothing except in relation to some actual corporeal property of which it is a mere incident or quality. But we are all of opinion that the power of separating to the creditor's use, or giving to him, in common with the debtor, the right of passing over land of the debtor not set off, in order that he may have access to the other land of the debtor which is set off, is essential to the execution of the statute according to the intention of the legislature. Cases may often occur in which, if this power does not exist, the estate levied on may be of no value to the creditor, unless he should have by law a way of necessity over other lands of the debtor; and, indeed, the very principle that when a man has no other way from his land to the streets or public ways, he shall have a way over his neighbor's land from necessity, is sufficient to show an authority in the sheriff and appraisers to give such a privilege as appurtenant to the land they may set off. It may be for the convenience of a debtor that the back part of his land and tenements be set off to his creditor, leaving him the front, in which he may continue to carry on his business. Now to refuse to the sheriff and appraisers the power to give a right of passage over land occupied as a yard by the debtor, would be to oblige creditors, in all cases, to levy upon that part of the debtor's real estate, the loss of which would most injure him; and perhaps, in most instances, would deprive him of the power of redeeming. It sometimes happens that the chambers of a house are sufficient to satisfy an execution; sometimes, the lower rooms and cellar. Now it is absurd to suppose that these may be taken and set off to the creditor, and yet that no passage through the entry and staircase can be given."

In New Hampshire, the Probate Court may, upon division of a deceased person's estate in a case where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares. The authority of the court to award such rights and privileges, especially land assigned for dower, is believed to have been long and generally exercised by the courts of probate of that State, the power being implied in the grant of jurisdiction to make partition and division of estates.

[1] Smiles v. Hastings, 24 Barb. 44.

clause: "In making this distribution, we have considered and allowed to each of said heirs a convenient passage across the other lots to and from his and her own, with the least damage to the owner, whenever it shall be necessary for the full enjoyment of his and her own." It was held that the lawful exercise of the right of way depended on its necessity.[1] *

§ 708. When a person has an easement in the land of another, he must be allowed to enjoy it in such a manner as will secure to him all the advantages contemplated by the grant.† But he must so use his own privileges as not to do any unnecessary damage to the other party.[2] It is a principle of law, that nothing passes as incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege. In determining what this fair enjoyment is, it is competent to consider, in the absence of express stipulations, how and in what manner it has been previously used, as tending to show, not only what is necessary, but, by implication, what is intended. Where, however, there is a right of way to a close for all purposes and for all carriages without restriction, the owner of the close is not bound to limit the use of it, and of his right of way, to the same purposes for which it was used previous to the

[1] Smith v. Tarbox, 31 Conn. 585. [2] Dixon v. Clow, 24 Wend. 188.

* A way of necessity can only be created in lands owned by the grantor at the time of the conveyance, and must be either reserved in the lands conveyed for the benefit of the grantor, or created in other lands of the grantor for the benefit of the grantee. It arises from a fair construction of the deed as to the presumed intent of the parties; and it affects nobody but the parties to the deed, or those claiming under them (Collins v. Prentice, 15 Conn. 423).

Although, if a man having two parcels of land, to one of which he has no access except over the other, conveys the accessible parcel, reserving the inaccessible one, a right of way to the latter over the former is reserved to the grantor; yet it does not follow that if he afterward convey the inaccessible parcel to a third person, that such person, by virtue of the terms or force of the deed, is entitled to the same right of way (Pierce v. Selleck, 18 Conn. 321).

† Where a person has a right of way or a right of passage with boats on a canal, without any interest in the soil over which the privilege is exercised, he cannot maintain an action against a wrong-doer who exercises the same privilege, but does not obstruct him in the enjoyment of his right (Hill v. Tupper, 2 H. & C. 121).

Trespass on the case is the remedy for interrupting a right of way (Smith v. Wiggin, 48 N. Hamp. 105).

grant. For instance: If the close to which the right of way is made appurtenant has, before the grant, been used for agricultural purposes, and the apparent object of the way is to enable the owner to remove the produce, or to pass to and from it with teams, cattle and carriages, for the purposes of cultivation and pasturage, such previous use will not negative the right to build a house, barn and outhouses on the close, and to use the way for all purposes properly incident to the enjoyment of such house and buildings.*

§ 709. The grantee of a way is restricted in the use of it to the purposes and mode specified in the grant. He cannot go beyond the limits of his way, nor use it to pass to any other place than the one described, nor to that place for any other purpose than such as is specified, if the use is restricted; the grantor having the right to limit his grant in any manner he chooses, and the grantee taking the way subject to all the restrictions the grantor has imposed.[1] In French v. Marstin,[2] which was an action for assault and battery, it appeared that the plaintiff had a right of way across the land of the defendant to what was known as the "Bean Lot," and that there were two other lots, called the "Brown" and "Sheafe" lots, embraced in the same inclosure; the whole being called

[1] Woolrych on Ways, 33, 50, 259; Cruise Dig. 103; Bac. Abr. Highway, C; Senhouse v. Christian, 1 D. & E. 560; Howell v. King, 1 Mod. 190; Bullard v. Harrison, 4 M. & S. 387; Taylor v. Whitehead, 2 Doug. 745; Comstock v. Van Deusen, 5 Pick. 166.

[2] 4 Fost. 440.

* The owner of land who has, for himself, his tenants and occupiers, a right of way across a neighbor's land to the highway, for the convenient occupation of his land, can transfer to another the right to use the way, to haul off the wood and timber growing on his land, to whom he had sold the trees with such a privilege to haul them off (Bartlett v. Prescott, 41 N. Hamp. 493). Bell, J.: "As the owner of the land has himself the right to use the way to haul off his wood and timber, as well as for any other purpose, he may, by a sale of the timber with the right to remove it, give the purchaser the same right which he has himself to use the way. The buyer is to be regarded as, for this purpose, the tenant of the land, and entitled, as such, to use the way." A right of way does not, of course, extend to servants. It may be the personal right of the owner and his tenants, and his servants may have been expressly excluded. Where, therefore, the right of servants to use a way is relied upon, the plea must state that the privilege of passing extends to them (Ib.)

the "Mountain Pasture." It was held that the plaintiff could not lawfully cross the land of the defendant to go to any other lot than the "Bean" lot, and that the defendant had a right to use sufficient force to prevent the plaintiff from doing so.

In Davenport v. Lamson,[1] which was an action of trespass *quare clausum*, it appeared that by a division of a farm among part owners, the defendant became entitled to a right of way, as appurtenant to a three acre lot in and over the *locus in quo*, which before the partition was part of the same tenement; and that he became possessed of another lot of nine acres, adjoining to, and beyond the three acre lot, by another title, which nine acre lot was never a part of the same farm with the *locus in quo* belonging to the plaintiff. It further appeared that between the nine acre lot and the three acre lot belonging to the defendant there were no fences, and that being mowing land, the grass was cut and the hay made on both, without regard to the dividing line; that the hay was laid in winrows extending across both, and that a load of hay taken partly from one and partly from the other, was driven across the plaintiff's close, passing last from the three acre lot. The question was whether the defendant was justified in so using the plaintiff's land, and the court were of opinion that he was not. It held that the defendant having a right of way as appurtenant to the three acre lot, could not use it as a right of way to and from the nine acre lot, which lay beyond the three acre lot, and that throwing the whole into one close by the removal of the fences, and using it as one entire close, and taking the hay from one and the other part indiscriminately, was in effect, using it as a way to and from the nine acre lot, although the cart passed last from the three acre lot on to the plaintiff's close, and that such use of the plaintiff's land was beyond the limit of the right reserved, and not justified. A point was made whether, under the circumstances, as the defendant

[1] 21 Pick. 72.

had a right to enter the close to carry off the hay which grew upon the three acre lot, trespass *quare clausum* would lie. It was held that it would; that the defendant could only lawfully enter the plaintiff's close in the just exercise of his limited right; that it was not a case for an apportionment; and that as the justification failed, the entry was unlawful and constituted a trespass.

§ 710. The owner of the soil retains all the rights and benefits of ownership consistent with the easement, the grantee having the right to use so much of the surface as shall be reasonably necessary and convenient for the purpose for which it was granted, whether as a foot or carriage way, with a right to grade and prepare it, according to the nature of the use for which it was granted. Where there was a grant of a messuage on Washington street, Boston, reserving to the grantor free liberty of ingress, egress, and regress through a certain gate and passage way for carrying and re-carrying wood or other things to and from the housing of the grantor; it was held that the owner of the land so granted might lawfully build over this passage, leaving an arch of sufficient height and width for such way, considering the purpose for which it was designed, even if the passage was thereby darkened, unless so darkened as from the length of the passage to render it unfit for the purposes for which it was reserved.[1]*

[1] Atkins v. Boardman, 2 Metc. 457.

* The use which others similarly situated make of their land is evidence of a reasonable use (Welch v. Wilcox, 101 Mass. 162). Per Colt, J.: "When no actually existing way as bounded and located is granted or reserved, the way in point of width and height will be such as is reasonably necessary and convenient for the purposes for which it is granted (Atkins v. Boardman, *supra*). Dixon v. Clow (24 Wend. 188) was an action of trespass *quare clausum fregit* for entering on the plaintiff's land and throwing down fences. The defendant attempted to justify under a grant for a ditch over the plaintiff's land, subject to the rights of the State in a feeder to the Erie Canal. The water was to be carried about half a mile over the plaintiff's land in a ditch to be constructed for that purpose, to propel machinery to be erected on the land of the defendant. It appeared that the defendant on two or three occasions threw down the plaintiff's fences, and that he removed four lengths of fence at two places, at a time when he did not enter with teams. At the trial in the Common Pleas, the court instructed the jury that the plaintiff had no right to build a fence across the ditch,—that if he had a right to do so, he might build a stone wall, and thereby

§ 711. As the grantee of a right of way, or of the right of passage for waste water through an artificial drain or water-course extending from the land of the grantee through the land of the grantor, is bound to maintain and repair the way and the water-course if he wishes to use them, unless the grantor has expressly undertaken to do so, it follows that the grantee has a right to go upon the land over which the easement is enjoyed to make necessary repairs.[1] He may lawfully make such repairs and improvements not inconsist-

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prevent the defendant from getting to his ditch to repair it, and that the defendant was entitled to go along the line of his ditch without obstruction. The Supreme Court, in setting aside the judgment of the Common Pleas, which was for the defendant, said: "It is evident from the prior right of the State, the small amount of consideration in the deed, and the capacity of the ditch, so far as it has been constructed, that only a very small quantity of water was to be conducted over the plaintiff's land, and that the water works or machinery to be erected on the defendant's lot were of no great extent or importance. I cannot think that a reasonable construction of this grant gives the defendant an unobstructed right of way along the ditch, and compels the plaintiff either to throw open his fields, or to erect a fence on both sides of the canal for the whole distance of half a mile that it passes over his land. If the plaintiff may include the ditch in his fields, by extending across the banks a fence which can easily be removed in case of necessity, it does not follow that he can build a stone wall which will wholly exclude the defendant from his water-course. The court held that the plaintiff had no right to build any fence that should run across the bank. I cannot see that this is a necessary conclusion of law on the facts detailed in the bill of exceptions. The case should, I think, have been submitted to the jury to say, whether the acts of which the plaintiff complains were necessary to the enjoyment of the defendant's privileges, or whether he acted wantonly, and did an unnecessary injury to the plaintiff." Lambert v. Hoke (14 Johns. 383) was an action of trespass for using a private road laid out across the land of the defendant for the benefit of the plaintiff. It was proved that when the damages were assessed for laying out the road the defendant stated that he did not intend to use the road for any purpose. Held that, according to the true construction of the 20th section of the act to regulate highways (2 N. Y. Rev. St. 276; Rev. Sts. 5th ed. vol. 2, p. 402), providing for laying out private roads, and declaring that "such road, when so laid out, shall be for the use of such applicant or applicants, his or their heirs and assigns; but not to be converted to any other use or purpose than that of a road: *provided always*, that the occupant or owner of the land through which such road shall be laid out, shall not be prevented making use thereof as a road, if he shall signify his intention of making use of the same at the time when the jury or commissioners are to ascertain the damages sustained by laying out such road," the plaintiff must be deemed to have the sole and exclusive right to use the road as a private way; that although the most appropriate action would have been trespass on the case, yet as the defendant had waived his right of obj ction by joining issue and consenting to go to trial on the merits, after being fully apprized of the grounds of the plaintiff's claim, the judgment must be affirmed" (see 3 Hill, 607). (The wording of the section of the act recited in Lambert v. Hoke, *supra*, has been slightly changed in the Revised Statutes.)

[1] Pomfret v. Ricroft, 1 Wms. Saund. 321; Ld. Egremont v. Pulman, M. & M. 404; McSwiney v. Haynes, 4 Ir. Eq. R. 322; Taylor v. Whitehead, 2 Doug. 745.

ent with the grant as are essential to its enjoyment. Where a right of way was granted as a foot or carriage way, with all liberties, powers, and authorities necessary to the enjoyment thereof, it was held, that the grantee of the way might lay down a flag-stone upon the land in front of his house over which the way passed if the flag-stone was reasonably necessary for his enjoyment of the way, and if the laying of it down did not in any wise obstruct the carriage road or cause any injury or inconvenience to the grantor.[1]

§ 712. If the way has been interrupted by the wilful act of the grantor, the grantee will be justified in adopting such means for its restoration as are available and the exigeney of the case demands, although some unavoidable damage be caused to the grantor thereby. Hamilton v. White[2] was an action of trespass for breaking and entering the plaintiff's close, and filling up with rails, sand, and stones a stream of water, whereby the plaintiff's land was overflown. It appeared that there was a road or way across the plaintiff's land to the land of the defendants, which had been used by the defendants for more than thirty years previous to the alleged trespass; that ten or twelve years before the trial, the plaintiff altered the route of the road; that from that time until the alleged trespass the defendants used the road as it had been so altered by the plaintiff, the original way having been closed by him; that on the day of the alleged trespass the plaintiff removed the bridge over the stream upon the altered part of the way; that when the defendants came there for the purpose of passing, and found the bridge removed, they inquired of the plaintiff how they should get over, to which he replied that they should not go across; and that thereupon they did the acts charged. A verdict having been found for the defendants, in the Common Pleas, it was affirmed by the Supreme Court, and afterward by the Court of Appeals.*

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[1] Gerrard v. Cooke, 2 B. & P. N. R. 109.

[2] 5 N. Y. 9; s. c. 4 Barb. 60. See *post*, § 849.

* In Hamilton v. White, *supra*, Ruggles, Ch. J., in delivering the opinion of

§ 713. Where a person, in selling land, reserves in the deed a right of way, and the location of the way has been determined by use so exclusive and continued as to afford presumptive evidence of an agreement, neither the grantor nor those claiming under him can, without the consent of the owner of the land, change the way thus ascertained.[1] * But it is competent for the owner of a right of way and of the land over which it runs to alter its location, and when it is changed it is for the jury to say whether such change was intended to be permanent or merely temporary; and if the new way has been used by the party owning the easement, and the owner of the land forbids the use of the new road (if the right to use it exists by license), the owner of the way may go back to the old road. But if such change was the result of an agreement to make a permanent change, then the right to change back does not attach in the event of the owner of the land closing the new way. In other words, if the change was intended to be permanent, the old way is gone; if temporary, then the party entitled may fall back

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the Court of Appeals, said: "The plaintiff in the present case had shut up the old way and assigned a new one. The new way had been used so long that the evidence of the defendants' right to the old must have been in some degree weakened and impaired. The plaintiff then denied the defendants' right to either, and the defendants were thus put to the alternative of breaking down the plaintiff's inclosures and doing him probably a very considerable damage, or of continuing to pass the new way, doing very little damage. To have broken down the inclosures would have been *prima facie* a wilful trespass. The plaintiff had no right to put the defendants in this dilemma. If he chose to put an end to the defendants' right of passing by the new way, he should have opened the way to which the defendants had a lawful title. By denying the defendants' right of way altogether, the plaintiff showed his intention of putting the controversy between himself and the defendants on the ground that the defendants had no right at all; and on that point the cause was tried and determined, and we are of opinion that the plaintiff has no right to complain of it."

[1] Garraty v. Duffy, 7 R. I. 476.

* In Wynkoop v. Burger, 12 Johns. 222, the action was for obstructing the plaintiff's way over the land of the defendant. The right of way was proved by an ancient deed, in which it was expressly granted, though the deed did not fix its precise location. It was held, that the length of time the way had been used in a particular place determined the location by the acts and acquiescence of the parties, and that being so located, it could not afterwards be changed by the grantor whenever and as he pleased. But the defendant (holding under the grantor), having changed the location of a particular part of the road, and the plaintiff having continued to use it as altered, the court said that it was "fairly to be intended that the alteration was made by the consent of the plaintiff, as it had been used by him since it was altered for such length of time as to show an acquiescence in the alteration."

upon it.[1] In Smith v. Barnes,[2] it appeared that the defendants owned a right of way over the plaintiff's land; that the plaintiff shut up the way against the will of the defendants; that he afterwards notified them that they might pass over his land by a different way; and that they thereupon adopted and used the new way instead of the old one for several years, the old one remaining obstructed. It was held, that these facts warranted the finding that there was a dedication of the new way in consideration of the surrender of the old one, notwithstanding the plaintiff, when he bought his farm, had no knowledge or suspicion that any such right of way existed, and that he did not in terms recognize or acknowledge any right of way; and that his acts in closing up the one and notifying the defendants that they might use the other, accompanied by acquiescence of both parties in the change, and in connection with his action against his grantor for the damages occasioned by the incumbrance, were an acknowledgment of the right.

§ 714. A way of necessity, whether it originates in the necessity of the party claiming it, or from the operation of a deed furnishing evidence of the intent of the parties, is limited to the necessity which creates it, and is suspended or destroyed whenever such necessity ceases. Conceding, therefore, that the defendant had at any time a way of necessity over the plaintiff's land, the question to be determined is, whether it existed at the time of the alleged trespass or had previously terminated.[3] Though the way of necessity may determine, yet it will be restored upon the return of the necessity.[4] A way extinguished by unity of possession is revivable afterward upon a descent to two where the land through which the way passed is allotted to one, and the other land to which the way belonged is allotted to the other.[5]

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[1] Reignolds v. Edwards, Willes' R. 282; Crounse v. Wemple, 29 N. Y. 540.

[2] 101 Mass. 275.

[3] Holmes v. Goring, 2 Bing. 76; Buckby v. Coles, 5 Taunt. 311; Collins v. Prentice, 15 Conn. 39; Pierce v. Selleck, 18 Ib. 321; 2 Kent's Com. 338.

[4] Pearson v. Spencer, 1 B. & S. 571. [5] Bro. Abr. Extinguishment, 15.

12. *Property in fences.*

§ 715. Fences are a part of the freehold, and the fact that the materials of which they are composed are accidentally or temporarily detached, without any intent in the owner to divert them from their use as a part of the fence, works no change in their nature.[1] * If I build a fence on my neigh-

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[1] Goodrich v. Jones, 2 Hill, 142; and see Walker v. Sherman, 20 Wend. 639, 640.

* Burrell v. Burrell, 11 Mass. 294, was an action of trespass for entering on the plaintiff's land, and taking away a fence on the dividing line between premises owned by the parties respectively. The part of the fence removed by the defendant was made of rails; and he proved that he built it twenty-three years previous, and had ever since kept it in repair; and that, at the time of the alleged trespass, he took away the rails in order to replace the fence by a stone wall, which he built the following year, putting it nearer to his own land than the place where the rail fence had stood. A verdict having been found for the defendant in the court below, the Supreme Court, in sustaining it, said: "The only question which could exist at the trial was whether the facts there testified were true; and the jury having declared that they were, the verdict was a necessary legal consequence. There is nothing in the report from which an entry on the plaintiff's land can be inferred, unless such entry was necessary for the purpose of taking down the fence in order to rebuild it, which would not be tortious. The part of the fence assigned to the defendant to keep in repair was his property, so far at least that the removal of it for lawful purposes could not make him a trespasser; and we do not think there was any joint tenancy or tenancy in common of the materials of which the fence was composed."

Where A. conveyed the westerly half of a lot of land to B., bounding it on the east by a straight line between two monuments, and took a stipulation that a fence standing partly on the line and partly on the land conveyed should remain the property of the grantor, and afterwards conveyed the east half of the lot to C., bounding it on the same straight line, it was held that C. had no right to that part of the fence which stood on the land of B. (Ropps v. Barker, 4 Pick. 239). This was an action of trespass for entering the plaintiff's premises and carrying away his fence. The plaintiff proved a conveyance from Bourne to Joscelyn & Howard, which described the land as bounded "westerly on W. White;" and a conveyance from Joscelyn & Howard to him, referring to the first named conveyance for a description. He also introduced in evidence a previous conveyance of the adjoining lot of land from Bourne to White, in which White's easterly line adjoining the plaintiff's land was described as running in a straight course. The two extremities of the fence were on the plaintiff's westerly line, but it diverged so that the greater part of it stood on White's land. Bourne, at the time of executing the conveyance to White, took a stipulation from White that the whole of the fence should remain the property of Bourne. The Supreme Court, in affirming the judgment of the court below, which was for the defendants, said: "We consider the property of the fence to have been in Bourne, by virtue of his agreement with White. Without doubt, but for this agreement, the fence would have passed to White. The conveyance to the plaintiff was by a line which excluded the fence, and left it in one place fifteen feet within White's land, and the deed contained no covenant or bargain respecting the fence. This gave no right as against White, so that the plaintiff could not, without license from him, have occupied between the line of his purchase and the fence, without trespassing. The act of the defendants, therefore, in taking away the fence, was no wrong to the plaintiff, for he neither owned the land on which it stood, nor is there any evidence that he was in possession of it; for his possession must be held

bor's land, it is his, not mine; and the dominion which every man has over his own property gives him a right to remove it whenever he pleases. If it be useful to me as well as to him, and if I build it in consideration of his promise that it shall stand there permanently, and he removes it in violation of that promise, I may recover, in an action on the contract, the value of my labor, and perhaps for the consequential injury; but I cannot maintain trespass.[1] *

§ 716. Where the owner of land constructs a ditch through it, and afterward sells a portion of the land, bounding the part sold on the ditch, the grantee takes to the center of the ditch. The ditch in such case is to be deemed a common fence, which, if it be not narrowed by agreement between the parties, must remain subject to be repaired by either, preserving its width.[2] A person, in making a ditch, cannot lawfully cut into his neighbor's soil; and he is, of course, bound to throw the soil which he digs out upon his own land.[3] When a hedge constitutes the dividing boundary,

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to correspond with his title, unless a different possession is proved. The principles advanced by the plaintiff's counsel are not controverted, that the fence upon the land conveyed will pass as appurtenant, without being specially named, and that a fence intended and maintained as a division fence would so pass, although it might vary from the true line. But the part of the fence taken by the defendants was not intended as a division fence. On the contrary, by compact, it was agreed between Bourne and White not to be a division fence, but to be left as the property of Bourne, distinct from the land. Joscelyn & Howard should have contracted with Bourne for the fence if they wished to have it, and they would then have had the same right respecting it that Bourne had; which, however, as against White, would have been limited to the right of taking it away; for by the deed of White, there was no qualification of his title or possession of the land conveyed to him. It was urged that in trespass *quare clausum*, although the plaintiff fails to prove his close, he may recover for chattels alleged to have been carried away. The authorities, however, do not support this, where there is but one count. But if it were so, the case shows that the plaintiff has neither proved his property in the close nor in the fence."

[1] Dietrich v. Berk, 24 Penn. St. R. 470.

[2] Warner v. Southworth, 6 Conn. 470.

[3] Vowles v. Miller, 3 Taunt. 137.

* A person inclosed land of which he was in possession with a fence. Four years afterwards, another claimant, who had a better title to the land, forcibly pulled down and removed the fence. It was held that this was not a trespass within the Virginia statute of February 14th, 1823 (Campbell's Case, 2 Robinson, 791).

If a person builds a fence on a school-house lot, a trustee of the school district may lawfully remove the fence and place it where it ought to be (Thayer v. Wright, 4 Denio, 180).

it in general belongs to the occupier who has been accustomed to trim and repair it; and proof of such acts will be *prima facie* evidence of property in the hedge. If the adjoining owners be tenants in common of the hedge, each has a right to clip it, but not to grub it up.[1]

13. *Boundary established by deed.*

§ 717. The line described in title deeds must always be considered the true line between the owners of contiguous lots. This is generally ascertained by a fence. But the fence is only evidence of the direction of the line, unless it is referred to in the deed as a monument. When a line is given in any deed or other instrument of conveyance to be run from one landmark to another, it is a necessary inference that a straight line is to be run from one of the *termini* to the other, and without regard to the correspondence of either course or distance, unless a different line is described. In Allen v. Kingsbury,[2] which was an action of trespass *quare clausum fregit*, the principal question was whether the *locus in quo* was included within the limits of the plaintiff's lot. The land was held by the plaintiff in right of his wife, under an assignment to her as her share in the estate of her deceased father, and was bounded by land set off to the widow, her mother. This dividing line was described in the report of the commissioners appointed to set off the widow's dower as running from "an oak tree marked, thence to another oak tree marked." It was ruled at the trial that "this line from tree to tree was to be considered as a straight line; and as there was no reference to any intermediate monument, or other extraneous matter for explanation, and no latent ambiguity, parol evidence was not admissible to prove that a different line between the two parts was marked by old monuments, or that the commissioners intended a different line, or that the parties supposed that a different line was the true line

[1] Voyce v. Voyce, Gow, 201.

[2] 16 Pick. 235.

between them;" and the foregoing was held correct by the Supreme Court.*

14. *Boundary established by monuments.*

§ 718. The actual establishment of monuments by agreement of the parties subsequent to the execution of the deed, will bind them and those who claim under them, notwithstanding the monuments may vary from the description of the lines in the deed.[1] In tracing and determining lines, monuments will control courses and distances. The original

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[1] Prescott v. Hawkins, 12 N. Hamp. 27; Berry v. Garland, 6 Fost. 473.

* Where the course is particularly designated in the deed, the grantee cannot depart from it, without becoming a trespasser. Dickerson v. Mixter, 13 Metc. 217, which was an action of trespass for breaking and entering the plaintiff's close, turned on the construction of the deed from the plaintiff to one Waite, from whom the defendant derived his title by several *mesne* conveyances. By that deed, the plaintiff conveyed to Waite a narrow strip of land, for the purpose of enabling him to erect a mill dam thereon; and also the right to build upon the land of the grantor a mill or factory, and the right to dig a canal from said mill dam to such mill as might be so erected. The mill was not, however, built on the plaintiff's land, but several rods therefrom, and a canal was dug from the mill dam to the race across the plaintiff's land, which the defendant contended the grantee, his heirs and assigns had a right to do, and to enter upon the plaintiff's land to repair and clear out the canal, which was the trespass alleged. It was held that, the course of the canal or trench being particularly designated, and there being no ambiguity in the grant, Waite had no right to dig a canal in any other place than that specified in the deed. It was argued that the plaintiff acquiesced in the building of the mill and the digging of the canal. The court said that there was no such evidence, and that, if there were, as the language of the grant was clear, it would not be material.

The rule of construction is well established, that by the grant of a mill, the land adjacent thereto, so far as necessary to its use and commonly used with it, will pass by implication. And the same rule of construction applies to an exception in a grant. But to justify such an implication, it must be made to appear that the land adjacent was necessary for the use of the mill. In Forbush v. Lombard, 13 Metc. 109, the question was whether the evidence given in the Common Pleas authorized the jury to find that the plaintiff had such a title and possession of the *locus* as was sufficient to maintain an action of trespass. The plaintiff's title was derived from one Whitman, from whom the defendant also claimed title; and the question of title depended on the construction of the exception in the deed from Whitman to Hilton, who conveyed his title to the plaintiff. It was admitted that the deeds from Whitman to Hilton and from Hilton to the plaintiff included the *locus*, unless it was excluded by the exception. By the deed from Whitman to Hilton, the mills and water privileges were excepted, and did not pass by the grant; and the question was whether the mill yard was also included in the exception. It was admitted that the land claimed by the defendant as a mill yard had been used for purposes disconnected with the mills. A dwelling-house and barn had been erected on it, and a part of it used as a barn yard and garden. And the present action was brought for erecting three other small buildings within the limits of the mill yard so called. A verdict having been found for the plaintiff, exceptions to it were overruled.

location of a line, if shown to have been run and marked, is to be ascertained by tracing it from monuments established, or places where monuments are proved to have been placed in a direct line, whether such monuments are more or less distant.[1] Where a lot is bounded in a conveyance by monuments on a supposed line of an adjoining lot, and the monuments do not in fact correspond with the true dividing line, the monuments must govern as the most certain indication of the intent of the parties. And if the monuments should extend beyond the dividing line upon an estate not belonging to the grantor, he would be liable on his warranty.[2] Quantity, distances, and points of compass, yield to actual boundaries when ascertained; and when they are described as lying on the north or on the south of certain land, they are not required to be due north or due south. If a close be described as abutting toward the east, and it prove to be north inclining to the east, it is sufficient.[3]

§ 719. In establishing a disputed boundary between adjoining owners, a corresponding line between adjacent lots, which is admitted, may be given in evidence for the purpose of showing the true line;[4] but not where the line is described in a deed of conveyance by courses and distances in such a way, that upon survey the correct location of the tract can be ascertained.[5]

§ 720. It sometimes happens that the monument found upon the ground corresponds with the description of the monument in the deed in some particulars, and differs from it in others. In such case, the whole description in the deed is not to be rejected; and parol evidence is admissible to show whether the monument partially but erroneously described, was the one intended.[6] Thus, if premises are bounded by

[1] Melcher v. Merryman, 41 Maine, 601. [2] Frost v. Spaulding, 19 Pick. 445.
[3] Buller's N. P. 82; 2 Roll. Abr. 678; Rollins v. Varney, 2 Fost. 99.
[4] Gibson v. Poor, 1 Fost. 440; Tate v. Southard, 1 Hawks, 45.
[5] Adams v. Rockwell, 16 Wend. 285; rev'g s. c. 6 Ib. 467.
[6] Parker v. Smith, 17 Mass. 413; Clark v. Munyan, 22 Pick. 410; Abbott v. Abbott, 51 Maine, 575; Linscott v. Fernald, 5 Greenl. 496.

land of A. on the *north*, and A.'s land is on the *south*, it may be proved that it was intended as the southern boundary.[1] So, if bounded by "Broad river," it may be proved that Catawba river was intended.[2] *What* are the boundaries of land conveyed by a deed, is a question of law. *Where* the boundaries are, is a question of fact. An existing line of an adjoining tract may as well be a monument as any other object. And the identity of a monument found upon the ground with one referred to in the deed, is always a question for the jury. And upon this question of identity, parol evidence is always admissible. The acts and declarations of the grantor are important in determining it. Subsequent occupation by the parties, is generally decisive.[3] In Robinson v. White,[4] which was an action of trespass *quare clausum fregit*, the judge was asked to instruct the jury that "if they found that there was an old stake standing at the end of the one hundred and fifty-six rods, the distance named in the deed, bearing upon it surveyor's marks and *other indications* of the character of the monument named in the deed, in the absence of all proof to the contrary, the presumption would be that it was the stake referred to in the deed." It was held that the foregoing instruction was properly refused; that there was no presumption of law in the case; and that the various considerations in relation to the stake, tending to show that it was the monument, were proper for the jury.

15. *Boundary established by agreement.*

§ 721. It is the policy of the law to allow persons to settle and adjust their differences; and when a matter, which before was uncertain, has been thus arranged between them, upon good consideration, they will not afterward be permitted to repudiate the agreement. Parol agreements to

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[1] White v. Eagan, 1 Bay, 247. [2] Middleton v. Perry, 2 Bay, 539.

[3] Waterman v. Johnson, 13 Pick. 261; Wing v. Burgis, 13 Maine, 111; Patten v. Goldsborough, 9 Serg. & R. 47; Stone v. Clark, 1 Metc. 378; Abbott v. Abbott, 51 Maine, 575.

[4] 42 Maine, 209.

change or establish boundary lines, where there is no dispute or uncertainty, are within the statute of frauds, which requires a writing to pass title, thus distinguishing between cases where the line is disputed or uncertain, and those which are not so, the former being binding upon the parties, the latter not. It might happen that the paper title of both parties covered the same land, and yet there be no dispute about the boundary line. There is a clear distinction between a dispute about the title to land, and a dispute about a boundary line. It is confounding these two questions, or the regarding them as identical, that has often misled parties in seeking their remedy. The settlement of a disputed boundary line by arbitrament or parol, and especially where equivalents of benefit or advantage are mutually received and acted on, will bind the parties to it, not by way of transferring the title from one to the other, which the statute of frauds prohibits, but by way of estoppel.[1]* While

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[1] Rockwell v. Adams, 6 Wend. 467; s. c. 7 Cowen, 761; Terry v. Chandler, 16 N. Y. 354; Vosburgh v. Treator, 32 Ib. 561; Eaton v. Rice, 8 N. Hamp. 378; Sawyer v. Fellows, 6 Ib. 107; Wakefield v. Ross, 5 Mason, 16; Boyd's Lessee v. Graves, 4 Wheat. 513; Jackson v. Ogden, 7 Johns. 238; Orr v. Hadley, 36 N. Hamp. 575; Prescott v. Hawkins, 12 Ib. 26; Clough v. Bowman, 15 Ib. 511; Carlton v. Redington, 21 Ib. 301.

* In Jackson v. Dysling, 2 Caines, 198, Spencer, J. said: "An agreement by parol, to the settlement of a boundary line, appears to be effectual, and not liable to any objection on the score of the statute of frauds and perjuries." Thompson, J., in the same case, observed that "The submission to two surveyors, and their decision thereupon, cannot be considered as extending to the title of the land, or to have the operation of a conveyance. The submission was of a mere matter of fact to ascertain where the line would run on actual survey." In Robinson v. McNiel, 12 Wend. 578, Sutherland, J., said: "The only question between the parties was as to the division line between those lots, and that fact they agreed should be decided by arbitrators. It had no bearing whatever upon the abstract question of title—no more than the testimony of a witness showing the particular location of the deed according to its courses and distances. It is well settled, that upon the strength of such an award, the party in whose favor it is made may recover in an action of ejectment."

A division of fences by agreement, with or without a subsequent lapse of time, has been held in New York, to be of the same force as a decision by fence viewers pursuant to statute. The statute implies that these are only different methods of establishing a division; for it gives the fence viewers jurisdiction only where the parties are unable to agree upon the respective proportions of the fence to be maintained by each (Adams v. Van Alstyne, 25 N. Y. R. 232).

In Thayer v. Arnold, 4 Metc. 589, the court remarked that an assignment under the statutes of Massachusetts imposed the same obligations upon the parties that would result from prescription; and that an agreement in writing between the tenants of adjoining closes, making a division of the fences, and each

an action of trespass *quare clausum fregit* was pending in the Supreme Court of Massachusetts, the parties agreed to refer it to the determination of three arbitrators who were to settle the division line between the *locus in quo* and the land of the defendant. After meeting and hearing the parties and viewing the premises, they decided that the boundary be fixed and established as therein described, which award was returned into court, accepted and recorded. It was held that this record concluded the parties from afterward disputing the title or boundary which was distinctly settled by the award, and operated by way of estoppel.[1]

§ 722. But in order to make these parol agreements and submissions effectual for any purpose, the parties to them must maintain toward each other the relation of adjoining owners. This has been deemed an indispensable prerequisite in all the cases in which these agreements have been upheld. In New York, the validity and legal force of parol agreements and submissions to settle disputed boundary lines, was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute. The courts however held, upon very substantial reasons, that such agreements and submissions did not affect the title. If they were confined to the sole object of ascertaining the true line of separation, they gave effect to the title which the parties to such agreements really had, and left the statute of frauds in full force. Neither their purpose, nor their effect was to pass real property from one person to another, but simply to ascertain the line to which their respective lands extended. The boundary of A., which was also that of B., was often undefined, obscure, and uncertain; and when the agreement resulted in nothing more than to establish and mark where that boundary was, the provisions of the statute of frauds were

stipulating to maintain and keep in repair his part thereof, would also be a good justification for him whose cattle had escaped into the close of the other through the neglect of the other to maintain his part of the fence.

[1] Goodridge v. Dustin, 5 Metc. 363.

not invaded. It was never thought that the judgments of the courts, in actions of ejectment, where the subject was a question of boundary, divested the title of one person, and vested it in another. And yet a parol agreement, submission, and award effect the same object, and perform the same office as the judgment of a competent court. Both ascertain by the means at their command where the true line is, and establish it for all future time.[1] *

§ 723. An agreement of owners of adjoining lands that the line between them shall be ascertained and established by a surveyor, is, when executed, conclusive. Accordingly where the parties to an original deed agreed to employ a surveyor to run out and establish the line, and the line was so run and marked, it was held that the parties, and all claiming under them, were bound by such line; and that long continued possession up to such line was evidence from which, connected with other circumstances, the jury might infer such agreement to establish the line.[2] † In Dudley v. Elkins,[3] the following instruction in the court below was held correct: That the parties might agree that a surveyor should run and establish the line, and if he, in pursuance of such agreement, and while it was unrevoked, did so run, mark and establish the line, the parties and their grantees would be bound by it, but that at any time before the line was actually run and established, either party might revoke the agreement; that if the line was run by a surveyor em-

[1] Terry v. Chandler, 16 N. Y. 354, per Brown, J.

[2] Hobbs v. Cram, 2 Fost. 130; and see Carey v. Wilcox, 6 N. Hamp. 177; Page v. Foster, 7 Ib. 392; Aldrich v. Jessiman, 8 Ib. 516; Hale v. Woods, 9 Ib. 103; Doe v. Rosser, 3 East, 15.

[3] 39 N. Hamp. 78.

* In Maine and Massachusetts, an agreement of parties to establish a line is not conclusive, but merely strong evidence of the accuracy of the line thus established (Whitney v. Holmes, 15 Mass. 153; Gove v. Richardson, 4 Greenl. 327; Sparhawk v. Bullard, 1 Metc. 95; Clark v. Stone, 1 Ib. 378).

An agreement determining a boundary that has been disputed, does not excuse past trespasses (Stockton v. Garfrias, 12 Cal. 315).

† A certificate of surveyors of highways, adjudging where parties should set their division fence, is not evidence of the title of the respective parties (Corlis v. Little, 1 Green, N. J. 229).

ployed by both parties, without an agreement to be bound by his line, and the parties afterward agreed to the line as run, they would be bound by it; that though the parties at the time were dissatisfied with the line, yet if they acquiesced in it, and each party on his own side cut timber as he had occasion, up to the line and no further, and each knowing what was so done by the other, neither made any complaint, it would be evidence from which the jury, if they deemed it sufficient, might find an agreement to abide by the line; but that such occupation to be evidence must be uninterrupted and undisputed.

§ 724. Where the owner of land agrees with the adjoining proprietor as to the boundary line under a mistake of facts, he has a right upon discovering the mistake to disavow the agreement.[1] * There may be cases in which an express agreement recognizing an erroneous boundary will conclude a party; as where a long time has elapsed; or where the other party, acting upon the faith of such agreement, has

[1] Coon v. Smith, 29 N. Y. 392.

* Where a lessee of land establishes the division line between him and his neighbor, he cannot maintain an action of trespass against his neighbor for taking away crops put in by the latter under the belief that the line agreed upon between them was the true line. In Dewey v. Bordwell, 9 Wend. 65, the plaintiff was the lessee of lot No. 61, and the defendant had been in possession of lot No. 62 adjoining for forty years. The plaintiff caused a line to be run as a boundary between the two lots, and the defendant planted corn and potatoes up to this line. Before the corn and potatoes were harvested, the agent of the owner of lot No. 61 caused a resurvey to be made, and the line so run included part of the land on which the defendant's corn and potatoes were growing. The defendant notwithstanding gathered the crops, and for so doing an action of trespass was brought against him. A judgment having been found for the plaintiff in the court below, the Supreme Court, in reversing it, said: "This is not a question between the owner and the defendant, but between the occupant who has taken upon himself to fix and designate the line of division between him and them, and which they have acknowledged; and it does seem to me, as between these parties, it would be a violation of the plainest principles of justice and law to permit him to reap the crops of the defendant by means of his own errors. He at least should be estopped from disputing his own boundary to the injury of the rights and property of the defendant. I do not mean to be understood as saying that the mistake in running the first line may not be corrected, if there was one; but that by running the first line, and designating it as the division between the parties, the plaintiff thereby acknowledged the right of the defendant to cultivate up to it, and that conceding the right to correct the line, the crops put in under these circumstances belong to the defendant. To give them to the plaintiff would be allowing him to reap the advantage of his own mistakes, which would be a violation as well of law as justice."

made expensive improvements, the benefit of which will be lost to him if the line is disturbed. It seems that there is no certain rule as to what length of possession by express agreement shall be adjudged conclusive, or how long a possession will justify the inference of an agreement so as to conclude the parties. Five and eight years have been held not conclusive. But sixteen, eighteen, and nineteen years have, under particular circumstances, been deemed long enough to justify a court in determining that the possession shall not be disturbed. The cases of eighteen and nineteen years were cases of possession in pursuance of an express agreement; and that of sixteen years, continued possession, with valuable improvements made on the premises.[1]

§ 725. If adjoining land owners have a division line run pursuant to agreement, one cannot maintain an action of trespass against the other for acts done by the latter on his side of the line thus established, without a revocation of the agreement.[2]

16. *Boundary established by acquiescence.*

§ 726. Long acquiescence in an established line affords ground not merely for an inference of fact to go to the jury of an original parol agreement, but for a direct legal inference as to the true boundary, although it be proved that such location was originally made under an agreement resulting from a mutual mistake as to facts. It has been held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary. Unless, however, the acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance.* The rule seems to have been adopted as a

[1] Adams v. Rockwell, 16 Wend. 285; s. c. 6 Wend. 467.

[2] Palmer v. Anderson, 63 N. C. 365.

* In Kip v. Norton, 12 Wend. 127, four or five years, and in Adams v. Rockwell, 16 Wend. 285, eleven years were held insufficient; and the same was held in Jackson v. Douglass, 8 Johns. 367, as to eight years. In Jackson v. Bowen, 1 Caines, 358, the acquiescence was thirty-six years; in Jackson v. Dysling, 2 Ib.

rule of repose with a view of quieting titles, and rests upon the same reasons as the statute prohibiting the disturbance

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198, forty years; in Jackson v. Vedder, 3 Johns. 8, the same; in Jackson v. Dieffendorf, Ib. 269, thirty-eight years; and in Jackson v. McCall, 10 Johns. 377, forty-one years.

Where a fence between adjoining farms has been maintained for twenty years in the same place, one of the parties all the time claiming to own to the fence, that will constitute an absolute title by adverse possession. But it is otherwise where such a fence is kept up for a long series of years nearly in the same place, but not permanent and stationary. In the latter case, it is only evidence to go to the jury of an agreement and acquiescence of the parties in that line as the true one (Knight v. Coleman, 19 N. Hamp. 118).

In McCormick v. Barnum, 10 Wend. 104, Chief Justice Savage, in speaking of cases of location and acquiescence, said: "Cases of this description have been frequently before the court. The principle on which they have all been decided is, that where parties agree upon a division line, either expressly or by long acquiescence, such line shall not be disturbed. Buildings and permanent improvements may be made upon the faith of the location of the line, transfers may be made, and to permit such lines to be altered might be productive of incalculable injury." Again, in Kip v. Norton, 12 Wend. 127, he says: "An assent to a location must be either express or implied. If there is a disputed line between two adjoining proprietors of land, it may be settled between them by a location made by both, or made by one and acquiesced in by the other for so long a time as to be evidence of an agreement to the line. There can be no doubt that an express parol agreement to settle a disputed or unsettled line is valid if executed immediately, and possession accompanies and follows such an agreement. So, also, where there has been no express agreement, long acquiescence by one in the line assumed by the other is evidence of an agreement. In Jackson v. Corlaer, 11 Johns. 123, the court said: "After the parties have deliberately settled a boundary line between them, it would give too much encouragement to the spirit of litigation to look beyond such settlement, and break up the line so established between them." "It is not to be controverted," said Spencer, J., in Jackson v. Ogden, 4 Johns. 140, "that parties whose rights to real property may be perfect, and the boundaries of which may be susceptible of certain and precise ascertainment, may, by their acts, conclude themselves by establishing other and different boundaries." It is to be presumed that the learned judge meant to be understood that those acts are to be as certain which will take away from a man his property, as the boundaries are susceptible of certain and precise ascertainment. In the same case, Chief Justice Kent remarked that where the question of boundary was rendered ambiguous or uncertain by the contradiction between the map and survey, a practical location and construction given by the parties, and acquiesced in by a series of transfers and for a great number of years, until the lands had become cultivated and valuable, could not but operate with decisive force. In Jackson v. Murray, 7 Johns. 5, the court said: "In all cases of any uncertainty in the location of patents and deeds, courts hold the party to his actual location." And Chief Justice Thompson, in Jackson v. Wood, 13 Johns. 346, remarked that "In grants of great antiquity, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under the adjoining patents, are entitled to great weight in the location of a grant." In most of the cases where this question has arisen, the actual and true boundaries between the parties were uncertain or unknown by reason of some ambiguity in the grant, or in consequence of some discrepancy between the survey and the map, or between the survey or map and the deed. In all such cases the establishing of the line must necessarily be a matter of compromise, either by express agreement or by possession with the knowledge and acquiescence of the parties, which is tantamount to or evidence of an agreement.

of an adverse possession. In New York, in the cases in which practical locations have been confirmed upon evidence of this kind, the acquiescence has rarely continued less than twenty years.[1]* In Vermont, the following propositions were

[1] Jackson v. Freer, 17 Johns. 29; Jackson v. Widger, 7 Cowen, 723; McCormick v. Barnum, 10 Wend. 104; Dibble v. Rogers, 13 Ib. 536; Baldwin v. Brown, 16 N. Y. 359; Reed v. Farr, 35 Ib. 113; Reed v. McCourt, 41 Ib. 435; see Crowell v. Bebee, 10 Vt. 33; Berry v. Garland, 6 Fost. 473; Knowlton v. Smith, 36 Mo. 507.

* Stuyvesant v. Tompkins & Dunham, 9 Johns. 61; s. c. 11 Ib. 569, was an action of *trespass quare clausum fregit* which came before the Supreme Court by writ of error from the Mayor's Court of the city of New York. The land owned by the parties respectively was separated by a crooked fence, and the defendant showed to one of the plaintiffs the two ends of the fence as the extreme points of the boundary line between them, and declared that the true boundary was a straight line. The plaintiffs then employed a surveyor to run the line. The defendant saw the surveyor at work and made no objection, but went away before the survey was completed. The surveyor ran a straight line between the extreme points so shown by the defendant, and the plaintiffs moved the fence according to the line so run, and it was erected beyond the former fence and on a place in the actual possession of the defendant. The defendant proved that for more than twenty-five years previous to the action, he and his ancestors had been seized and possessed of the *locus in quo*, and that the fence so removed had been, for that length of time, the actual boundary line between the parties and those under whom they held. The defendant further proved that after the line was run, he disapproved of it, and forbade the fence to be removed on to his land; and after it was erected, he threw it down, and that it was because he had done this that the action was brought. The recorder charged the jury that from the parol admissions of the defendant they might infer that both parties originally intended to occupy according to a straight line, and had occupied under a belief that a straight line was the correct boundary, and that the defendant might be considered as holding by sufferance or permission, and that his possession was not adverse. The Supreme Court, in reversing the judgment, which was for the plaintiffs, in the court below, said: "The charge of the recorder was incorrect, for the facts in this case clearly show that the plaintiffs below were not entitled to an action of trespass. The party must have actual and lawful possession of real property to enable him to maintain trespass, and the plaintiffs below had no such possession. Their entry was of itself an act of trespass. The parol admission of the defendant was certainly not sufficient *per se* to change the possession. To give to a naked parol declaration that the true line was a straight line such an effect, after so long an acquiescence in a boundary line, would counteract the beneficial effects of the statute of frauds, and render the title to real property alarmingly insecure. The defendant's possession for upwards of twenty-five years was of itself an absolute title, and a bar to all the world. He had availed himself of the *locus pœnitentiæ*, and did not sanction the running of the boundary line, or the attempt to change the possession" (see 16 N. Y. 363).

In Maryland, the following instruction in an action of trespass *quare clausum* was refused: That if the plaintiff, twenty years previous to the commencement of the action, ran his line, in the presence of the defendant, to a point indicated on the plots in the case, as a dividing line between their respective lands, as also the several lines from that point to certain other points, also marked on the plots, as a boundary between them, and if the defendant had not trespassed over said lines the action could not be maintained, unless he was previously warned not to come to said lines (Thomas v. Thomas, 2 Har. & J. 506).

laid down in an early case:[1] "If an entire lot be owned by different proprietors who are in possession of separate parcels of the lot, and a divisional line is acquiesced in for fifteen years, it is thereby established; and if no line of division be in fact drawn, but the parties acquiesce in an imaginary line of division, this is the same as if the line had been marked by visible monuments. If a person own the whole of a lot, and convey a given number of acres off of one end or side, this is to be understood by a line parallel with the lot line. If two own a lot in equal portions in severalty, but in fact not divided, and enter on extreme parts of the lot, each upon his own portion, it will be considered that they intend a division by a line drawn through the center, leaving the two parts as nearly similar as they can be and be equal." *

[1] Beecher v. Parmele, 9 Vt. 352.

* Mere occupation by inadvertence or mistake, without any intention to claim title, may not be a disseizin; as where a fence is erroneously erected not on the dividing line (Lincoln v. Edgecomb, 31 Maine, 345; Brown v. Gay, 3 Greenl. 126). But if, in such case, there is an intention to claim title to the land occupied, though the line is fixed by mistake, it is a disseizin (Otis v. Moulton, 20 Maine, 205). In French v. Pearce, 8 Conn. 439, it was held that actual occupation under claim of ownership, though resulting from a misapprehension of the place of the dividing line, was a disseizin sufficient, if continued, to establish a title in the possessor. That case was approved in Spaulding v. Warren, 25 Vt. 316. The authorities on the subject are collected in 1 Greenl. Cruise, 53, note. The intention which is necessary to constitute a disseizin is an intention to claim title. Such intention is not presumed on the part of a tenant against his landlord. It is presumed, even beyond the extent of occupation, if it is under a recorded deed. An intention to commit a wrong against the lawful owner, implying a knowledge that the disseizor has no right, is never necessary. In nearly all the reported cases of disseizin, the disseizor appears to have occupied, if without legal right, by mistake either of law or of fact. And if the mistake is of the boundary line, it does not vary the result (Melvin v. Prop. of Locks, &c. 5 Metc. 15). But if it were otherwise, there can be no doubt that exclusive occupation, under a mutual agreement, upon a boundary line, though it be erroneous, is such possession as is requisite to constitute a disseizin. In some of the States such an agreement is held to be binding on the ground of estoppel (Carleton v. Redington, 1 Fost. 291; Kip v. Norton, 12 Wend. 127; Lindsay v. Springer, 4 Har. 547; Orr v. Foote, 10 B. Mon. 387; Dudley v. Elkins, 39 N. H. 78). Although the doctrine is questioned in some of the other States, yet it seems to be conceded in all of them, that exclusive possession under such an agreement twenty years, or long enough to bar an entry, will establish a title in the possessor by disseizin, if not by estoppel (Boyd v. Graves, 4 Wheat. 513; Smith v. McAllister, 14 Barb. 434; Holton v. Whitney, 30 Vt. 405; Wilson v. Gibbs, 28 Penn. 151; Clark v. Tabor, 28 Vt. 222; B. & W. R. R. Co. v. Sparhawk, 5 Metc. 469; Wakefield v. Ross, 5 Mason, 16; Abbott v. Abbott, 51 Maine, 575).

Constructive possession of land adjoining a line acquiesced in would be suffi-

§ 727. If a party has a clear and conceded title to land (there being no ambiguity or uncertainty as to its location by the terms of his grant), in order to establish a practical location different from the boundaries described in the deed, which shall deprive the party claiming under the deed of his legal rights, there must either be a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations in relation to real estate; or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof; or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses in relation to the land on the opposite side of the line which would be an injury to him, and which he would not have done if the line had not been so located, in which case, perhaps, a grant might be presumed within the twenty years.[1] *

§ 728. When a person has sold land up to a certain line, pointing it out as the true line, and inducing another to buy up to it, he is estopped to deny that it is the line between his own and the adjoining land.[2] And if one who is in open, visible occupation to a known and agreed boundary sells to a stranger, and afterward himself purchases the adjoining lot, he will be estopped as against such stranger, from denying the correctness of such boundary, though his grantor of the adjoining lot, would not have been.[3] †

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cient to bind the adjoining owners to that line, if continued a sufficient length of time (Child v. Kingsbury, 46 Vt. 47).

[1] Adams v. Rockwell, 16 Wend. 285; s. c. 7 Cowen, 761; 6 Wend. 467.

[2] Richardson v. Chickering, 41 N. Hamp. 380.

[3] Meriwether v. Larmon, 8 Sneed, 447; Abbott v. Abbott, 51 Maine, 575.

* In New York it was afterward held, in Clark v. Wethey, 19 Wend. 320, that nothing short of an adverse possession for a length of time sufficient to bar an entry would be effectual to establish a line different from that given in the deed; with this qualification, that when the monuments mentioned in the deed can no longer be found, the acts or agreements of the parties may be resorted to as secondary evidence to supply the hiatus created by the absence of the monuments.

† When a person is in possession of land claiming that it belongs to him, his acquiescence in a boundary line is as binding as if the legal title had been con-

§ 729. Where the parties have agreed upon a fence variant from the line, avowedly for convenience, and still have continued to claim according to the true line, neither party acquires a title, or even a right of possession, against the other, merely on account of the fence; and the question is one of fact to be determined by the jury. Burrell v. Burrell[1] was an action of trespass tried in 1814. One of the counts of the declaration charged the defendant with removing part of a rail fence which was on or near the dividing line between the premises of the plaintiff and defendant, and entering on the plaintiff's land. The defendant had owned the north lot about thirty years. The south lot was conveyed by one Ashley to one Dutchen, who owned it in 1802, before the plaintiff had any title to it. The fence between the lots, in consequence of a swamp, did not run in a straight line, but diverged to the northward, thereby giving the south lot about two more acres than it would have had if the fence had been straight. The defendant proved that Ashley, when he bought the south lot, in 1764, and afterwards in 1792, caused it to be surveyed, and ran the dividing line straight in the place where the defendant now claimed to own; and that both Ashley and Dutchen declared that they did not claim any land north of that line. It was held to be a question of fact properly submitted to the jury, whether, under the circumstances of these parties, and of the prior owners of the land, by whose acts the then owners were bound, the fence was to be considered as limiting the claims of the proprietors on either side, contrary to the boundary established

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veyed to him (Sheldon v. Perkins, 37 Vt. 550). If an erection situate on the land of one of two adjoining proprietors be regarded by them as a division fence, neither party can complain of any act done by the other which would have been lawful if the fence had been on the division line (Henry v. Jones, 28 Ala. 385).

Where land is conveyed according to a plan, the courses, distances and lines delineated are regarded in legal construction as the description by which the limits of the grant are to be ascertained (Davis v. Rainsford, 17 Mass. 207; Thomas v. Patten, 13 Maine, 329; Props. of Kennebec Purchase v. Tiffany, 1 Ib. 219; Palmer v. Dougherty, 33 Ib. 502). An imperfect division of land, shown by a plan, or by parol, acquiesced in by the proprietors, is good against a stranger (Sawyer v. Newland, 9 Vt. 383).

[1] 11 Mass. 294.

by their supposed titles; and the jury at the trial in the court below having found for the defendant, the Supreme Court refused to disturb the verdict. In Morrison v. Chapin,[1] the premises consisted of a wood lot. A portion of one side had always been open, and the fences on the other sides were erected between the lot in question and land which was cleared, and might have been placed there for the purpose of inclosing these adjacent lots, and not in order to indicate possession and ownership of the wood lot. It was held that whether the fences had been erected for the latter purpose, was a question of fact for the jury in connection with the other evidence in the case, and that it would therefore have been error in the court before which the trial was had to pronounce on its effect.*

17. *Rights and duties in relation to party walls.*

§ 730. It is not essential, in order to constitute a party wall, that the proprietors of adjoining lots should own the wall as tenants in common, nor that they should own in individual moieties the land on which it stands. Each owns in severalty to the dividing line of their respective lots, and each

[1] 97 Mass. 72.

* Adjoining land owners had between their respective premises a rail fence, extending westerly in a straight line sixty or seventy rods, which had stood there over forty years. They then built a slash fence commencing at the west end of the rail fence, and extending on westerly up a hill, over rocks and ledges, running it zig-zag for convenience, wherever they could build it the cheapest and easiest. It was held that possession to the slash fence would not be available to either party to gain title to the land up to it, except under a claim of ownership. "For a distance of sixty or seventy rods, the rail fence on the true straight line would indicate that the adjoining proprietors claimed only to that line through the whole distance of their adjoining lands, if there was nothing to show the contrary. This slash fence indicated the general course of the line there to be the same as at the rail fence. The fact that the slash fence was irregular in its course, and diverged from the straight line as convenience required, over the rough ground, apparently in order to have the rocks and ledges aid in making the fence, would not necessarily indicate that the line, to which the adjoining proprietors claimed was thus crooked. The whole appearance would rather indicate to a common observer, that the adjoining proprietors were claiming to the straight line indicated by the rail fence, and that the slash fence diverged in places from that line for temporary convenience only, and not on account of the line being in exact accordance with the slash fence. If a common observer, on viewing the premises and noticing the manner of occupancy, would so infer, then upon the facts reported, the referee or a jury might infer that the occupancy between the straight true line and the slash fence was not under claim of title" (Morse v. Churchill, 41 Vt. 649, per Peck, J.)

has a separate property in a moiety of the party wall, and an easement for the support of his house in the other moiety.[1] Nor is it necessary that there should be a covenant between the owners of adjoining lots severally binding them, their heirs and assigns that the division wall shall be and remain a party wall. If the adjoining owners, in building upon their lots, erect by common consent a division wall partly on the land of each at their joint expense, for the purpose of supporting both buildings, and which is essential to such support, and so use it for over twenty years, the wall becomes a party wall, within the proper meaning of that term. So, if one person owns both lots, and erects buildings on both, with a wall standing partly on each lot, for the purpose of supporting both buildings, and which is necessary for their support, and subsequently, while that wall is continuing to be so used, conveys one house and lot by metes and bounds, and by boundaries, one of which runs through the center of said wall, the grant will carry, not only an absolute title to the premises specifically conveyed, but will also pass as an appurtenance to the grant an easement in the residue of the division wall, for the support of the house granted. Where an individual builds several houses together, so that they need and receive mutual support, there is an implied right to such mutual support for their common protection or security, so that, if the houses are afterward sold and conveyed to different persons, the mutual right to support continues. And if several persons build their houses together, so that each house rests upon and requires the support of the adjoining one, the grant of a right to mutual support will be implied, notwithstanding change in the ownership of the houses.[2] But it is otherwise where houses are built against each other with separate and independent walls, resting upon separate and independent foundations.[3]

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[1] Brown v. Pentz, 11 N. Y. Leg. Obs. 24, N. Y. Ct. of Appeals.

[2] Richards v. Rose, 9 Exch. 218; U. S. v. Appleton, 1 Sumner, 500.

[3] Solomon v. Vintners' Co. 4 H. & N. 598; Peyton v. Mayor of London, 9 B. & C. 725.

§ 731. If the owner of a house sells the upper story, there is an implied grant of support from the lower stories.[1] If he forms each story into a separate dwelling, and sells or lets the different stories to different persons, there is an implied grant to every purchaser or hirer of the rooms of all such adjacent and subjacent support as may be required for each dwelling. When the different floors of the same house are held as separate freeholds by different persons, the owner of the lower rooms and foundations is in general bound to uphold and maintain the walls and necessary supports of the rooms above.[2] "Where I have a chamber below, and another has a chamber above mine, * * * in this case, I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner, he may compel me to sustain my chamber below, by the reparation of the principal timber for the salvation of his chamber above."[3]

§ 732. When one of two adjoining owners wishes to improve his premises before the party wall has become ruinous, or incapable of further answering the purposes for which it was erected, he may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the party wall, if he can do so without injury to the building on the adjoining lot. And to avoid causing such injury, he may shore up and support the original party wall a reasonable time, to excavate and place a new underpinning beneath it;* but he cannot interfere with

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[1] Caledon. R. Co. v. Sprot, 2 Macq. 450.

[2] Richards v. Rose, 9 Exch. 218; 23 L. J. Exch. 3; Humphreys v. Brogden, 15 Q. B. 739; Tenant v. Goldwin, 6 Mod. 314; 2 Ld. Raym. 1093.

[3] Anon. Keilw. 98, Pl. 4; 11 Mod. 8.

* In Bradbee v. Christ's Hospital, 4 Man. & Grang. 714, it was held that each of the owners of two contiguous lots, having an ancient party wall erected partly on each lot, for the purpose of sustaining the houses standing on both, has an easement for the support of his own house in so much of the wall as stands on the lot of the other. Neither has any right to underpin the party wall, either partially or wholly, unless it can be done without injuring the other's house. And if underpinned in such a manner as to injure it, the one doing the act is liable for the injury. The court said: "Both parties seem to have assumed before the arbitrator that the party wall belonged one-half to the plaintiff and the other

it in any manner, unless he can do so without injury to the adjoining building, or without the consent of the owner of such building.[1]* Where there is a decayed and ruinous party wall,

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half to the defendant, and he was not requested to state any question for the opinion of the court upon that point. He has, according to the request of the parties, raised a question as to the liability of the defendants in respect of injury arising from their underpinning only their own half of the party wall, by stating that the carelessness, negligence and unskilfulness for which he has given damages, consisted in their underpinning their own half of the party wall only. Now there is not, amongst the numerous objections taken to this award, any distinctly complaining of that assessment of damages. Assuming, however, that the point is raised for the consideration of the court, we are of opinion that the defendants had no right to underpin the party wall, either partially or wholly, unless that could be done without injuring the plaintiff's house. It may indeed be doubtful whether the plaintiff had a several interest in that half of the wall which was next to his house, or whether he and the defendants were tenants in common of the whole. But in either event, an action was maintainable against the defendants in respect of the injury which resulted from their mode of dealing with it."

[1] Eno v. Del Vecchio, 4 Duer, 53.

* In the above case, Bosworth, J., who delivered the opinion, said: "Unless these rights are necessarily incident to such an ownership in such a party wall, it is difficult to say on what principle either owner has any valuable right or privilege in it. If either may pare off so much of the wall as is upon his own lot, notwithstanding it may so weaken the residue of the wall that it cannot stand; or, if either may excavate under so much of the wall as is upon his own land, though the necessary consequence be that so much of the wall as is on the other lot will fall, then it follows that a purchaser from the owner of both does not acquire, by a grant of one house and lot, with the appurtenances, a right to the use of all that is absolutely indispensable to the enjoyment and security of the house built, although it was in use as a part of the house at the time the house was granted. If either may, as a matter of strict right, take down or pare off so much of the wall as is on his own lot, although the residue must necessarily fall, or will be insufficient to support the adjoining building, then it is out of the power of the latter to protect himself, even if he have notice. Notice may enable him to shore up his building until he can erect a new wall wholly on his own land. But it will not enable him to sustain his own half of the wall, and make it strong enough to uphold his building when it is itself incapable of standing, after the other half has been pared off or taken down. The owner of a lot having a building with independent walls standing wholly upon it, is entitled to notice from the owner of an adjoining lot, who intends to build on the latter, and so improve it as to make it necessary for the security of the former house that it should be shored up and supported during the progress of the work. The one giving the notice, even in such a case, is also bound to exercise care and skill in improving his own lot; and for any injury resulting to the other from a breach of that duty he will be liable. I see no middle course, in such cases, between holding either that one of the owners of two adjoining buildings, having such a party wall for the support of both, cannot remove or impair the stability of the wall without the other's consent, or that each has as absolute and exclusive a dominion over so much of the wall as stands on his own lot as he would have had if it had been erected as a separate and independent wall. If the latter rule be adopted, it must also be held that, although the owners of adjoining lots erect buildings upon them, with a party wall for the support of both, standing, by common consent, one-half on each lot, and by agreement built at joint expense, yet, the day after they are completed, or after the wall has stood and been used as a party wall long enough to justify the presumption of a grant where the possession is adverse, either may take down so much of such wall as is on his own

the necessity of the case furnishes a law of itself; and if the owner of one of the buildings finds that, by taking down his half of the wall, the destruction of the other is inevitable, he will be justified, without the assent of the adjoining owner, in taking down the whole, doing it carefully and with the least possible disturbance of the adjoining owner's occupation, and rebuilding the wall at the earliest practicable moment.[1] *

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lot, although, as an inevitable consequence, the other half must fall. The latter doctrine is repugnant to natural justice and equity, and I have not found any authorities that sanction it. The contrary doctrine is in accordance with the most obvious principles of justice and good faith, and with express decisions, and is supported by the opinions of eminent jurists, expressed without hesitation or qualification, and does not interfere with either party in making any kind of improvements upon his own lot which do not involve a breach of duty to, or the practice of bad faith toward, the other."

[1] Partridge v. Gilbert, 15 N. Y. 601.

* In this case, the court said: "We hold that the owner of the building occupied by the plaintiff was entitled to have it supported by the common wall, while that wall remained in a condition to uphold it. But the jury have found that the wall, and the arch on which it stood, were so decayed and ruinous that a just regard to the safety of life and property rendered their removal necessary, and that the buildings, on that account, were not safe to be occupied for stores for the year ensuing the time the defendants commenced their wall. They have also found, what seems quite obvious, that the wall could not be split through the center, so as to leave the half which was on the plaintiff's lot standing, after the other half was taken down; and that the outer walls and the interior structure of the defendants' store could not be taken down without prostrating the wall. What, then, is the law in such a case? Must the party who is ready to rebuild await the actual falling down of his store, if the adjoining owner is unwilling, or from having parted with the possession of his property for a term, is unable to join in rebuilding the wall? This position would be highly unreasonable, and it is not sustained by any authority. In a case like this, in all its material features, Chancellor Kent decided that the devisee of the party who had stood out against having the old wall taken down, was bound, in equity, to pay one-half of the cost of the new wall to the owner of the adjoining building, who had erected it. This was going further than is required to sustain the defendants in this case. The decision, of course, includes the establishment of the right of the plaintiff to take down the old and erect the new wall; for if that was an illegal act, no claim to contribution would have arisen out of it. The Chancellor accordingly quotes Pothier to show that no action would lie for the inconvenience occasioned to the party who refused to unite in rebuilding the wall, as follows: 'If I necessarily deprive my neighbor of the profits of his business arising from the use of his side of the wall during the time of the repair of the party wall, I am not bound to indemnify him for his loss, because I am only in the exercise of a lawful right, unless I consume unnecessary time in the construction of the wall.' So Domat, in treating of 'services,' lays it down that where it is necessary to rebuild a wall which serves for bearing a building or supporting anything belonging to another person, he who is owner of the wall, or who ought to maintain it in good condition, will be liable only for the charges necessary to repair the wall; and whatever is laid out, either in demolishing that which rested on the wall, or in supporting it, will be borne by the person who had the right to rest the said thing on the wall" (referring to Domat's Civil Law, b. 1, tit. 12, § 5).

Where a tenant in common destroys a wall which is owned in common, the other tenant in common is entitled to damages therefor; but not if the wall is

§ 733. Although the erection of a party wall creates a community of interest between neighboring proprietors, yet there is no just sense in which the reciprocal easement for its preservation can be deemed a legal incumbrance upon the property. The benefit thus secured to each is not converted into a burden by the mere fact that it is mutual and not exclusive.[1] The right to its enjoyment only exists so long as the wall continues to be sufficient for the purpose, and the respective buildings remain in a condition to need the support. When the wall no longer answers the common purpose, and it becomes necessary to take it down and rebuild the houses, either the interest of each proprietor of the land ceases with the existence of the state of things which created it, or each is entitled to call upon the other, to contribute toward rebuilding the wall on the same site; and in case of his default to build it himself, and call upon the other owner to reimburse him one-half of the expense. The view of Chancellor Kent was, that the mutual rights of the several owners against each other continued, and that either might rebuild in case the other refused to co-operate, and claim contribution from the defaulting owner. In Sherred v. Cisco,[2] the New York Superior Court held, that the mutual easement ceased with the destruction of the buildings and the wall by fire, and that the respective parties were remitted to their original unqualified title to the division line. There does not seem to be any solid distinction between a total destruction of the wall and buildings, and a state of things which should require the whole to be rebuilt from the foundation. "In either case, there is great force in saying that the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his

taken down for the mere purpose of rebuilding it. If the wall is made higher by one tenant in common to the injury of the other, the latter may take down the heightened portion of the wall (Cubitt v. Porter, 8 B. & C. 257; Murray v. Hall, 7 C. B. 441; Murley v. M'Dermott, 8 Ad. & E. 138). Where the wall is built against by one of two tenants in common, and the wall is heightened and carried up into a chimney, this constitutes an ouster of the other tenant in common (Stedman v. Smith, 8 Ell. & Bl. 1; 26 L. J. Q. B. 315).

[1] Hendricks v. Stark, 37 N. Y. 106. [2] 4 Sandf. 480.

own land without any obligation to accommodate the other. Circumstances may have materially changed since the adjoining proprietors were content with such walls as would have supported two adjoining dwellings. If the right of mutual support continues by means of the original arrangement, or by prescription, it is just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing condition of our cities and villages, it must often happen that edifices of different dimensions and an entirely different character would be required. And it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings, would essentially differ from those of the other; and the division wall which would suit one of them, would be inapplicable to the objects of the other."[1]

18. *Right to the lateral or subjacent support of soil.*

§ 734. The civil law recognizing the principle that the owner of land is entitled to have his land supported by the adjoining soil, established a rule for the purpose of protecting this right. It declared that if a man dug a ditch, he should leave between it and his neighbor's land a space equal to its depth; and if a well, the space of a fathom. A French writer, referring to a similar rule in the code of France, says: "By a parity of reasoning, the owner of land who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbor, and continue to excavate perpendicularly; because his neighbor's land thus deprived of support, would be in danger of falling in."[2]

§ 735. With reference to the existing rule on this subject, Lord Campbell, C. J., said that in the case of adjoining closes, the right to lateral support "stands on natural jus-

[1] Partridge v. Gilbert, *supra*. Per Denio, Ch. J.

[2] Pardessus, *Traite des Servitudes*.

tice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the principle, *sic utere tuo ut alienum non lædas.*" And again, he says: "The right to lateral support from the adjoining soil, is not like the support of one building upon another supposed to be gained by grant, but is a right of property passing with the soil." Humphries v. Brogden,[1] in which the foregoing language was used, was a case of subjacent instead of lateral support of lands in their natural state. It was held that when the surface of land or the soil lying over minerals belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the surface while unincumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata; that those strata, may, of course, be removed by the owner of them, so that a sufficient support for the surface is left. But if the surface subsides and is injured by the removal of the strata, although the operation may not have been conducted negligently, the owner of the surface may maintain an action against the owner of the minerals for the damages sustained by the subsidence.[2] *

[1] 1 L. & Eq. R. 241.

[2] And see to the same effect, Backhouse v. Bonomi, 9 H. L. C. 503; 34 L. J. Q. B. 181; Brown v. Robins, 4 H. & N. 186; Rogers v. Taylor, 2 Ib. 828; 27 L. J. Exch. 175; Hamer v. Knowles, 6 H. & N. 454; 30 L. J. Exch. 102.

* In Farrand v. Marshall, 19 Barb. 580, aff'd 21 Ib. 409, which was a motion to modify an injunction, restraining the defendant from excavating his premises next adjoining the land of the plaintiff, for the purpose of getting clay to make brick, Harris, J., in delivering the judgment of the court, said: "I think the judgment should be so modified as only to restrain the defendant from excavating or removing any soil from any land adjoining the plaintiff's premises, which shall cause the plaintiff's land, by reason of the withdrawal of its lateral support, to fall away or subside. The defendant will then be at liberty to excavate as he pleases, at the peril, nevertheless, of being convicted of a violation of the injunction in case his excavation should result in injury to the plaintiff's land. In Palmer v. Wetmore, 2 Sandf. 316, it was contended by counsel, that the rule which authorizes every man to use his own property, as he sees fit, not trespassing on his neighbor's rights, does not apply to a landlord in respect of his lands adjoining premises demised by him; that such landlord cannot use or improve his adjoining lands in any manner that will interfere with the use or enjoyment of the demised premises in the possession of the tenant; and that the relative condition of the two lots must continue the same through-

§ 736. But the doctrine under consideration has always been confined to those cases in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. Every attempt to extend it beyond such cases has proved unsuccessful. When the party complaining of an injury has erected buildings upon the margin of his own land, he is not entitled to recover, upon the familiar principle that he who complains of the use which another makes of his own property must himself be free from fault. "A man who builds a house adjoining his neighbor's land," remarks Parker, Ch. J., in Thurston v. Hancock,[1] "ought to foresee the probable use by his neighbor of the adjoining land, and by convention, or by a different arrangement of his house, secure himself against future interruption and inconvenience." *

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out the term, where any change in the lot not leased, will, in any degree, lessen or prejudice the enjoyment or uses of the lot demised. It was held that there was no such distinction as to a landlord's property, there being no reason why a landlord, in respect of his tenant, is more restricted as to his vacant lots than he would be in respect of any other owner for years, or in fee, of an adjacent house.

[1] 12 Mass. 220.

* In Lasala v. Holbrook, 4 Paige, 169, Chancellor Walworth said: "I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier. But my neighbor has the right to dig the pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state. I cannot, therefore, deprive him of this right by erecting a building upon my lot, the weight of which may cause my land to fall into his pit, which he may dig in the proper and legitimate exercise of his previous right to improve his own lot."

"As an original question, we should certainly doubt the correctness of the position that though a man may have recently erected a house on the confines of his land, his adjoining neighbor may, without being answerable for the consequences should the house fall into the pit, excavate his land to an extraordinary and unreasonable depth, not for the purpose of improving and enjoying it as land is usually enjoyed, but to abstract the soil itself and convert it into brick. It is said that it was the fault of the one building the house, as he could not, by his act, hinder his neighbor from making the most profitable use of his land. It is difficult to perceive how it is his fault in a legal sense, when lawfully using his land. It was quite as lawful for him to build there as for his neighbor to dig down. Neither could lawfully prevent the other from a reasonable use of his own premises, nor could either make an unreasonable use of his own to the injury of his neighbor. The case in Rolle, and others holding that a man who builds his house upon the margin of his land cannot recover, were thought to fall within a qualification of the maxim *sic utere tuo*, &c., viz., that he who complains of the use which another makes of his own property must himself be free from fault. This qualification was not applied in the case of Slingsby v. Barn-

The earliest English writer who has mentioned the subject, as to how far the owner of ground adjacent to land owned by another may remove the earth, and thus withdraw the natural support of his neighbor's soil, without being liable for the injury, is Rolle. It had been held in the King's Bench, as long ago as the time of Charles I, that if A., seized in fee of land next adjoining the land of B., erect a new house on his land, and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., whereby the foundation of the house, and the house itself, falls into the pit, still, no action lies at the suit of A. against B., for this was the fault of A. himself, that he built his house so near to the land of B.; for he could not, by his act, hinder B. from making the most profitable use of his own land.[1] In Wyatt v. Harrison,[2] Tenterden, Ch. J., in referring to the doctrine of Rolle, said: "It may be true, that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." *

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ard, 1 Roll. R. 430, which case is mentioned with approbation and relied upon as authority, by Baron Vaughn, in Brown v. Windsor, 1 Cromp. & Jer. 28. But it was applied, in Thurston v. Hancock, 12 Mass. 220, and in Lasala v. Holbrook, 4 Paige, 169" (Wright, J., delivering the opinion of the court in Farrand v. Marshall, 21 Barb. 409).

[1] Wilde v. Minsterley, 15 Car. [2] 3 Barn. & Ald. 871.

* The doctrine of Rolle is recognized and approved by the following: Humphries v. Brogden, 1 Law & Eq. R. 241; Thurston v. Hancock, 12 Mass. 220; Lasala v. Holbrook, 4 Paige, 169; Hay v. The Cohoes Co. 2 Comst. 159; Comyn's Dig. *Action on the case for a nuisance* (a). On the other hand, in Radcliff's Exrs. v. The Mayor of Brooklyn, 4 Comst. 195, Bronson, Ch. J., questions and disapproves of it. But he was not called upon to commit himself upon the question, and he stated his dissent cautiously, adding that the case under consideration seemed "to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land owner. But if that be a doubtful position, there is a class of cases directly on

§ 737. Where the owner of land sells a portion of it to be built upon, or for a road or railway, there is an implied grant of lateral support from his adjoining land; and if the vendor reserves to himself the right to the minerals underneath the surface, he, nevertheless, impliedly grants all such adjacent and subjacent support as is reasonably necessary to enable the purchaser to erect and maintain his buildings, road or railway.[1]

When the owner of the subsoil takes away the proper support of the surface, he is not liable therefor until some actual damage has been sustained by the owner of the surface. If that were not so, the owner of the subjacent land could not abstract the minerals, nor avail himself of the full benefit of his property, without being liable to an action; though before any damage had actually occurred he had, by substituting other means of support, removed all danger of injury to the plaintiff's property. This would be wholly inconsistent with the right of the proprietor to use his property as he pleases, provided he does not injure that of his neighbor.[2] *

§ 738. When the surface of land is in one man, and the subsoil in another, by separate grants from the owner of the inheritance, or where the owner grants the surface to another to be cultivated and enjoyed, reserving to himself a right to the subsoil and to all stones and minerals beneath the surface, each proprietor is possessed of a "close," and has a separate and distinct freehold. Where the subsoil is granted,

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the point in judgment," viz., that a municipal corporation, acting under an authority conferred by the legislature to grade, level, and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. And this latter point was the only one settled by the judgment of the court.

[1] North East R. R. Co. v. Crosland, 32 L. J. Ch. 353.

[2] Murchie v. Black, 34 L. J. C. P. 337.

* A man who should support his house by a prop resting on his neighbor's land could maintain an action against a stranger who, by removing it, caused the house to fall, though he could have no action against his neighbor if the latter removed it and occasioned the same damage (Jeffries v. Williams, 5 Exch. 800).

reserving the surface to the owner of the land, there is an implied grant of access to the subsoil, and the grantee may go upon, and dig through the surface to reach the subsoil, if he cannot reach it in any other way. The owner of the surface is liable in damages if he unnecessarily digs holes in the subsoil; and, on the other hand, the owner of the subsoil is responsible if he interfere with the fair use and enjoyment of the surface.[1] If A. be seized in fee of a close upon which the burgesses of B. have a right, during a certain portion of the year, to depasture their cattle, and have during that period the exclusive possession of the close, A. may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes, but not against one who, during that period, merely rides over the close.[2]

19. *Rights in relation to growing crops.*

§ 739. If a man sows upon his own land, the crop is parcel of the land. If he sows upon his neighbor's land with the agreement that the crop is to be his, and removable by him, it is not parcel of the land, but personal estate. So, buildings, grain, grass, and earth itself, sold to be separated from the land, are not within the statute of frauds, for the reason that by the agreement of the parties, they have lost their character as parcel of the realty.[3] * In Rose v. Bunn,[4]

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[1] Wilkinson v. Proud, 11 M. & W. 33; Rowbotham v. Wilson, 8 Ell. & Bl. 142.

[2] Cox v. Glue, 12 Jur. 185; 17 L. J. 162.

[3] Newcomb v. Ramer, 2 Johns. 421, note; Curtiss v. Hoyt, 19 Conn. 154; Smith v. Jenks, 1 Denio, 580; but see Foster v. Fletcher, 7 Monr. 534.

[4] 21 N. Y. R. 275.

* A contract for the sale of growing crops, produced annually by labor and the cultivation of the earth, and which are included within the meaning of the term "emblements," is not a contract for the sale of land, or any interest in it, or concerning it; and it is not material, whether they have come to maturity or not, at the time of the sale; or whether they are to be cut and taken off of the ground by the vendor or the vendee (Buck v. Pickwell, 27 Vt. 157).

There would seem to be some reason for making a distinction between a growing crop of grass, or growing trees, and a field of wheat or corn or other emblements. Emblements seem to be distinct from the real estate, and subject to many of the incidents attending personal chattels. They go to the executor

it was objected that the "grass, herbage, feeding, and pasturage," which were excepted in terms, being the annual profits of the land, could not be excepted or reserved; such reservation being, it was argued, repugnant to the grant; and moreover, that being things not in existence at the time of the grant, they could not be the subject of an exception. It was held however, that the restriction, whether it was called an exception or a reservation, was a qualification of the grant by which the grantee, by accepting the deed, was bound.[1]* A conveyance of land without exception or

upon the death of the owner of the land, and not to his heirs, and they may be levied upon, and sold upon execution like other personal chattels, and this without regard to the state of maturity which they are in. It would seem to follow, that the owner should have power to make sale of them by a parol contract. But the word "land" is comprehensive in its meaning, and embraces growing grass and standing trees, as well as houses and other buildings, and all pass under the general designation of land, in a deed. Dunn v. Ferguson, cited in 2 Steph. N. P. 1971, from Hayes (Irish), 542, marks well the distinction and the grounds upon which the sale of a growing crop is not a contract for an interest in land. The defendant sold by verbal contract, to the plaintiff, a crop of turnips which he had previously sown; and some time after, and while the turnips were in the ground, the defendant dug them and carried them away. Chief Baron Joy, said: "Whether there has been a contract concerning an interest in land, or whether it merely concerns goods and chattels, must depend upon the question, whether a growing crop is goods and chattels," and upon this, he said: "The decisions have been very contradictory; a result always to be expected, when the judges give themselves up to fine distinctions." The court, in the foregoing case, base their decision upon the ground that at common law, growing crops were uniformly held to be goods, and subject to all the leading consequences of being goods, and that the statute of frauds took things as it found them, and provided for land and goods according as they were esteemed at the time of its enactment.

Where a party had purchased, by a verbal contract, a crop of growing grass, with liberty to go on the close where it grew for the purpose of cutting and carrying it away, it was held that he could not maintain trespass against the seller for taking away his horse and cart from the close which he had brought there for the purpose of carrying away the grass; it being in substance an action charging the defendant on a contract within the 4th section of the statute of frauds (Carrington v. Roots, 2 Mees. & W. 248).

[1] See Hills v. Miller, 3 Paige, 254; Child v. Chappell, 5 Seld. 246.

* In Austin v. Sawyer, 9 Cowen, 39, it appeared that the plaintiff and one Wilcox owned separate farms, and that each had sowed a crop of wheat; that they then agreed to exchange farms, each reserving his own crop; and that they accordingly exchanged quitclaim deeds, but that the deeds were without any reservation. Austin fenced the wheat on the farm he had left. Wilcox did the same as to the wheat he had sowed, and at harvest time he cut and carried it away. Wilcox did not take possession of the farm which he had of the plaintiff; but some time after assigned his interest in it to the defendant, telling him at the time, that the wheat was reserved and belonged to the plaintiff. The defendant's son testified, that he thought he heard his father say, that the wheat was reserved, and that it was Austin's. The defendant cut the wheat, and put it into his own barn. The defendant having shown an absolute conveyance, the plaintiff's right

reservation, carries the property of the crop to the purchaser; and the result is the same where the land is sold under an execution.[1] *

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to recover, depended on the validity of his reservation of the wheat. At the trial of the cause at the circuit, a verdict was taken for the plaintiff, subject to the opinion of the Supreme Court on a case. The Supreme Court in directing judgment to be entered for the plaintiff said: "Whatever may be the rule of construction elsewhere, we are not at liberty here to question the validity of a parol contract for the sale of growing crops. Was there any evidence of such a contract? Rejecting all that passed anterior to, and at time of executing the written contract, the proof is, that Wilcox when treating with the defendant as to the sale of the farm, declared the wheat to belong to the plaintiff. This is sufficient in my judgment, to authorize a jury to presume a formal and valid contract for the sale of the wheat. The title to the wheat then being in the plaintiff, it was not in the power of Wilcox to convey it to the defendant. Suppose Wilcox had leased this wheat field for three years by parol, the lease would have been valid. Any absolute conveyance by him subsequently, could not divest the rights of the lessee by parol. For the same reason, the assignment by Wilcox to the defendant, though absolute in its terms, conveyed no more than Wilcox had a right to convey. The crop of wheat therefore, I consider legally shown to be the property of the plaintiff."

A. sold and conveyed certain land to B. but reserved the grain on the ground, which was to be threshed in the barn, and the straw left for B. Before the grain was cut, A. sold it to C. who had no knowledge of the agreement. B. being in possession of the farm, C. cut and stacked the grain thereon, and afterward hauled away the unthreshed grain, threshed it, and did not return the straw. An action of trespass *quare clausum* having been brought by B. against C., it was held that if C. entered in order to remove the grain and thresh it away from the premises, the plaintiff was entitled to recover for the entry and for the straw removed and not returned (Moats v. Witmer, 3 Gill & Johns. 118.)

[1] Foote v. Colvin, 3 Johns. 216.

* A verbal gift of a growing crop cannot be enforced. Noble v. Smith, 2 Johns. 52, was an action of trespass for breaking and entering the close of the plaintiff, and carrying away property belonging to him. It was proved that the defendant, although forbidden by the plaintiff, cut down and carried away near two hundred bushels of wheat in the straw. The defense set up was a promise of the plaintiff that he would give the wheat growing to the defendant. The judge at the circuit, having charged the jury that there was sufficient evidence of a valid gift of the wheat, not revocable by the plaintiff, the plaintiff submitted to a nonsuit. The Supreme Court in granting a new trial said: "It is very clear from the general current of authorities that delivery is essential to give effect to a gift. If delivery be requisite, there was none in the present case. The land at the time of the alleged gift was in possession of one Hallett, and not of any of the defendants to whom the gift is said to have been made; and before the wheat was ripe, the plaintiff recovered the possession of the land by due course of law. Here was not even an attempt at symbolical delivery, and giving the testimony the strongest possible construction in favor of the defendants, it amounted to nothing more than saying *I give*, without any act to enforce it. A mere symbolical delivery would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of the key of a trunk, of a room, or warehouse, which was the true and effectual way of obtaining the use and command of the subject. I do not know that corn growing is susceptible of delivery in any other way than by putting the donee into possession of the soil; but it is not necessary to give any opinion at present, to that extent; nor do the court mean to do so. It

§ 740. A grant to a man and his heirs, of woods, underwoods, corn, and produce, which may thereafter grow on the land of the grantor, amounts to a mere personal contract between the immediate parties to it and their heirs, and does not bind the land in the hands of persons to whom the land may be afterward conveyed.[1] The cases in which the right to the future produce and profits of the soil exists as an assignable and inheritable interest burdening the land in the hands of subsequent purchasers and proprietors are, where the relationship of landlord and tenant existed between the grantor and grantee of the right, and the grant constituted or was accompanied by a covenant which ran with the land, binding upon both the assignee of the reversion and the assignee of the term.[2] Where, for instance, a lessor granted and covenanted in a lease that the lessee, his executors, and assigns, should take and carry away such corn as should be growing upon the ground at the end of the term, and the lessor sold his reversion, and the executor of the lessee having sown the corn, sold it, it was held that the property in the growing crop vested in the purchaser, who might enter upon the land and take it, for there was both a covenant and a grant, and the covenant ran with the land, and bound both the assignee of the reversion and the assignee of the term.[3]

§ 741. Where a person has a separate interest in the soil for a special purpose, although the right to the land is not in him, yet if he be injured in the enjoyment of the particular use, even with the assent of the owner of the land, he

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is sufficient to say, that there was no evidence of delivery in the present case, and that to presume one, we must go the whole length of the example given in the Roman law, where the buyer is supposed to take possession of a large immovable column by his eyes and his affections. The courts of equity seem to have adopted the true rule in their decisions on the *donatio causâ mortis*, in which they hold that the delivery must be actual and real, or by some act clearly equivalent."

[1] Keppell v. Bailey, 2 Mylne & K. 535; Rowbotham v. Wilson, 8 H. L. C. 359; Malone v. Harris, 11 Ir. Ch. R. 39.

[2] Addison on Contr. ch. 22, s. 1.

[3] Grantham v. Hawley, Hob. 132; Martyn v. Williams, 1 H. & N. 827; 26 L. J. Exch. 121.

may maintain trespass *quare clausum fregit.*[1] * Thus, this action lies for him who has the herbage, without a right to the soil.[2] In Wilson v. Mackreth,[3] the plaintiff had an exclusive right to take turf in a several parcel of ground in which, and in other parcels adjoining, he and the other tenants of the manor had common of pasture, the right to the soil being in the lord of the manor. The defendant dug and carried away peat in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. The distinction there taken was between ex-

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[1] Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 Mees. & W. 248; Dolloff v. Danforth, 43 N. Hamp. 219.

[2] Clap v. Draper, 4 Mass. 266.

[3] 3 Burr. 1824.

* One who settles on government land and plants a crop, cannot maintain trespass *quare clausum fregit* against a person who afterward purchases the land from the United States, and enters in order to harvest the crop for his own use, the improvements and crops in such case passing with the land to the purchaser (Floyd v. Ricks, 14 Ark. 286).

Where the owner of land after sowing crops is dispossessed, and the crops are cut and removed by the wrong-doer while he is occupying the premises, replevin will not lie for the crops so removed; but the remedy of the owner is by action of trespass *quare clausum fregit* after he has regained possession. De Mott v. Hagerman, 8 Cowen, 220, was an action of replevin brought by De Mott and Billson against W. and J. Hagerman for wheat and rye. It appeared that Billson was working the farm of De Mott on shares, and had sowed wheat and rye when the defendants entered and ousted him. De Mott afterwards re-entered, but previous to this, the defendants harvested the wheat and rye sown by Billson, and stacked the sheaves on another piece of land in their possession. At the trial at the circuit, the plaintiffs were nonsuited on the ground that the action should have been trespass *quare clausum fregit;* and the present was a motion to set the nonsuit aside. The Supreme Court, in denying the motion, said: "It does not appear in what manner the defendants obtained possession. It is not stated that they wrongfully disseized Billson. If the entry was lawful, the property of the wheat and rye was in the defendants. If it was unlawful and worked a disseizin, trespass *quare clausum fregit* might have been maintained for the first entry; and after a recovery in ejectment, damages would follow for the mesne profits. But I do not see how the parties can maintain an action for the wheat and rye raised, disconnected from the remedy by trespass. If that be allowable, a plaintiff may sue in trover for wheat or corn raised on land of which he has been disseized, and that too before his re-entry. The action of replevin does not lie in such a case. That action is founded on the right of the party. Now, after the entry and occupation of the defendants, the right of the plaintiffs to the crop ceased, though it could be available by an action of trespass after a recovery of the land by ejectment. In this case we know not by what means one of the plaintiffs was restored to the possession, nor is it material; for had it been by ejectment, the action for mesne profits was the remedy. It is not necessary to inquire whether the regaining of possession by one of the plaintiffs without suit, inured to the benefit of both, and whether if so, or if both had in fact entered, they could have an action for damages done after the first entry."

clusive rights and rights in common; that if the plaintiff had only common of turbary, trespass would not lie.*

§ 742. The lessee of a mortgagor under a lease given after the mortgage is not entitled as against the mortgagee to the crops growing on the mortgaged premises at the time of the foreclosure and sale, the mortgagee having become

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* Where land is fraudulently held and cultivated for a debtor, to keep it from his creditors, the crop may be taken for his debts, and trespass will not lie for the entry by a purchaser to remove it (Thompson v. Craigmyle, 4 B. Mon. 391).

A growing crop of grass cannot be attached on mesne process. Norris v. Watson, 2 Fost. 364, was an action of trespass against a deputy sheriff for breaking and entering the plaintiff's close and carrying away the grass. It appeared that, on the 8th of July, the defendant made an attachment of the grass; that on the 26th of the same month, he cut and carried the grass away; and that he also attached the grass by leaving copies, as in the attachment of real estate. The gist of the action was the breaking and entering. But if the defendant had a right to make the attachment, he, of course, had the right to enter on the land in a reasonable way for the purpose of making it, and might justify the entry under his process. The question then was, whether the growing grass was liable to attachment. The grass was kept from the plaintiff from the 8th until the 26th of July, when it was cut and carried away. If the grass was illegally taken and detained from the 8th to the 26th of the month, it would be no defense to show that the crop was mature and liable to attachment at the end of that period. The exclusive possession of the land was necessary to assert the right which the defendant claimed. He could not keep the growing crop fenced and protected until it should ripen, without exclusive possession. If the possession which he took and kept had been legal and rightful, it would have been sufficient to maintain trespass *quare clausum fregit* against a stranger, or against the owner himself, if he had entered in a way to disturb the defendant's right. The attachment required that the officer should take and keep the whole beneficial interest in the land during the time necessary to mature the crop. If he could, for that purpose, legally hold possession eighteen days, the law could fix no limit that would prevent him from holding it for any indefinite time that might be necessary to make the attachment effectual. The officer might, in this way, become in substance, tenant of the land under color of authority to attach personal property, though the law did not permit him by a direct attachment of the land in mesne process to intermeddle at all with the possession. The court, in holding that the plaintiff was entitled to recover, said: "We cannot think that the provisions of the Revised Statutes authorizing the mortgage of growing crops as personal property, and the attachment of personal property subject to mortgage were intended to make any change in the law relating to the attachment of growing crops. The 15th section of the 184th chapter, which provides for the attachment of personal property subject to mortgage, is limited in its operation by the terms of the statute to 'property not exempt from attachment.' If growing crops, therefore, were exempt from attachment, they are excluded by the exception from the operation of the statute. In the case of certain enumerated kinds of property, the 14th section of the same chapter provides that the officer may preserve an attachment without actual possession, by leaving copies of his writ and return with the town clerk, as where lands are attached. The statute names 'grain unthreshed, hay, or potatoes,' &c., but makes no mention of growing crops which would fall particularly within the reason of the enactment, and could hardly have been omitted, if the legislature had understood that they were liable to attachment."

the purchaser; and if the lessee carry the crops away, the mortgagee may maintain an action of trespass against him therefor. The mortgagor has no power to let the land not subject to every circumstance of the mortgage. The tenant, therefore, stands exactly in the situation of the mortgagor. When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense. He is not entitled to reap the crop as other tenants at will are, because all is liable to the debt, on payment of which the mortgagee's title ceases.[1] *

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[1] The Mayor of N. Y. v. Mabie, 3 Kern. 151; Howard v. Doolittle, 3 Duer, 464; Lloyd v. Tomkies, 1 Term R. 671.

* In Keech v. Hall, Doug. 21, the mortgagor brought an action of ejectment against a tenant who claimed under a lease from the mortgagor given after the mortgage, without the privity of the mortgagee. Lord Mansfield, in delivering the opinion of the court, said: "On full consideration, we are all clearly of opinion that there is no inference of fraud or concert against the mortgagee to prevent him from considering the lessee of the mortgagor as a wrong-doer." Mr. Powell (Tr. on Mortgages, ch. 7, 213–14) considers the right of a mortgagee to emblements, as against the lessee of the mortgagor, as necessarily resulting from the doctrine established by the foregoing case. He observes that he can see no ground on which the case of such lessee as to emblements can be distinguished from that of any other tenant under a tortious title. For if he be considered a wrong-doer as to his occupation of the premises, he cannot be considered in a different character as to the emblements; nor can there be any ground to imply a consent to cultivate the property when no implication is admitted of a consent to occupy it.

In M'Kircher v. Hawley, 16 Johns. 289, the New York Supreme Court held that the relation subsisting between the mortgagor and mortgagee did not imply a right on the part of the mortgagor to lease. The mortgagor, therefore, in giving a lease, becomes, as to the mortgagee, a disseizor. And if, during the disseizin, he should cut down the grass, trees, or corn growing on the land, the disseizee after re-entry may have an action of trespass *vi et armis* against him for the trees, grass, or corn.

Where a creditor to whom land is set off on execution cuts hay upon the land, and after re-conveying his interest in the land, removes the hay, he is not liable as a trespasser. In Drown v. Foss, 39 N. Hamp. 525, the land upon which the hay in controversy grew, having been set off on an execution to a creditor, he conveyed his interest in the land to the defendant. On the morning of the day the defendant was going on the land to cut the hay, John B. Foss, the execution debtor, forbade his cutting it, remarking that he intended to redeem that day; but the defendant mowed the hay that forenoon. In the afternoon of the same day, John B. Foss paid the defendant the amount of the debt, costs, and charges; and the defendant, at his request, made out and delivered to the plaintiff a deed of the land. At that time the hay was claimed by both parties, and John B. Foss offered to pay the defendant for cutting it. The defendant afterwards cured it and carried it away. Judgment having been rendered for the plaintiff in the Common Pleas, the Supreme Court, in setting it aside, said: "The defendant, while in possession of land under the levies of executions, cut the hay before the payment or tender of the amount of his claims, and before he

20. *Property in trees standing on line.*

§ 743. There are a few English cases and *dicta* which hold that where a tree stands wholly upon one man's land, and so near the division line between his land and the land of another person as that a part of the roots penetrate into the soil of the latter, the respective owners of the land upon both sides of the line are tenants in common of the tree and its branches and fruit, upon the principle that the tree derives a part of its nourishment from the land of each of the adjoining owners.* But this doctrine may now be regarded

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conveyed his interest in the land to the plaintiff. Whether the defendant could have been, or can now be held accountable for the hay, as for rents and profits in any other proceeding, or whether he is liable for use and occupation of the land while curing and removing the hay, are questions not before us. By cutting the hay before redemption, he became the absolute owner of it, and it did not pass by his deed to the plaintiff. If the defendant, with his family, had occupied a house upon the land, and John B. Foss, or any person having his right, within the time allowed by statute, had tendered to the defendant the sums due to him, according to the statute, thereby rendering void the extents of the executions, the defendant would not thereupon be liable, in this form of action, for removing or for not removing his family and furniture. While continuing in a possession originally rightful, whatever might be the nature and conditions of his tenancy, he would not be liable in trespass *quare clausum* for merely occupying the premises or removing his property therefrom. Before curing and removing the hay, the defendant delivered to John B. Foss a deed of his interest in the land, in which deed the plaintiff was made grantee at the request of John B. Foss, who paid the redemption money. It does not appear that the plaintiff was present, or that he had authorized John B. Foss to receive the deed, or that he has ever had, or claimed to have, actual possession of the land or the deed. But if it might not be necessary for him to enter, in order to maintain trespass against one who should enter as a trespasser after the delivery of the deed, and if the deed might take effect from the time of its delivery to John B. Foss, by the assent of the plaintiff, presumed by law, or shown by his bringing this suit, yet it is clear that the defendant did not abandon or surrender, nor intend to abandon or surrender the actual possession of the premises before removing his hay. He could not easily have made his possession more real and manifest than by curing his hay there. After the delivery of the deed he did not make a new entry, but continued his former possession, which was lawfully acquired, and for that he is not liable in this form of action."

* There is an anonymous case in 2 Rolle, 255, in which it is held that if a tree grows in a hedge which divides the land of A. and B., and the roots take nourishment from both of their lands, they are tenants in common of it. From this case, the principle is not deducible that the adjoining proprietors are tenants in common of a tree in all cases where the roots penetrate the soil of both, without reference to the distance of the tree from the division line. In Waterman v. Soper, 1 Ld. Raym. 737, it is a condition that the tree be planted on the *extremest limit* of the land, so that growing it extends its roots into the land of the adjoining proprretor. A tree thus planted must almost inevitably, in its subsequent growth, extend its body more or less upon the dividing line. In the other case, the tree grew in the hedge which divided the land of the two proprietors. Such a division hedge in England, like division fences in the United

as exploded, as well on account of the difficulty of reducing the principle to practice as upon authority.*

There seems to have been some conflict of opinion in the civil law on this subject, notwithstanding the law of vicinage and the rights and duties of adjoining proprietors were, by the Roman code, defined with much more particularity than by the common law. A passage in the Institutes of Justinian, after stating that if one sets his plant in another's ground it becomes the property of the owner of the land where it is set, after it has taken root, proceeds as follows: "So that if the tree of a neighbor borders so closely upon the ground of Titius as to take root in it and be wholly nourished there, we may affirm that such tree is become the property of Titius; for reason doth not permit that a tree should be deemed the property of any other than of him in whose ground it hath rooted. Therefore, if a tree planted near the bounds of one person shall also extend its roots into the land of another, it will become common to both."[1] The

States, is generally *prima facie* the common property of both, and the tree may have been treated as constituting part of the hedge; but if not, it must have stood in close proximity to, if not upon, the line. These cases may reasonably be supposed to have been decided upon the ground that the roots extended into the land of each.

In Masters v. Pollie, 2 Roll. R. 141, it was held that where a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him. The authority of this case is recognized and approved by Littledale, J., in Holder v. Coates, 1 Moo. & Malk. 112. He says: "I remember, when I read those cases, I was of the opinion that the doctrine in the case of Masters v. Pollie was preferable to that in Waterman v. Soper; and I still think so." The same doctrine is also laid down in Mitten v. Faudrye, Pop. R. 161–163; and see 20 Vin. Abr. 417; 1 Chit. Gen. Pr. 652.

[1] Inst. 2, 1, 31; Coop. Just. 79.

* There is, at first view, an apparent equity in the proposition that the proprietor, from whose land a tree draws a portion of its support, should have some benefit in return. But to allow him an equal right to the tree and its fruits because a single root penetrates his soil, is quite as unjust as to deny him any right in the tree whatever. If he is tenant in common, what proportion does he own? If his interest is in proportion to the nourishment the tree draws from his land, how is this fact to be ascertained? Suppose the division line runs through a grove, a fruit yard, a nursery of trees, or a forest, and this rule is adopted, there might be a belt of land, rods in width, on which the parties would be tenants in common of more or less of the trees. How is each to know or ascertain what he owns solely, and what in common, and in what proportion, especially as the rights of the parties would be constantly changing by the growth and consequent extension of the roots across the division line?

foregoing may have reference only to a tree so near the line as to be regarded as standing substantially on the line. The civil law, in the days of Rome, required a boundary of five feet to be left between farm and farm, or rather between the trees of the two adjoining proprietors, except in the case of an olive or a fig-tree, where a space of nine feet was required. It is evident, that the passage above quoted has reference to trees set within the prohibited distance from the extreme boundary. There might be more reason in saying that if a party set his tree on the extreme limit of his land, in violation of express law, that the adjoining proprietor should become tenant in common of the tree, than if no such legal regulation existed, or if the tree was set no nearer the division line than the law prescribed. It is laid down in another book of the civil law, that such tree extending its roots into the land of the adjoining proprietor, is nevertheless the property of him in whose land it had its origin.[1] * Domat, in treating this subject, attributes no consequence to the setting of a tree nearer the division line than the law allows, except that the party thus offending may be compelled to remove it and pay the damages. He does not intimate that the tree thereby becomes the common property of the two adjoining proprietors.[2]

In the United States, the rule is well settled, that a tree and its product are the sole property of him on whose land it is situated; and that its location is to be determined by the position of the trunk or body of the tree above the soil, rather than by the roots within or the branches above it. In

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[1] Dig. 47, 7, 6, 2.

[2] 1 Domat Civil Law, 589, tit. 6, § 1, art. 2; Ib. 591, § 2, art. 1; Cooper's Just. 460.

* This is the rule which is recognized by Littledale, J., in Holder v. Coates, 22 Eng. C. L. 264. Such a rule would generally lead to the same result as the rule that the tree belongs to him on whose land the trunk or body of the tree is situated, as a tree would naturally be supposed to grow where it was set or planted. Yet, in the case last cited, the jury were unable to find on whose land the tree was planted, although the trunk of the tree was on the defendant's land, because the court told the jury to determine it from the evidence as to the situation of the trunk of the tree above the soil, and of the roots within it.

Skinner v. Wilder,[1] it appeared that the plaintiff set apple-trees on his land six feet from the division line between his land and the land of the defendant, and that the trees grew until the roots extended into, and the branches overhung, the defendant's land. It was held that, although the defendant might perhaps lawfully cut the roots and branches of the tree to the division line, yet that he had no right to the apples which grew on the overhanging branches.[2] *

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[1] 38 Vt. 115.

[2] See Hoffman v. Armstrong, 46 Barb. 337.

* In Lyman v. Hale, 11 Conn. 177, the tree in question was a pear-tree which stood upon the plaintiff's land about four feet from the line dividing his land from that of the defendant. It was proved that several roots of the tree penetrated the defendant's land, and that some of the branches extended a considerable distance across the line and over the premises of the defendant; and that the defendant picked from these branches six bushels of pears. It appeared that the tree had stood in that place more than twenty-five years, and that during all that time the plaintiff had gathered the fruit of the entire tree. A joint ownership in the tree was not claimed on the ground that some of the branches overhung the defendant's land, but from the fact that the tree extended its roots into the defendant's land, and derived a part of its nourishment from his soil. The difficulties which would arise from regarding the plaintiff and defendant as joint owners or tenants in common of the tree were well stated by Bissell, J., in delivering the opinion of the court, as follows: "All is made to depend solely on the inquiry whether any portion of the roots extend into the defendant's land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained? Again, if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportion do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties? Again, suppose the line between adjoining proprietors to run through a forest or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees, growing indeed on his own land, but near the line; and whether he can safely cut them without subjecting himself to an action? And again, on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth. It is not seen how these consequences are to be obviated if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the the adoption of the principle" (referring to Beardslee v. French, 7 Conn. 125; Welsh v. Nash, 8 East, 394; Dyson v. Collick, 5 Barn. & Ald. 600).

It is stated by the reporter, that Williams, Ch. J., at first dissented from the foregoing, on the ground of a decision of the Superior Court, in Hartford county, and the general understanding and practice in Connecticut among adjoining proprietors.

Blackstone, after quoting the maxim, *cujus est solum, ejus est usque ad cœlum et ad inferos*, says: "Upwards, therefore, no man may erect any building or the like, to overhang another's land; and downwards, whatever is in a direct line

§ 744. For the same reason that a tree is wholly the property of him on whose land the trunk stands, the proprietorship of the soil will give to the owner of the estate that part of the trunk of a tree which is upon his land when the trunk is divided by the line separating the estates. The ownership of the soil will be several in the proprietors of the two estates; while the tree standing partly upon the soil of each, and not capable, as an entire thing, of several ownership, will belong to the two as tenants in common.[1] This is an instance where the maxim that he who owns land owns to the sky above it, is qualified, and made to give way to a rule of convenience more just and equitable, and more beneficial to both parties. To hold in such case that each is the absolute owner of that part of the tree standing on his own land, would lead to a mode of division of the tree when cut, that would be impracticable, and give the right to one to hew down his part of the tree to the line, and thereby destroy the part belonging to the other.*

21. *Property in church pew.*

§ 745. Church pews, which constitute a subject of peculiar ownership, were not known according to the modern use and idea, until long after the Reformation; and inclosed pews

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between the surface of any land and the center of the earth belongs to the owner of the surface" (Blk. Com. vol. 2, p. 18). It is clear that this maxim ought not to apply to cases of overhanging branches of trees or to walls or other fixtures. The title to the fixture at the surface of the land determines that of everything connected with, and which is superincumbent above the surface where the base of the fixture rests.

[1] Crabbe's L. of Real Prop. § 96; Holder v. Coates, 1 M. & M. 112; Anon. 2 Roll. 255; Dubois v. Beaver, 25 N. Y. 123; Odiorne v. Lyford, 9 N. Hamp. 511; Griffin v. Bixby, 12 Ib. 454.

* In France, difficulty and conflict of opinions, upon this branch of the law, have been avoided by legislation; and boundary hedges and the trees in them are declared to be the common property of the owners of the two estates. So long as neither can make title upon any principles of right known to the law, to the exclusion of the other, a common property necessarily exists in both; and the rule of the French code is but the rule of the common law, resulting from the principle which gives to the owner of the soil an exclusive right to an indefinite extent upward and downward, and which makes trees and bushes growing upon land, a part of the land itself. Trees thus standing upon the boundary line, as mete stones or monuments, are not like party walls erected with reference to the usual occupation of adjacent premises.

were not in general use before the middle of the seventeenth century, being for a long time confined to the family of the patron.

In England, the right of property in a pew is a mere easement or incorporeal right; and hence the English doctrine that case only will lie for the disturbance of the occupant. In Boothly v. Baily,[1] it is said that the church and church yard are in law the soil and freehold of the parson, yet the use of the body of the church, and the repair and maintenance of it, are common to all the parishioners. "For avoiding of confusion, the distribution and disposing of seats, and charges of repair, belong to the ordinary" (or person having ecclesiastical jurisdiction), "and therefore no man can challenge a peculiar seat without a special reason," as prescribed to repair and maintain it. The disposal and distribution of the seats rest with the church wardens, subject to the control of the ordinary, who seems to have an unlimited discretion over the subject, and can make such changes from time to time, as he sees fit. An exclusive right to the occupation and enjoyment of a particular pew may be prescribed for or granted under ecclesiastical authority as appurtenant and annexed to a house in or out of the parish; and this, it seems, is the only right to that species of property of which the common law takes notice. The right of property in a pew, therefore, being an incorporeal one, annexed to a messuage—a mere easement—sufficiently accounts for the English doctrine that an action on the case only will lie for a disturbance of the occupant.[2]

In the United States, the owner of pew has an exclusive right to its possession and enjoyment for the purposes of public worship, not as an easement, but by virtue of an individual right of property, derived in theory, at least, from the proprietors of the edifice or freehold, and hence trespass *quare clausum* lies for a violation of the owner's right of

[1] Hob. 69.

[2] 3 Toml. L. Dict. 65, 107; Rep. of Eccl. Com. Feb. 1832; Manwaring v. Giles, 5 Barn. & Ald. 356; Lously v. Hayward, 1 Younge & Jervis, 583.

possession. It is now well settled in this country, that, in the absence of any statute, this kind of property is to be considered as real estate in all cases arising under the statute of frauds, or of conveyances, or of descents and distributions.[1] * The owners hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold. These rights are distinct and separate; and neither do they, nor the respective possessions growing out of the enjoyment of them, necessarily conflict with each other. The remedy by an action of trespass for a disturbance of the owner in the possession of his pew is, therefore, entirely consistent with established principles.[2]

§ 746. The property in a pew in a church is not an absolute, but a qualified property. It is an exclusive right to occupy a certain part of the church for the purpose of attending upon public worship, and for no other purpose, and is necessarily subject to the right in the parish to take down and rebuild the church, and make such alterations as the good of the society may require. This restriction grows out of the nature of the property and the purposes to which it is applied. The owner of the pew cannot convert it to any

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[1] 1 Greenleaf's Cruise on Real Prop. 44; O'Hear v. De Goesbriand et al. 33 Vt. 593; Kellogg v. Dickinson, 18 Vt. 266; Hodges v. Green, 28 Ib. 358; Barnard v. Whipple, 29 Ib. 402; Wentworth v. First Parish in Canton, 3 Pick. 344; Second Cong. in North Bridgewater v. Waring, 24 Ib. 304; Jackson v. Rounseville, 5 Metc. 127; Marshall v. White, Harper, 122, *contra.*

[2] Shaw v. Beveridge, 3 Hill, 26; Baptist Church in Hartford v. Witherell, 3 Paige, 296; First Baptist Church in Ithica v. Bigelow, 16 Wend. 28; Vielie v. Osgood, 8 Barb. 130. See *post*, § 843.

* In Revere v. Gannett, 1 Pick. 169, the plaintiff having recovered a judgment in an action of debt against a meeting-house corporation, extended his execution on the pulpit of the meeting-house; and the defendant afterwards, with notice of the extent, occupied the pulpit as the settled minister of the parish, which was the trespass complained of. The court, in directing judgment of nonsuit to be entered, remarked that, as the corporation had sold the pews to individuals, the purchasers must be supposed to take with the pews that which rendered them valuable; that the sellers could have no right to take away the windows, or the walls, or the pulpit, or the singers' loft; that the proprietors of pews were entitled to various privileges, such as passing through the aisles, being addressed from the pulpit, &c.; that there was no property in the pulpit distinct from the right of enjoying the house for public worship; and the levy on the pulpit was therefore void.

other use; for having acquired it as a part of a house for public worship, he can do nothing which may interfere with, or impair the use of the building for that purpose, or which may injure other holders of pews in the right enjoyment of their property.[1]* The control of the aisles in a church pertains to the society, and not to the holders of pews.[2]

22. *Private property in burying ground.*

§ 747. The title of a person purchasing a lot in a cemetery, is more than a burial right in the soil, the freehold and possession of which remain in another, but confers the right

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[1] Daniel v. Wood, 1 Pick. 102.

[2] Seymour v. Page, 33 Conn. 61. See *post*, § 844.

* In O'Hear v. De Goesbriand et al., *supra*, the case of Smith v. Bonhoof, 2 Mich. 115, was cited in the argument on the part of the defendants, as an authority for the proposition that a church could not be a Roman Catholic church in which a layman was permitted to own a pew; inasmuch as it would be in violation of one of the fundamental laws of the church. The facts of that case were substantially as follows: One Beaubien conveyed a piece of ground to Lefevre, bishop of the Roman Catholic diocese of Detroit, and his successors in office, in trust for the erection of a church thereon to be used as a place of public worship, and for the spiritual use, benefit, and behoof of the German Roman Catholic church congregation in the city of Detroit, according to the rites and ceremonies of the Roman Catholic church, and for other trusts therein expressed. The deed also provided that, in the event of a vacancy in the office of bishop, happening between the death of Bishop Lefevre and the appointment of his successor, the premises should vest during such vacancy in the archbishop of the Roman Catholic church of which the diocese should be a suffragan. Trustees of the church were afterwards elected by the congregation organized as a corporation under the statute of the State. The priest who officiated in the church, leased a pew in it to the defendant Bonhoof, and he took possession of it. The trustees rented the same pew to Smith, the plaintiff. The question in the suit was whether the officiating priest, or the trustees, had the right to control and rent the pews. The claim of each party was referred exclusively to the right to the control of the church edifice, and not to any private right of property in the pews distinct from and independent of that right. It was held that under the deed of trust, and the constitution, laws and usages of the Roman Catholic church, by which the administration of the temporalities of the church is vested in the parish priest, the right to rent the pews belonged to the priest, and not to the trustees. The court said: "If I am to believe the testimony of witnesses, it is clear that when the control of the church edifice is wrested from the clergy and placed in the hands of laymen, it ceases from that moment to be a Roman Catholic church." But he does not intimate that a church in which a layman was allowed to own a pew could not be considered as a Roman Catholic church. In the fourth condition of the deed of trust from Beaubien to Bishop Lefevre, it was provided that, as soon as the church to be erected on the land should be completed, Beaubien, the grantor, and his wife, might select and choose a pew in the church, and hold the same during each of their natural lives, free and clear of all expense, payments, assessments and charges whatsoever.

to the exclusive occupation of the lot. Nor can it be presumed that land actually devoted to the purposes of a cemetery is not legally so used from the absence of evidence that the burial ground had been licensed by the municipal authorities; and such a defense is not available to a mere trespasser.[1]

§ 748. The right of burial when confined to a church-yard, as distinguished from a separate independent cemetery, although conveyed with the common formula of "heirs and assigns forever," stands upon the same footing as the right of public worship in a particular pew. It is an easement in, and not a title to, the freehold, and must be understood as granted and taken, subject (with compensation) to such changes as the altered circumstances of the congregation may demand. Like the sale of a church pew which gives the mere right to worship in the particular place while the church stands and is occupied for religious purposes, the sale of a church vault gives the mere right of interment in the particular plot of ground so long as that and the contiguous ground continues to be occupied as a church-yard. "The owner of the easement may be in case of disturbance, and no doubt is, entitled to a reasonable compensation or equivalent; but he cannot interpose a veto to the disposition of the soil, should the court, on application of the church officers, deem such disposition proper and order it accordingly. Every person purchasing a grave in a church-yard appendant to a church, does so with the knowledge and implied understanding that change of circumstances may in time require a change of location. The law, looking to such exigency, authorizes the corporation, with the sanction of the court, to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds. It acts upon the assumption—a necessary assumption—that church grants in such cases are made upon the implied condition that the land shall be sub-

[1] Meagher v. Driscoll, 99 Mass. 281. See *post*, ch. III, subs. 9 and 10.

ject to the right of resumption, whenever the public use, or a change of circumstances may, in the judgment of the church and of the court, require the exercise of such right, but subject, also, to the duty of making a just and fair compensation in the form of money or other suitable equivalent."[1]

§ 749. The proprietor of a lot in a cemetery has no such title to the walk or alley adjoining his lot as authorizes his interfering with it. In Seymour v. Page,[2] the alleged trespass consisted in changing a grass walk into a suitable gravel one in the alleys of a cemetery. The plaintiff owned a qualified fee in the adjacent lot, and claimed that his title extended to the middle of the alleys, in analogy to the right of an owner of land bounded on a highway. It appeared that the father of the defendant established a cemetery, and that the plaintiff purchased a lot therein. On two sides of the lot was an alley five feet wide, running at right angles with an avenue. In the rear of the lot was an alley two feet in width. In a few instances, the alleys were repaired by the owners of the adjoining lots, but the avenues and alleys were in general kept in order by the defendant's father in his lifetime, and after his decease by the defendant. The father of the defendant, previous to the purchase of the lot by the plaintiff, informed him that the alleys were designed for the benefit of the adjoining proprietors, and that if the same person purchased two or more adjoining lots, the alleys separating them could be closed up by the purchaser; but he did not intend thereby to authorize the closing up of the alleys, or to convey to the plaintiff an exclusive right in any alley. The plaintiff, after he bought his lot, with the knowledge of the defendant's father and the defendant, and without objection on their part, manured the alleys adjoining his lot, and sowed grass seed thereon. The defendant, in order to make a gravel walk, cut up and removed the turf from the alleys adjoining the plaintiff's lots, and used it for turfing other

[1] Richards v. The North West Protestant Dutch Church, 32 Barb. 42.
[2] 33 Conn. 61.

lots. The question was, whether the plaintiff had title to the alleys or any part thereof beyond a mere right of way; and on a case reserved for the Supreme Court, judgment was rendered for the defendant.

23. *Public right to use of river.*

§ 750. The rule of the common law of England relating to the ownership of the bed of streams, and the right of fishery in their waters, to wit, that navigable or tidal rivers, so far as the tide ebbs and flows in them, belong to the king; and rivers not navigable, that is fresh water rivers, belong to the owner of the adjacent soil, has no reference to the right to use the stream for the purpose of passage or transportation, the rule in that respect being that the public have not only a right to all tide waters, but also a right of way or easement paramount to the rights of the riparian owners in all rivers which, though not tidal or navigable in the sense of the former rule, are navigable in fact. And by the same law, a river is, in fact, navigable on which boats, lighters, or rafts may be floated to market.[1] * The servitude of the public interest depends upon the capacity of the stream to be used for the purpose of trade, commerce, or navigation. Sir Mathew Hale, in his treatise *De Jure Maris*, mentions barges and lighters as well as other vessels. In the United States, other modes of transportation have been recognized, such as the floating of rafts and logs, and the rafting of lumber. Where, however, a river was not capable of floating even single logs, except during seasons of high water, which were about two months in a year, and the logs so floated had to be aided in their passage by men in skiffs, canoes, or on

[1] Morgan v. King, 35 N. Y. 454; s. c. 30 Barb. 9.

* In trespass for destroying a weir in the plaintiff's fishery; plea of justification, that the weir was across part of a public navigable river, and obstructing the navigation of the same; a replication confessing that the *locus in quo* was part of a navigable stream, but alleging that it was a part of the river wholly distinct from the channel which the public navigated, and that the said part was not a public navigable river, was held good after verdict, and that it was a sufficient answer in substance to the plea (Williams v. Wilcox, 3 Nev. & P. 606; 1 W. W. & H. 477).

shore; the current was so broken and impeded by rapids and rocks that logs, lumber, and square timber, in small quantities only, and but occasionally, could be floated for a distance of from six to eight miles; and the logs so floated were sometimes badly, and always more or less, injured; it was held that it would be going beyond the warrant of either principle or precedent to hold that a flotable capacity so temporary, precarious, and unprofitable, constituted the stream a public highway.[1] The true rule is, that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting in a condition fit for market the products of the forests or mines, or of the tillage of the soil upon its banks. It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against as well as in the direction of its current. If it is so far navigable or flotable, in its natural state and its ordinary capacity as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons; and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement.[2]

§ 751. If the stream have no flotable capacity, it belongs absolutely to the riparian owner; and the legislature cannot

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[1] Ibid.; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 Ib. 511.

[2] Morgan v. King, 35 N. Y. 454, rev'g s. c. 30 Barb. 9.

make it a highway by simply declaring it to be one. That would be taking private property for public use, and the owner would be entitled to compensation. The owner is also entitled to compensation before the legislature can make it public by improving it, if not previously subject to public use. But on the other hand, if it be a public river, the legislature may not only declare it to be so, but may improve it, remove impediments to its navigation, and also grant permission to erect dams booms, &c., and perhaps obstruct it entirely.[1] *

§ 752. Where a river is a public highway, all impediments to its use, by dams, piers, booms, &c., unauthorized by the legislature, are nuisances. But if the river can only

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[1] Miles v. Rose, 5 Taunt. 705; Rex v. Smith, Doug. 441; Hooker v. Cummings, 20 Johns. 90; The People v. Platt, 17 Ib. 195; Carter v. Murcot, 4 Burr. 2162; Brown v. Chadbourne, 31 Maine, 9; Shaw v. Crawford, 10 Johns. 236; Browne v. Scofield, 8 Barb. 239; Canal Comrs. v. The People, 5 Wend. 423, per Walworth, Chancellor, and Allen, Senator; Bloodgood v. Mohawk & H. R. R. Co. 18 Ib. 9; s. c. 14 Ib. 51.

* There is no right at common law of towing along the banks of a navigable river (Bell v. Herbert, 3 Term R. 253). There may be an individual right to a navigable river, but it must be acquired by grant from the sovereign authority, or by prescription (Chapman v. Kimball, 9 Conn. 38).

To an action of trespass for breaking and entering the plaintiff's close, called the manor of S., the defendant pleaded, first, not guilty, and secondly, that from time immemorial there hath been, and still is, a public port partly within the said manor, and also in a river which has been a public and common navigable river from time immemorial; and that there is in that part of the port which is within the manor a certain ancient work or erection belonging to the said port, necessary for the preservation of the same, and for the safety and convenience of the ships resorting thereto; that the work being damaged and in decay at the said times when, &c., it became necessary that the said work should be repaired, but that the plaintiff did not nor would repair the same, but wholly neglected so to do; wherefore the defendant entered and repaired it. The plaintiff replied *de injuria*. A verdict having been found for the plaintiff on the general issue, and for the defendant on the second special plea, it was held that the plaintiff was entitled to judgment notwithstanding the finding on that plea, inasmuch as it did not state that immediate repairs were necessary, or that any persons bound to do so had neglected to repair after notice had been given them for that purpose, or that a reasonable time for repairing the same had elapsed, or that the defendant had occasion to use that port; and that it was doubtful whether the plea would have been good, even had it contained those allegations (Lonsdale v. Nelson, 3 D. & R. 556; 2 B. & C. 302).

Where it was proved that a river in its natural state was not capable at any season of being navigated by vessels, barges, lighters, or rafts, but that during the period of high water in each year, it had capacity for floating to market single pieces, the New York Court of Appeals, reversing the judgment of the Supreme Court, held that it was a private stream, and that the riparian proprietor was not liable for obstructing it with booms (Morgan v. King, *supra*).

be used for certain purposes, the riparian owner is simply bound not to obstruct it in that respect. If the facts are ascertained or admitted, the determination whether or not a river is public is a question of law. But whether any particular obstruction or erection is a nuisance or a damage to the navigation is a question for the jury.[1]* It is sufficient that the public domain, which is devoted to a public use, is invaded in a way to deprive the public of the use of any part of it. In case of a grant or license to erect a dam, pier, dock, or wharf, or other obstruction in a navigable stream, it could not be held a nuisance without proof of the fact that the public damage and injury resulting from the obstruction greatly exceeded the public benefits of the obstruction, and perhaps not even upon proof of an entire destruction of the *jus publicum*. But any obstruction placed in a public way, without right (and a public navigable river stands upon the same footing as a highway), would be a nuisance, and courts will not inquire whether the advantage arising from the act complained of would compensate for all the injury and inconvenience which the public would suffer from it.[2] †

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[1] Morgan v. King, 18 Barb. 277; 30 Ib. 9; 35 N. Y. 454.

[2] The People v. Vanderbilt, 38 Barb. 282; s. c. 28 N. Y. 396.

* To a declaration charging the defendant with breaking and entering upon a certain dummy or landing stage of the plaintiffs, the same being a barge of the plaintiffs, moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on to and from divers ships and vessels, and mooring ships and vessels against the same, the defendant pleaded that the Orwell was a public and common navigable river and common highway; that he had a right to land, and was desirous of landing passengers from his steam vessel at the wharf; that the plaintiffs' dummy or landing stage, at the time when, &c., was permanently moored and fixed alongside the wharf, so that his passengers could not embark or disembark there without his vessel being moored thereto, and his passengers passing over the same, &c. At the trial it appeared that the dummy was moored to the wharf, so as to rise and fall with the tide; that vessels could not, if the dummy had not been there, have approached the wharf at low water; and that the defendant claimed the right of landing at all times over the dummy. It was held, on demurrer to the plea, that it was a sufficient answer to the declaration, the dummy appearing to be a permanent obstruction to the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it; and that if the plaintiffs had intended to complain of the defendant's exercise of his supposed right at times of low water, when he could not have come to the wharf if the dummy had not been there, they should have new assigned (Eastern Counties R. R. Co. v. Dorling, 5 J. Scott, N. S. 821).

† In the above case, the action was brought to restrain the defendant from

§ 753. Although an action will lie for an obstruction in the bed of a river which deprives another of his right of free passage, yet if he has not sustained any personal damage different from, and independent of, the rest of the public, an action cannot be maintained, but the remedy must be by indictment.[1] * Where the plaintiff was an innkeeper, in a

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enlarging a pier in the harbor of New York. The defendant claimed that he was authorized to construct the proposed pier by a resolution of the common council of the city of New York. It was held that the mayor and common council of New York had no authority to grant the defendant such permission; that the crib sunk by him and the proposed pier were a purpresture, and *per se* a public nuisance; and that, therefore, the offer of the defendant's counsel to prove, by the testimony of witnesses, that the crib and proposed pier were not, and would not be an actual nuisance, and would not injuriously interfere with, or affect the navigation of the river or bay, was properly overruled (per Emott, J., referring to Wat. Eden on Injunc. vol. 2, p. 259).

In Hart v. The Mayor of Albany, 9 Wend. 571, it was held unlawful for an individual, without grant, to construct and moor a floating storehouse or vessel for the receiving and delivering of goods and merchandise in any public river, or in any port or harbor, or in the basins or docks thereof; and that such permanent appropriation and exclusive occupation of a public river is an obstruction to its free and common use, and indictable as a nuisance (and see The People v. Cunningham, 1 Denio, 524).

In England, a legal grant from the crown cannot make an erection in a public river for private purposes legitimate, the right of the public to the unobstructed use of navigable waters being paramount to any right of property in the crown (Woolrych on Waters, Law Lib. 4th Series, v. 53, p. 194).

In The King v. Ward, 4 Adol. & Ell. 384, which was the trial of an indictment for a nuisance in a navigable river, called the harbor of Cowes, by erecting an embankment in the waterway, it was held that a finding of the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounted to a verdict of guilty; and that it was no defense to such an indictment that, although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to other uses of the port.

In Att'y Gen'l v. Richards, 2 Anst. 603, the information stated that the defendants had erected a wharf or key, two docks, and other buildings, between high and low water mark, in the harbor of Portsmouth, so as to prevent the boats and vessels from sailing over that spot or mooring there, and prayed that the defendants might be restrained from making any further erections, and that those made might be abated, and the harbor restored to its ancient situation. The court decreed accordingly.

[1] Dimes v. Petley, 15 Q. B. 276.

* In Gould agst. The Hudson River R. R. Co. 6 N. Y. R. 522, aff'g s. c. 12 Barb. 616, the plaintiff owned a farm in Columbia county, New York, having a front of two thousand feet on the east bank of the Hudson river. The river is navigable there for ships of the largest tonnage, and the tide ebbs and flows more than forty miles higher up the river. Both above and below this spot the river is in common and public use for purposes of ferriage, fishing, and navigation. The defendants were incorporated, with authority to construct a railroad from New York to Albany, through the counties bordering on the east shore of the river, and were empowered to enter upon any land or water for the purpose of surveying, constructing, and maintaining their road. But all real estate thus entered upon, if not voluntarily granted, or given, or purchased, at a price

house abutting upon a public navigable tidal river, and the defandant placed beams and spars in the water, which floated backwards and forwards with the tide, and obstructed the approach to the house at certain periods, whereby the plaintiff's customers were prevented from going to his house, it was held that he was entitled to damages therefor.[1] And where the plaintiff's barges, laden with goods, were impeded on a public navigable river, by a vessel which the defendant had wrongfully moored across the stream, and the plaintiff was thereby compelled to unload his barges, and carry his goods by land to their place of destination, it was held that the defendant was liable for all the expenses of the land carriage of the merchandise.[2]

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mutually agreed upon, was to be appraised in the manner pointed out in the statute, and the amount of the appraisal to be paid by the company to the owner. The defendants, pursuant to the authority thus given, entered upon the Hudson river, in front of and adjacent to the plaintiff's farm, between ordinary high and low water marks, and constructed a line of solid embankment along the whole front of his farm, so raised and elevated that its surface was about five feet above the ordinary high water mark of the river, and formed a barrier to the passage of boats, vessels, and other craft through the same, so that the plaintiff was prevented from and obstructed in the passage of vessels to and fro between his farm and the channel of the river, and was deprived of all means of getting from his farm to the river with vessels for the purpose of removing produce and other lawful purposes. The defendants having demurred to the complaint, judgment was given for them, both at the special and general term of the Supreme Court and by the Court of Appeals, on the ground that as the plaintiff had no private right or property in the waters of the Hudson, or in the shore between high and low water mark, he was not entitled to compensation from the defendants. Edmonds, J., dissenting.

In Dougherty v. Bunting, 1 Sandf. S. C. R. 1, the plaintiff claimed damages on account of vessels being prevented from coming to the wharf in front of his store or warehouse by the defendants constantly maintaining piles of wood on the street constituting the bulkhead in front of his building, and that thereby the use of his store was impaired, so that he could not obtain the storing of merchandise, nor rent his premises as he otherwise might have done. Judgment having been rendered for the plaintiff in the court below, it was reversed, on the ground that the grievance complained of constitured a public nuisance, and that no individual could maintain a suit for damages thereby, unless he had sustained an injury which was special in its character, or which was not common to others affected by the nuisance. The only injury proved was a speculative one to the store of the plaintiff, which was fitted and used for storage. It was said that vessels could not come up to the wharf so as to land their cargoes, and that the plaintiff was thus deprived of the warehousing which would otherwise have accrued to him. But it was not shown that any vessels which were thus shut out from the wharf would have connected their business with the plaintiff particularly, or that any specific consignee would have made use of his warehouse, or that he sustained any more injury from the obstruction caused by the defendants' piles of wood than other persons generally did in the same vicinity.

[1] Rose v. Groves, 5 M. & G. 613. [2] Rose v. Miles, 4 M. & S. 101.

24. *Private property in bed of stream.*

§ 754. If a river which is not navigable run between the land of two persons, each of them is owner of that part of the river which is next his land, of common right. When land adjoining a river is described as bounded by a monument standing on the bank of the same, and a course is given as running from it down the river to another monument, the grantee takes to the middle of the river, unless the terms of the grant clearly denote an intention to stop on the margin;[1] the monument in such case being only referred to, as giving the direction of the line, and not as restricting the boundary on the river. So, when land is bounded by a line commencing at a stake "by the side of the river, and running by the side of said river to another stake by the said river," the grant extends to the thread of the stream.[2] But where the land is bounded by the *bank* of the river or the line is described as running *along the bank* of the river, the stream is excluded;[3] and the same is true, where the grant is bounded by the *shore* of the river.[4] * Land bounded upon a natural lake or pond extends only to the water's edge.[5] If the pond were an artificial one, it would be reasonable to presume that a grant of land bounded by it, extended to the thread of the stream by which it was formed; unless the pond had been so long kept up as to become permanent, and to have acquired a well defined boundary.[6] † This rule has been followed in Connecticut.[7]

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[1] Luce v. Carley, 24 Wend. 451; Cold Spring Iron Works v. Tolland, 9 Cush. 495.

[2] Lowell v. Robinson, 4 Shepl. 357. [3] Hatch v. Dwight, 17 Mass. 298.

[4] Child v. Starr, 4 Hill, 369, rev'g s. c. 20 Wend. 149, Bockee, Senator, dissenting.

[5] State v. Gilmanton, 9 N. Hamp. 461.

[6] Waterman v. Johnson, 13 Pick. 261.

[7] Mill River Woolen Manf. Co. v. Smith, 34 Conn. 462.

* It is a rule of law, that a riparian proprietor, with shore and flats adjoining, may convey his upland without his flats, or his flats without his upland, and that whether upon the conveyance of the upland, the flats will pass as appurtenant, is to be determined by the intent as ascertained by the terms and construction of the conveyance (Barker v. Bates, 13 Pick. 255).

† One who owns the water of a mill pond, owns also the ice formed upon it,

It is however arbitrary, and in a majority of cases perhaps, contrary to the popular understanding. Where these ponds have existed for a long time, and will probably continue to exist for an indefinite period, it is going a great way to assume that the parties actually contemplated a grant of the land under them, or to the thread of a stream which has ceased to exist at that point as such. The margin of the pond is a plain visible boundary, and probably in nine cases in ten, the one actually contemplated. Perhaps it is well enough to make the distinction, and adopt the rule for the sake of uniformity, where there is nothing on the face of the deed, or in the condition of the subject-matter of it, to indicate that the parties actually intended the margin as the boundary.*

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and the riparian proprietors who own the soil, have no right to remove the ice (Mill River Woolen Manf. Co. v. Smith, *supra*).

* In Wetmore agst. Robinson, 2 Conn. 529, the plaintiff alleged that he was possessed of a certain farm, in front of which there was a pond containing about sixty acres; and that from time immemorial, the owners of the farm had enjoyed the privilege of the water therein, and of taking manure therefrom, which the defendant interrupted by casting stones into the pond. Judgment having been rendered for the plaintiff in the court below, the Supreme Court, in reversing it, on account of the insufficiency of the declaration, said: "It is contended by the plaintiff that this is an action for an injury to an incorporeal right to which he was entitled by prescription. But there is no averment, that the plaintiff was possessed of such right. He only alleges the possession of a certain farm, in front of which there was a certain pond; and that from time immemorial, the owners of the farm had enjoyed certain privileges of the water in the pond; not that the plaintiff was possessed of such privilege, or that it was ever appurtenant to the farm. If however the plaintiff had stated an incorporeal right by prescription, he should have brought an action of trespass on the case for the disturbance; for trespass *vi et armis* will not lie. To maintain this action, then, it is necessary that the plaintiff should have alleged that he was in possession of the place where the injury is charged to have been committed. The plaintiff insists that though the place is not set forth expressly, yet he has alleged that he was in possession of a certain farm bounded on the highway, in front of which, and nearer to his land than any other person's, is a certain pond, where the injury complained of was done; that as he is entitled to the highway (excepting the public easement), in virtue of being the adjoining proprietor to it, this is equivalent to an allegation that he was in possession of the *locus in quo*. But he might have been in possession of his farm, and another might have been in possession of the highway; so that this does not amount to an allegation that he was in possession of the place where the injury was done."

When the constituted authorities of the State proceed to deepen the outlet of a lake, and deposit the stones and earth that are removed in the shallow water in front of the premises of the riparian proprietor, it is a visible and public declaration, that that portion of the lake can no longer be used for navigation; and the riparian proprietor having entered into possession, the trusteeship of the State is virtually at an end. There then arises, if not a legal,

§ 755. At common law, the right of a proprietor of land on a navigable river, to the soil, extends only to high water mark, all below being in the public.[1] The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for the purposes of navigation, are entirely separate and distinct. The first of these rights is by a common law vested *prima facie* in the sovereign power; but may be alienated by the king or people so as to become vested in an individual or corporation. The second, is a right common to the whole people, and is vested in the public at large. By the common law, every river where the sea ebbs and flows is considered as navigable, and all rivers not thus distinguished are not navigable.[2] The distinction between rivers navigable and not navigable is very ancient; the former being called arms of the sea, while the latter pass under the denomination of private or inland rivers.[3]

§ 756. The rule of the common law, as to what is to be deemed a navigable river, should be received in the United States with such modifications as will adapt it to the peculiar character of our streams, and the commerce for which they may be used. This accords with the general principle of the common law of England, that English subjects, colonizing a new country, carry with them only so much of the laws of the mother country, as is applicable to their own situation and the condition of an infant colony. It is also consistent with the nature of the rule itself, which is but an outgrowth or product of the peculiar circumstances and necessities of

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at least a strong equitable title, which coupled with actual possession cannot be disputed except by the State. Consequently an action cannot be maintained by the adjoining owner to restrain the planting of trees on such newly acquired land, and thereby obstructing the plaintiff's view of the lake (Ledyard v. Ten Eyck, 36 Barb. 102).

[1] Harg. Law Tracts, 12, 13, 17, 32; Com. Dig. Tit. Navigation, A, B; The King v. Smith, Doug. 441; Ball v. Herbert, 3 Term R. 253; East Haven v. Hemmingway, 7 Conn. 186; Middletown v. Sage, 8 Ib. 221; Chapman v. Kimball, 9 Ib. 38.

[2] Hale *De Jure Maris*; Harg. Law Tracts, 5; 2 Roll. 170, Pl. 14; Lord Fitzwalter's Case, 1 Mod. 105; The King v. Wharton, 12 Mod. 510; Carter v. Murcot, 4 Burr. 2162; Adams v. Pease, 2 Conn. 481.

[3] The King v. Smith, *supra*.

the people with whom it originated, in respect to the use of their inland waters for the purposes of trade and commerce. In Pennsylvania, North Carolina, and South Carolina, the English rule was departed from at an early day.[1] * The New York cases at first adopted the common law distinction.[2] They subsequently held, that if the water was fresh, the bed of the stream belonged to the adjoining owners *ad medium filum aquæ;* but that if the water was salt, the title to the soil was in the public. Recently, however, in New York, the foregoing qualification has been disregarded, and it has been decided that the State is the absolute owner of the navigable rivers within its borders; that the riparian owner may use the water passing or adjoining his land, for his own advantage, so long as he does not impede the navigation, in the absence of any counter claim by the State as absolute proprietor; but that the State may, as such proprietor of the waters, grant them, or any interest in them, to an individual.[3] †

[1] Carson v. Blazer, 2 Bin. 475; Collins v. Benbury, 3 Ired. 277; Ingraham v. Treadgill, 3 Dev. 59; Cates v. Wadlington, 1 M'Cord, 580.

[2] Hooker v. Cummings, 20 Johns. 90; The People v. Platt, 17 Ib. 195; Palmer v. Mulligan, 3 Caines, 307, *contra; Ex parte* Jennings, 6 Cowen, 518; *Ex parte* Tibbitts, 5 Wend. 423; s. c. 17 Ib. 571.

[3] The People v. Tibbetts, 19 N. Y. 523; and see The People v. The Canal Appraisers, 33 Ib. 461.

* In Com. v. Chapin, 5 Pick. 199, the Supreme Court of Massachusetts held that the Connecticut river was not navigable, within the meaning of that term as understood by the common law, which the court regarded as the law of England, New York, Connecticut and Massachusetts. In Scott v. Wilson, 3 N. Hamp. 321, it was held that the Connecticut river could not, by the rules of the common law, be considered as navigable, in New Hampshire, above the ebb and flow of the sea; but that it had been so long used by the public, for boating and rafting, that it must now be considered a public highway. In Illinois, it was decided that the Mississippi river was not a navigable stream at common law, and that the title of the riparian proprietor extended to the middle thread of the stream, including islands (Middleton v. Pritchard, 3 Scam. 510). The same question was discussed in Morgan v. Reading, 3 Sm. & Marsh. 366, in which it was declared that the common law, and not the civil law, governed the case, and the magnitude of the river did not affect it; that the Mississippi river above the ebb and flow of the tide was not navigable, in the sense of the common law, and the right of the riparian owner extended to the middle of the river subject to the right of passage in the public.

† Whittaker v. Burhans, 62 Barb. 237, was an action of trespass for interfering with the rights of the plaintiff in the soil of flat lands adjoining the Hudson river, over which the tide ebbed and flowed; the defendant using the same for the purposes of fishing, driving stakes, and mooring his boats there. At high tide the water was usually from six to eight feet deep on the land, and at low tide from two to three feet deep; but the water had been known to be so

25. *Right to natural flow of stream.*

§ 757. Every owner of land situate upon a stream, has a right to the natural flow of the stream; a right to insist that the stream shall continue to run in its accustomed channel; that it shall flow upon his land in its usual quantity, at its natural place, and at its usual height; and that it shall flow off his land upon the land of his neighbor below, in its accustomed place, and at its usual level. This right he has as incident to the property in his land, and he cannot be deprived of it but by grant, actual or presumptive.[1] Whenever, by reason of the interference of the owner above, the water is diverted from his land and made to run elsewhere; or the water of other streams, naturally running elsewhere, is turned upon his land; or the water of the natural stream is made to flow upon his land at a different place from its natural channel, or at a different level, or in an unnatural manner; and so, whenever, by the acts of the owner of the land below, the water is obstructed or drawn down, or made to run off, in an unusual place, or in an unusual manner, and actual injury ensues to any material amount, the owner of the land may maintain an action for such injury. In short, if any person, above or below, shall make any change in the natural flow of a stream, to the material injury of the owner situate upon it; or by any interference shall prevent the stream from flowing as it was wont to flow, he is liable for the damage he may occasion. These rights are subject to the privilege of the owners of the land, situate above and below upon the stream, to make a reasonable use of the water upon their own land, while it is passing along the same. It matters not what the source of the water may be; whether it be back water, or the flowage of the same, or the water of another stream. The wrong consists in turning any water

low as not to cover the land. The plaintiff did not claim the exclusive right of fishing on the premises, nor that they might not be used as a highway for boats when there was sufficient water; but he claimed the ownership of the soil and the exclusive right to its use as such. It was held that the defendant was a trespasser upon the exclusive rights of the plaintiff.

[1] Heath v. Williams, 25 Maine, 209; Howell v. McCoy, 3 Rawle, 256.

upon the land, which does not naturally flow in that place; and it can make no difference if the water wrongfully turned upon a man's land, against his will, flows in the channel of an ancient stream, or in a course where no water flowed before, if similar damage results.[1] *

§ 758. Strictly speaking, the owner of land on a stream has no property in the water itself, but the simple use of it while it passes along. By the civil law, running water, light, and air, were considered as things in common, and were defined as things, the property of which belonged to no one, but the use to all. Blackstone says: "Water is a movable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary,

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[1] Bealey v. Shaw, 6 East, 208; Mason v. Hill, 3 B. & A. 304; King v. Tiffany, 9 Conn. 162; Merritt v. Parker, Coxe, N. J. R. 460; Tillotson v. Smith, 32 N. Hamp. 90; Townsend v. McDonald, 12 N. Y. 381.

* If the owner or occupier of lower lands obstructs the natural flow of the water through his lands, so as to cause the higher lands to be flooded, he is liable in damages, unless he has acquired a right to pen back water by contract, grant, or prescription (Shury v. Piggot, 3 Bulstr. 340; Chasemore v. Richards, 7 H. L. C. 349; 29 L. J. Exch. 81). So, on the other hand, if the proprietor of the higher lands changes the natural condition of his property, and collects the surface and rain water at the boundary of his estate, so that it floods the land below, he will be liable for the damage resulting therefrom to the possessor of the lower lands (Sharpe v. Hancock, 8 Sc. N. R. 46; see Harrison v. Great Northern R. R. Co. 33 L. J. Exch. 267).

Is is not necessary for the owner of land on a stream, to have acquired a right to have the water of the stream so used as to prevent its being thereby flowed back upon his mill, by an appropriation of it without such an occurrence for more than twenty years. The common law affords him sufficient protection against the flow of water back upon his own land, to the injury of his mill, by the acts of another. Failing to obtain relief from the continuance of such an injury without it, he might lawfully enter upon the land of the person causing the injury, and remove, so far as necessary, the obstruction which occasioned it; unless his title to the water power which he claims should prove to be defective, or his full right of use should prove to be impaired (Heath v. Williams, 25 Maine, 209).

Where a man has by his dam raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant, he may repair his dam to make it tighter, although the effect may be to keep the water more constantly at an upper level (Hynds v. Shults, 39 Barb. 600; 29 N. Y. 346).

In an action to recover damages for flowing lands of the plaintiff, the uninterrupted use of the dam for twenty years was held a sufficient defense, without any other manifestation of an adverse possession than the effect which it produced during that time, on the defendant's land (Hammond v. Zehner, 21 N. Y. R. 118).

The owner of land may do as he pleases with casual and intermittent surface waters not running in any defined channel, but spreading themselves over the surface of the land (Broadbent v. Ramsbotham, 11 Exch. 602; 25 L. J. Exch. 115).

transient, usufructuary property therein. Wherefore, if a body of water move out of my pond into another man's, I have no right to reclaim it."[1] In Liggins v. Inge,[2] Tindal, Ch., J., remarked that it was well settled by the law of England, that flowing water in a stream is *publici juris*. In Mason v. Hill,[3] Denman, Ch. J., has shown that neither by the Roman law, nor the English common law, is running water considered that in which any one may acquire a property, but as public or common in this sense only, that all may drink it, or apply it to the necessary purposes of supporting life; and that no one has any property in the water itself, except in that particular portion which he may have abstracted from the stream, and of which he has the possession, and during the time of such possession only. "There is no authority," he remarks, "in our laws, nor, as far as we know, in the Roman law, that the first occupant (though he be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein."[4]

§ 759. The right to have waters flow in their natural bed passes by a deed as a necessary and inseparable accompaniment or incident to the ownership of the adjoining and subjacent soil. This is as absolute and fixed a right arising out of the relations of a riparian proprietor to the waters of the stream flowing over and along his lands, as the right to the soil itself, and is never separated or disconnected from the land until the right itself becomes extinguished by adverse possession.[5]* If a person owning land on a stream together

[1] 2 Blk. 18.

[2] 7 Bing. 682.

[3] 5 Barn. & Adol. 1.

[4] Quoted by Mason, J., in Thomas v. Brackney, 17 Barb. 654.

[5] Corning v. Troy Iron & Nail Factory, 39 Barb. 311; aff'd 40 N. Y. 191.

* In an action of trespass for damages to the plaintiff's mill, by diverting water therefrom, the defendant, by introducing evidence to prove title to the premises in question in the State, is not estopped from showing that the water was taken pursuant to the laws of the State, by order of a canal commissioner, to supply water temporarily for the State canal (Walrath v. Barton, 11 Barb.

with mills, sells the mills and water power necessary to operate them, to separate grantees, and afterward conveys all the land owned by him above the mills to one of the grantees, the latter cannot deprive the other grantee of such a flow of the stream as is essential to the enjoyment of his right.[1] *

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382). By the court: "There was nothing in the character of the defenses, or in the conduct of the defendant upon the trial, which should have precluded him from the defense. Indeed, I see no necessary inconsistency between the defenses. They may both be true. The State may have been the owner of the land and water, and the latter may have also been taken by the officers for a temporary purpose, and under circumstances which would have protected them in entering upon the premises of the plaintiff and taking the water for the purposes named. The water was clearly taken for temporary, not permanent use, and neither the commissioner nor superintendent were called upon to decide upon the validity of the title of the State at their peril; but might appropriate the water, as by law they had a right to do, if it was the property of an individual, leaving the party to seek his remedy under the statute, if the title was in him. Upon the trial of an action for the trespass, the State officers might not only show this appropriation, but they might also show that the plaintiff had no title."

[1] Elliot v. Shepherd, 25 Maine, 371.

* In the above case, which was an action of trespass *quare clausum*, one Moore, being the owner of a grain mill upon a dam, built another dam about fifty rods further up the stream in order to preserve the water for the use of his mill. He afterwards erected a shingle mill on the lower dam. Moore then conveyed to the plaintiff the undivided half of the grain mill and of a small tract of land containing about half an acre, "with the privilege of drawing water from the mill pond sufficient for this or any other grist mill that may be built on the ground that this mill stands on, or larger if the owners of the privilege shall elect, but not to infringe on the saw mill privilege. The grist mill has the right of drawing water over every other machinery on the dam." Moore conveyed the shingle mill to Shepherd, "with the privilege of water sufficient to drive a shingle saw at all times, except when the water is so low that the grist mill requires it all, and then the shingle saw must stop, and not till then." A few months later, Moore conveyed to the plaintiff the land on which the upper dam had been erected. It appeared that when the water ran over the upper dam there was water enough for all the machinery, but that when it did not, the upper gate must be hoisted to furnish water for the shingle machine. The water had fallen from twelve to eighteen inches below the top of the upper dam, in the month of July, when the defendant passed over the land of the plaintiff and raised the gate in that dam, to obtain sufficient water to work the shingle saw. This he had been forbidden to do by the plaintiff, who brought the present action for the alleged injury. There was no lack of water then to drive the grist mill. The water was falling, and the plaintiff stated that "he expected a drought, and that the reserve water would be needed." There was, however, no lack of water afterward. It was held, that the defendant had a right to draw water from the upper dam when necessary to the convenient use of the shingle mill, provided it did not incommode the operations of the grist mill; and that if it were necessary in such case to hoist the gate of the upper dam, the defendant would have a right so to do; and that if, in order to do so, he was compelled to pass over the plaintiff's land, he would have a right to a convenient way over the same for the purpose.

26. *Right to the use of artificial water-course.*

§ 760. If a person build a house and construct a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances without the land, or sell the land without the house to another, the conduit and pipes pass with the house, because they are necessary and appendant to it; and the purchaser of the house shall have liberty by law to dig in the land for the purpose of mending or renewing the pipes. And if a lessee for years of a house and land construct a conduit upon the land, and after the expiration of the term the lessor occupies them together for a time, and afterward sells the house with the appurtenances to one, and the land to another, the vendee of the house has a right to the conduit and pipes, and liberty to mend them. But if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one and the land in which the conduit is to another, after the lease determines, he who has the land wherein the conduit is may disturb the other in its use, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is if a disseizor of a house and land erect such a conduit, and the disseizee re-enter not taking conusance of any such erection or using it, but presently after his re-entry sells it, the house to one and the land to another, he who has the land is not bound to permit the other to enjoy the conduit.[1] *

§ 761. When the owner of a mill who has a right to have water run thereto through the adjoining land, purchases such adjoining land, and afterward sells the mill, the water-course

[1] Nicholas v. Chamberlain, Cro. Jac. 121; Brown v. Nichols, Moore. 682; Archer v. Bennett, 1 Lev. 131; Hinchliffe v. Earl Kinnoul, 5 Bing. N. C. 23; Wardle v. Brocklehurst, 29 L. J. Q. B 145.

* If a person who has water running in a leaden pipe through adjoining land buys the land and destroys the pipe, the water-course is thenceforth extinct (Lady Brown's Case, cited in Palm. 446).

and the right to its uninterrupted flow to the mill pass with the mill as appendant and appurtenant thereto, and the grantor and all persons claiming under him, are bound to keep it open for the benefit of the grantee of the mill.[1] * Where a man had a dye house, and there was water running to it, and he bought the land through which the stream ran, and then resold the land, it was held that his original right to the water course remained.[2] If the owner of adjoining buildings sells one of them, the vendee has a right to the enjoyment of all the drains for his building, and is subject to all the drains necessary for the enjoyment of the adjoining house, without any express reservation or grant; otherwise, the vendee of one house might destroy the drainage made for the benefit of both houses.[3] But where a man owning two lots of land permitted one of them to be drained across the other, and then granted both lots at one time to different parties, saying nothing about the drain, it was held that the lot drained acquired no rights in the drain by implication, if it could be drained in any other way.[4]

§ 762. Where a man purchases the privilege of constructing and maintaining a covered sewer or water-course through the land of the grantor, in order to carry off waste and refuse water from the land of the grantee, the grantor has no right to use the sewer without the permission of the grantee.[5] † Much less would the grantor be justified in de-

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[1] Miner v. Gilmour, 12 Moore's P. C. 131; New Ipswich Factory v. Batchelder, 3 N. Hamp. 190.

[2] Sury v. Pigot, Poph. 172; Palm. 444.

[3] Pyer v. Carter, 1 H. & N. 916; 26 L. J. Exch. 258.

[4] Johnson v. Jordan, 2 Metc. 234.

[5] Dewey v. Bellows, 9 N. Hamp. 282.

* The grant of a license to convey water across the land of the grantor, by means of a raceway, to the mill of the grantee, is an incorporeal hereditament; and for an injury to such right an action of trespass cannot be maintained (Baer v. Martin, 8 Blackf. 317).

Where the commissioner of highways turned the course of a sluiceway across another's land, whereby his cultivated fields were destroyed, it was held that he might lawfully fill up the sluice as a nuisance (Thompson v. Allen, 7 Lans. 459).

† In Dewey v. Bellows, *supra*, the court said: "The only question necessary to be settled in this case is whether the defendant had a legal right to remove

stroying the privilege. Where a person sells to another the right to fish, and then draws the water away from the pond or stream, and destroys the fish, the party aggrieved will have his remedy by action; for these are wilful acts of the grantor, and it is a misfeasance in him to annul his own grant.[1]

§ 763. The grantee of a flume or raceway across another's land cannot, without permission, lawfully enlarge it. A clothing mill, saw mill, and grist mill were owned by the same person. The first-mentioned was supplied with water by a flume that ran under the other mills. The grist mill and saw mill were sold to one person, and the clothing mill to another, on the same day. Afterwards, the purchaser of the grist mill and saw mill suffered them to fall to ruin, and tore them down, and the purchaser of the clothing mill thereupon entered upon the land which belonged to the grist mill and saw mill, and constructed a new and larger flume for the use of his mill. It was held that the grantee of the clothing mill was not entitled to a larger flume, and that the

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the flume erected by the plaintiff, and which passed over the land conveyed with the grist mill and saw mill. Whether the plaintiff, upon the decay of the dam and flume, might have notified the defendant to repair under the statute, and, on his neglect, might have entered and repaired himself, making substantially a similar dam and flume to that before erected, and then have maintained an action for contribution; or whether he might, instead, have proceeded to make such repairs at his own expense, without notice, are questions which do not require a decision at this time. Other questions might perhaps be raised; but we are clearly of opinion that the plaintiff could not make an erection of a flume altogether different from the former one, upon the defendant's land, and preclude him from the use of his property; nor make one which interfered with the defendant's privilege, and drew a larger quantity of water. If the plaintiff's conveyance gave him the right to enter upon the land embraced in the deed to the defendant, it was to repair or rebuild the flume there existing, and not to erect one of different dimensions; nor was he authorized to erect one drawing more water, even if such an one might be more advantageous to the plaintiff, and if the defendant for the time being forbore to use the water. Whatever rights the plaintiff may have had, as against the defendant, they were not of this character; and the defendant was justified in removing the flume for that reason."

A., with B.'s permission, placed timber in a ditch which bounded their lands, to prevent a ditch on his own land from being stopped up. B. afterward removed the timber from his own half of the ditch, whereby sand was washed down and filled A.'s ditch, causing the land of A. to be overflown. Held that an action of trespass could be maintained therefor (Hogwood v. Edwards, Phill. N. C. R. 350).

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

grantee of the other mills was justified in removing all of said flume which was within the limits of the land sold to him.[1]

27. *Public right of access to sea shore.*

§ 764. Where a highway is laid out to navigable water, and there terminates, it will be presumed that it was designed for the purpose of loading and unloading freight, and landing passengers from the water; and it will thereby become a public landing as an incident to the public highway. When, however, a highway in running from place to place incidentally comes in contact with tide water, and passes along the beach for a considerable distance, on account of facility of construction, or other cause, the reason for the presumption does not exist.[2]

§ 765. At common law, the right of fishery in the ocean, in arms of the sea, and navigable rivers below high-water mark, belongs to all, and the State alone can grant an exclusive right. Rivers, for this purpose, are deemed to be navigable as far as the sea flows and reflows, and thus far the common right of fishing extends. Above the ebbing and flowing of the tide the fishery belongs exclusively to the adjoining proprietors;[3] and in rivers not navigable, the adjoining proprietors own the fishery, and can grant a right of fishing.[4]* Towns adjoining or extending across a navigable

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[1] Lee v. Stevenson, 27 L. J. Q. B. 263.

[2] Burrows v. Gallup, 32 Conn. 493.

[3] 2 Roll. Abr. 107; Adams v. Pease, 2 Conn. 481.

[4] Chalker v. Dickinson, 1 Conn. 382; Beckman v. Kreamer, 43 Ill. 447.

* The right to take fish in the sea, and in the creeks and arms thereof, is common to the people of England as a public common of piscary, and they may not, without injury to their right, be restrained thereof. A point made by the counsel for the plaintiff in Lowndes v. Dickerson, 34 Barb. 586, was whether, since magna charta, "either the king or any particular subject can gain a proprietary exclusive of the common liberty." Brown, J., in delivering the opinion of the court, said: "Diverse opinions have been given by the courts in this country and in England upon the subject. The weight of authority would seem to be adverse to the existence of any power in the crown to grant any such franchise. Its existence, however, has been affirmed in this court in the case of

river may own the soil of the flats, and even of the channel, if a grant has been obtained from the government. But the property in the fish, and also in the tide waters, is in the public.[1] *

§ 766. Although there is no common-law right of bathing in the sea, and passing over every part of the shore for that purpose, independently of usage and custom, yet in Blundell v. Catterall,[2] Best, J., held the following not too strong language on this subject: "The right of bathing in the sea is as beneficial to the public as the right of fishing, and unless I found myself bound by an authority as strong and clear as an act of Parliament, I would hold, on principles of public policy—I might say, public necessity,—that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, the sea and its shores were left open to public use. In all countries it has been matter of just complaint, that individuals have encroached on the rights of the people. In England, our ancestors put the public rights in

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Rogers v. Jones, 1 Wend. 237. But it is manifest upon looking into the opinion of Mr. Justice Woodworth in that case, that he did not distinguish between grants by the crown alone, and grants by the crown in concurrence with the legislative power of the realm expressed through an act of parliament. There can be no doubt of the validity of grants made by the commissioners of the land office of lands under the tide waters of the State, to which the learned justice refers, and the more recent grants by legislative acts to particular individuals and corporations, because these are grants made by the people in their sovereign capacity acting through the legislature."

[1] Coolidge v. Williams, 4 Mass. 140. [2] 5 B. & Ald. 268.

* It seems to have been a part of the common law of Massachusetts that the town might appropriate the fish, if not appropriated by the legislature. But no one can lawfully go on the land of another to take the fish without leave. If no appropriation had been made of the fish, any citizen might take them, provided he did not trespass on the lands of others (Coolidge v. Williams, *supra*).

In Rogers v. Jones, 1 Wend. 237, Rogers was sued for a penalty created by a by-law of the town of Oyster Bay, declaring that "no person not being an inhabitant of Oyster Bay, shall be allowed to rake or take any oysters in the creeks or harbors of the town, under the penalty of $12 50 for each offense." He had entered the harbor or bay, and caught and carried away a quantity of oysters about 100 yards from the beach. He was a citizen of New York. The defense was placed upon the ground that the bay being an arm of the sea, where the tide ebbed and flowed, was a common fishery for all the citizens of the State, and that the inhabitants of the town possessed no exclusive right. But the court held that the grant to them by Sir Edward Andross, under Charles 2d, invested them with that right, and it accordingly sustained the by-law under which the penalty was imposed.

rivers under the safeguard of *Magna Charta*. If the principle of exclusive appropriation be extended so far as to touch the right of walking over the barren sands of the sea shore, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors."

§ 767. The purchase from a town of the right to the sea manure that may land on the beach during the year, does not entitle the vendee to an action of trespass against one who goes on to the beach and carries the manure away. In such case, the purchaser acquires no interest in the land, but only a right to the manure that may be thrown thereon, and a license to enter for the purpose of securing and removing it. His contract with the town is analagous to the grant of a wreck of the sea, which does not convey any title to the shore, it not being necessary, in order to make the grant of a wreck perfect, that more should be conceded than the right of egress and regress.[1]

§ 768. The right to take sea weed from the bed of a navigable river, not collected on the shore, but accumulating and growing below low-water mark, is in the public, and not exclusively in the adjoining proprietor.[2] In an action of trespass for carrying away sea weed from the shore of Long Island Sound, it appeared that the defendant entered upon a line of beach between ordinary and extraordinary high water mark, and took therefrom a load of sea weed which grew in the adjoining harbor (an arm of the sea) below low-water mark, and which had been thrown upon the beach by the tide and waves, and a part gathered into heaps by an employee of the plaintiff. The beach was not in any inclosure of the plaintiff, nor connected with any upland upon which the tide never flowed, but was upon the side of an extended field of salt meadows which was covered by extraordinary

[1] Parsons v. Smith, 5 Allen, 578, referring to Hall on Sea Shores.

[2] Chapman agst. Kimball, 9 Conn. 38.

tides. It had been formed by the abrasion of the shore and the washing and piling up of the coarse sand and gravel by the waves of that arm of the sea. The public had immemorially used the beach, by passing and driving over it and taking sea weed from it. The plaintiff owned the adjoining shore between high and low water mark, and he or his grantors had immemorially used it. It was a sedge flat, and they mowed it and took the annual crop of sedge. But neither the grantors of the plaintiff nor the plaintiff used the beach otherwise than as the public used it, by traveling upon it and taking sea weed from it; and the defendant had been in the habit of taking the weed for twenty-five years. The plaintiff's father had, in a few instances, forbidden individuals to take the weed, and the plaintiff, four years before, set up a notice prohibiting all persons from taking it, and the defendant and others who had occasion to go there saw the notice but disregarded it. It was held that the plaintiff had not shown such an exclusive possession of the beach as would enable him to maintain the action.[1] *

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[1] Church v. Meeker, 34 Conn. 421.

* In this case the question was raised whether or not sea weed, cast by the tide and waves on the land of a proprietor at or above high-water mark, belongs to the owner of the land. The court, with apparent hesitancy, held that it did. Butler, J., in delivering the opinion, said: "The same question was raised in Chapman v. Kimball, 9 Conn. 38, but not decided. In Emans v. Turnbull, 2 Johnson, 313, it was determined that it did. Although the decision was made by a very distinguished court, and the opinion was given by Chancellor Kent, our own court, in Chapman v. Kimball, evidently hesitated to follow it. As the weed grows upon land to which no individual has title as against the public, and is detached by the waves, and floats with the currents of the sea, there is no individual title in it, and it becomes the property of the first occupant. The mere fact that it is cast like wreck upon the land of a riparian proprietor does not therefore give him title, and so the court, in the case of Emans v. Turnbull, impliedly admitted. But it is unlike wreck in this, that no person has ever had title before it is cast on the shore, and there is a seeming equity in giving it to the riparian owner on whose land it is cast. The court, in that case, were evidently influenced by that equity, and perhaps justly. But, in some respects, the principles by which they professed to be governed are questionable. * * * * Neither the slow increase nor its usefulness as manure makes sea weed *alluvion*. It grows indeed, and becomes an article capable of ownership, slowly and imperceptibly, but it is not so added to the shore. It is most commonly detached during violent storms or strong winds, when the tide is low, and visibly driven in masses up the shore as the tide rises again. The '*jus alluvionis*' attaches to soil, earth of a solid substantial character which makes a permanent addition to the land by imperceptible accretion; and it is a departure from principle to attach it to vegetable matter which will decay and be dissipated in a few months.

28. *Private property in sea shore.*

§ 769. The principle running through the cases is, that the owner of land along the sea shore is entitled to what remains after giving the public full enjoyment of their rights.[1] He may construct a wharf adjoining his land and use it as his own, taking care not to interfere with navigation.[2] And he may erect on his own land reasonable defenses, although in so doing he cause the sea to flow with greater violence against the land of his neighbor, and compel the latter to erect similar sea defenses. But he cannot in such case do more than is necessary for his protection.[3] Upon his death, his estate in the shore, and the erections on it, descend to his heirs.[4]

§ 770. The owner of the sea shore, as against a stranger, is entitled to wreck which has been cast on the shore. In Barker v. Bates,[5] the question was which of the parties had the preferable claim by mere naked possession, without other title, to a stick of timber driven ashore under such circumstances as led to the belief that it was thrown overboard or washed out of some vessel in distress and never reclaimed by

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Nor can the *jus alluvionis* attach to it because it is useful as manure, though the fact undoubtedly creates an equity in favor of the riparian proprietor. As a protection to the bank, and favoring and assisting the deposit of alluvion, however, it is, if left for that purpose, undoubtedly useful, by receiving and retaining the suspended particles of the abraded shore, which would otherwise be carried away by the resurging waves; and by reason of that fact the deposit may be brought within a liberal interpretation of the *jus alluvionis*, and save that decision (Emans v. Turnbull) from the character of judicial legislation. The decision, however, establishes a rule where one did not exist and was needed; and although it favors the riparian proprietor, it does injustice to no one. And it may be sustained also, without a serious departure from principle, if we look at the fact that the weed, when cast upon the land, belongs to no one, and the owner may justly, as well as equitably, be deemed the first occupant. The decision has been followed in Massachusetts and elsewhere (Phillips v. Rhodes, 7 Metc. 322), and there being none the other way we are disposed to follow it also, for the sake of uniformity and certainty in respect to a matter of growing importance."

[1] Angell on Tide Waters, 159; Austin v. Carter, 1 Mass. 231; Bartlett v. Evarts, 8 Conn. 523; Burnham v. Hotchkiss, 14 Ib. 312; Hopkins v. Crombie, 4 N. Hamp. 520; East Haven v. Hemmingway, 7 Conn. 186; Frank v. Lawrence, 20 Ib. 118; Groton v. Hurlburt, 22 Ib. 178.

[2] Chapman v. Kimball, 9 Conn. 38; Burrows v. Gallup, 32 Ib. 493.

[3] Rex v. Pagham Commrs. 8 B. & C. 360.

[4] Chapman v. Kimball, *supra*.

[5] 13 Pick. 255.

the owner. The case did not involve any question of the right of the original owner to regain his property in the timber, with or without salvage, or the right of the sovereign to claim title to property as wreck, or of the power and jurisdiction of the government to pass such laws, and adopt such regulations on the subject of wreck as justice and public policy might require. The court said, that considering it as established that the place upon which the timber was thrown up and had lodged was the soil and freehold of the plaintiff, that the entry of the defendants was a trespass, and that as between the plaintiff and the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and that therefore the plaintiff was entitled to recover the agreed value of the timber in his claim of damages.

§ 771. The general rule in the case of reliction is, that the land which is relicted and left dry by the receding of the water is the property of the sovereign, as being a part and parcel of that which was previously the domain of the sovereign; and the ownership of the soil which was covered with water is not changed, because the water has receded from it. If the increase be gradual, then the accretion belongs to the adjoining proprietor. So islands rising in the sea or navigable rivers belong to the sovereign.[1] Sea weed, thrown up by the sea, is one of those marine increases arising by slow degrees, which belongs to the owner of the soil. Its usefulness as a manure, and as a protection to the bank, will vest the property of the weed in the owner, and forms a reasonable compensation to him for the gradual encroachments of the sea, to which other parts of his estate may be exposed. The *jus alluvionis* ought to receive liberal encouragement in favor of private right.[2]

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[1] 2 Blk. Com. 262; Harg. Law Tracts, 14 *et seq.*; Middletown v. Sage, 8 Conn. 221.

[2] Emans v. Turnbull, 2 Johns. 313.

29. *Rights and liabilities of the parties to a mortgage.*

§ 772. A mortgage of land is nothing more than a security for a debt, giving the mortgagee a special lien only upon the estate mortgaged, the title and seizin remaining in the mortgagor until all the proceedings to foreclose the mortgage have been completed.[1]* It has been well remarked that "the mortgagor's interest is transferable only by deed, descends to his heirs, is subject to execution as real estate, is liable to dower, gives a settlement by freehold estate, and in England is a freehold qualification for members of Parliament. On the other hand, the interest of the mortgagee is vested in executors, is liable to execution, is not subject to dower, gives no settlement, and authorizes no vote."[2] †

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[1] Waring v. Smith, 2 Barb. Ch. R. 119; Calkins v. Calkins, 3 Barb. 305, aff'd 20 N. Y. 147; Gardner v. Heartt, 3 Denio, 232; Bryan v. Butts, 27 Barb. 503; Southern v. Mendum, 5 N. Hamp. 429; Glass v. Ellison, 9 Ib. 69; Smith v. Moore, 11 Ib. 61; Ellison v. Daniels, 11 Ib. 274; Chellis v. Stearns, 2 Fost. 312; Davis v. Hemenway, 27 Vt. 589; Earle v. Hall, 2 Metc. 353; Harris v. Haynes, 34 Vt. 220.

[2] Hosmer, Ch. J., Clark v. Beach, 6 Conn. 142.

* Runyan v. Mersereau, 11 Johns. 534, was an action of trespass *quare clausum fregit*. The plaintiff proved that he was in possession of the *locus in quo*, and showed a title derived under a judgment against one Leonard, who, it appeared, had mortgaged the land to one Mersereau. The question was, whether the freehold was in the plaintiff who had purchased the equity of redemption under the judgment against the mortgagor, or in Mersereau the mortgagee. The court remarked that the light in which mortgages had been considered, in order to be consistent, necessarily led to the conclusion that the freehold must be considered in the plaintiff, and that he was, of course, entitled to judgment.

The mortgagor, even after condition broken, is owner, and his widow is entitled to dower, &c., and the mortgagee is a creditor, having a lien on the land for his debt, with the right of possession. As between them, the mortgagee is landlord and the mortgagor is tenant. Though much has been said as to the nature or name of such tenancy, it is universally allowed that he is a tenant, and therefore no trespasser until the mortgagee has asserted his right of possession, and then the mortgagor has only the equity of redemption. This right of ownership, tenancy, and equity of redemption, the mortgagor may convey, and his assignee, on taking possession, holds the same relationship of tenant that the mortgagor did; that is, he holds subject to the right of entry of the mortgagee.

Although the mortgagor, after the law day is passed, and a purchaser after failure to perform, hold by a tenure which has been denominated a kind of tenancy by sufferance, yet they are neither of them, in any sense, lessees; and a written agreement to pay rent, if it be really nothing more than interest upon the debt or purchase money, will not make them lessees (Davis v. Hemenway, *supra*, per Redfield, Ch. J.

† By indenture between F. & W., it was recited that F. was indebted to W. in 272*l.*; that it had been agreed between them that F. should execute a mortgage of a certain messuage with the fixtures, and certain chattels; and it was witnessed that, in pursuance of that agreement, and in consideration of the 272*l.*

§ 773. The mortgagor remaining in possession may cut fuel and take crops without being liable to account.[1] The mere ordinary use by him of a wood lot in the manner usually practiced by the owner of a farm, for supplying his own fires and for the repair of fences, may be justified in the absence of any express notice forbidding the same; and the fact that there was another wood lot not embraced in the mortgage from which the necessary fire-wood might have been obtained, is not an answer to the defense of an implied license to cut wood on the land mortgaged, if such cutting for family use was in the ordinary course of carrying on the farm as had been previously practiced. But evidence of an express license from the original mortgagee of land would be no justification for acts of cutting wood long after he had conveyed his interest to an assignee of the mortgage.[2] The mortgagor may sell the estate subject to the condition, or maintain trespass against a stranger; and the mortgagor or his assignee is not liable in trespass for the rents and profits

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so due, F. did grant, bargain, sell and demise to W., the messuage for a term of years, habendum to W. thenceforth for the term, subject to the proviso thereinafter contained; and also that, for the consideration aforesaid, F. did bargain, sell, assign, transfer, and set over to W. the fixtures and chattels, habendum to W., for his own absolute use and benefit, subject to the proviso thereinafter contained; provided, and it was thereby agreed, that if F. should pay the 272*l.* on the next 24th of June, W. should reconvey; provided also, and it was thereby further agreed, that if default of payment should be made on the day aforesaid, it should be lawful for W. to enter upon, receive, and take the rents and profits of the premises, and if he should think proper, of his sole authority, to sell or underlet them, and to sell the fixtures and chattels, and deliver them to the purchaser or tenant; and that W. should stand possessed of the money arising from such sale, and of the rents and profits in the mean time, in trust to discharge the expenses of the sale and the performance of the trusts, and then to pay himself so much as should remain unpaid of the 272*l.*; and W. should afterward stand possessed of the premises and chattels and the surplus proceeds in trust for F. And F. covenanted to pay the 272*l.*, with interest, on the day mentioned, and that notwithstanding any act, &c., the several premises should remain on the trusts thereinbefore declared, as long as any part of the 272*l.* should continue on that security. F. was in actual possession at the time of executing the indenture, and so remained (the 272*l.* continuing unpaid), at a day before the 24th of June, when M. (a third party) broke and entered the messuage and seized the fixtures and chattels. It was held that W. could not recover against M. in trespass *quare clausum fregit* for the entry, or for the seizure laid as aggravation; and that on a plea that the house, fixtures, and chattels were not the house, &c., of W., W. must be nonsuited (Wheeler v. Montefiore, 2 Ad. & E. N. S. 133; 1 Gale & D. 493).

[1] Woodward v. Pickett, 8 Gray, 617. [2] Hapgood v. Blood, 11 Gray, 400.

accruing between the commencement of the action to foreclose and the time of taking possession.[1]

§ 774. The mortgagee is entitled to have his mortgage interest regarded as real estate, and himself as the owner of the land, so far only as to enable him to protect his rights secured by the mortgage, and to give him all necessary and appropriate remedies for that purpose.[2] He may maintain an action against the mortgagor or his assignee for taking down a building, or for other injury lessening the value of his security in a manner not within the contemplation of the parties. And it has been held generally that, if a mortgagor in possession cut down and carry away timber trees, he is liable to the mortgagee in an action of trespass for their value.[3]* While the debt secured by the mortgage remains unpaid, fixtures erected on the mortgaged premises by the

[1] Mayo v. Fletcher, 14 Pick. 525; Fernald v. Linscott, 6 Greenl. 234; Hewes v. Bickford, 49 Maine, 71.

[2] Hitchcock v. Harrington, 6 Johns. 290; Wellington v. Gale, 7 Mass. 138; Orr v. Hadley, 36 N. Hamp. 575; Rigney v. Lovejoy, 13 Ib. 247.

[3] Smith v. Goodwin, 2 Greenl. 173; Stowell v. Pike, Ib. 387; Cavis v. McClary, 5 N. Hamp. 530; Glass v. Ellison, 9 Ib. 69; Smith v. Moore, 11 Ib. 55; Page v. Robinson, 10 Cush. 99; Hapgood v. Blood, *supra;* Jones v. Costigan, 12 Wis. 677.

* Smith v. Goodwin, *supra*, was an action of trespass by the assignee of a mortgagee against a person claiming under the grantee of the mortgagor for having taken away from the mortgaged premises a dwelling-house, which had been erected thereon by the mortgagor after the conveyance in mortgage, and which the defendant had purchased of such grantee. Two questions arose: 1. Whether the plaintiff had such a possession as entitled him to maintain an action of trespass. 2. Whether the act charged constituted a trespass. The court, in answering both questions in the affirmative, said: "It is well settled that, as between mortgagor and mortgagee, the legal estate is in the latter, and the possession of the mortgagor is not adverse to the mortgagee, but, in fact, is his possession. On this principle, the possession of the plaintiff, as assignee of the mortgagee, was sufficient to entitle him to maintain the action against the defendant, provided the act done by him was inconsistent with the estate of the mortgagor or his grantee. The dwelling-house which was sold to the defendant, and by him removed, was a part of the freehold which belonged to the mortgagee or his assignee. It was a fixture attached to the land, and, in legal contemplation, inseparable from it, though built by the mortgagor after the execution of the mortgage. On legal principles, we do not perceive any defense."

The holder of a mortgage upon land, after a judgment of foreclosure and sale, may maintain an action for an injury to the premises committed wrongfully and fraudulently before the sale, with intent to injure him, thereby preventing the full amount of the debt from being realized, where the act was committed by the mortgagor, who was at the time insolvent, or by others acting under his direction and having knowledge of his insolvency and of the existence of the security (Jones v. Costigan, *supra*).

mortgagor belong to the freehold, and cannot be removed by the mortgagor or be otherwise disposed of by him. Where, subsequent to the giving of a mortgage, a building was erected on the land, it was held that the mortgagee could maintain an action of trespass against a person who, by permission of the mortgagor, removed the building.[1] And where a stranger, with leave of the mortgagor, given after the estate had passed to the mortgagee, and *pendente lite* for an actual foreclosure, built a barn upon the land, it was held that he had no right to remove the barn.[2]

§ 775. Where land which has been mortgaged twice, remains in the possession of the mortgagor, who cuts timber upon the land without the consent of either of the mortgagees, after which the first mortgage is discharged, the second mortgagee may maintain trespass for the cutting of the timber. In Sanders v. Reed,[3] the premises originally belonged to one Colburn, who mortgaged them to a Mrs. Robeson. Afterwards Colburn sold the land to one Tyler, and took back a mortgage from him for the purchase money, which mortgage was duly assigned to the plaintiffs. The timber was cut by the defendant under a license from Tyler. Subsequently the debt due to Mrs. Robeson was paid. It was contended that as the mortgage to Mrs. Robeson was in force as a valid title to the land when the timber was cut, if there was any right of action for the cutting, it was in her and not in the plaintiffs; or, at least, that by reason of that mortgage and the actual possession of the defendant, the plaintiffs, who were second mortgagees, had neither the actual nor constructive possession, and could not therefore maintain the action. It was held that each mortgagee, for the purpose of protecting his rights, was to be regarded, as against the mortgagor, as holding the legal estate; and that, although it would have been a good defense to an action by

[1] Cole v. Stewart, 11 Cush. 181; and see Butler v. Page, 7 Metc. 40.
[2] Preston v. Briggs, 16 Vt. 124; see *post*, § 840.
[3] 12 N. Hamp. 558.

the second mortgagee that the first mortgage was unsatisfied (unless it could be shown that the first mortgagee assented, and therefore had no right of action), yet that as soon as the first mortgage was extinguished, the defendant was answerable as a wrong-doer to the second mortgagee.*

§ 776. Unless there is some agreement by which the rights of the mortgagee are limited, or such circumstances as would fairly warrant the jury in inferring such an agreement, the mortgagee may at once, or at his pleasure, enter into the mortgaged premises; or he may maintain a real action for the recovery of the possession.[1] † This doctrine, so well settled by repeated decisions in Massachusetts, is now incorporated into the statute law of that State.[2] ‡ Luckey v.

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[1] Chellis v. Stearns, 2 Fost. 312, and cases cited; Furbush v. Goodwin, 9 Fost. 321.

[2] Rev. Sts. of Mass. ch. 107, § 9.

* One who buys an equity of redemption, the mortgagee not having made an entry, is entitled to an action of trespass against the mortgagor in possession for the rents and profits, without previous entry. In Fox v. Harding, 21 Maine, 104, the defendant had mortgaged the land to one Sumner, who had not entered to foreclose. The right in equity to redeem was seized and sold on execution, and purchased by the plaintiffs, and the officer conveyed the estate to them subject to the rights of the mortgagee. The defendant continued to occupy the premises, and the plaintiffs brought an action of trespass to recover of him the rents and profits received after the estate had been conveyed to them. The defendant insisted that as the plaintiffs had no title except as purchasers of the equity of redemption, and had made no entry into the premises, they could not maintain the action. But it was held that as the mortgagee was not entitled to the rents and profits until he took possession, the plaintiffs were entitled to recover (s. p. Fernald v. Linscott, 6 Maine, 234).

† This right of the mortgagee to take possession before foreclosure of the equity of redemption he seldom assets, because by doing so he becomes accountable for the rents and profits upon the mortgage. His taking possession, therefore, should be distinct and unequivocal, and such as would clearly make him accountable for the use. It is not enough that he forbid the tenant to come upon the land or to cut his crops. He must tell him distinctly that he insists on taking possession himself on his mortgage, and he must proceed actually to use and occupy (Collamer, J., in Hooper v. Wilson, 12 Vt. 695).

‡ But this strict right of the mortgagee, as we have before stated, is rarely exercised, and may be restrained by the agreement of the parties that the mortgagor shall hold the land till the day assigned for the payment of the money or the performance of the condition. Such an agreement is usually inserted in English mortgages, and may operate by way of estoppel, covenant, condition, or reservation. Such a clause inserted in the mortgage deed or other deed made at the same time, and being part of the same transaction, is undoubtedly binding on the mortgagee, and is to receive a liberal construction, as it generally has an operation beneficial to both parties.

Furbush v. Goodwin, *supra*, was an action of trespass *quare clausum* against the assignee of the mortgagee of the premises for entering thereon, and digging

Holbrook [1] was an action for entering the plaintiff's house and carrying away his goods during the absence of himself and his family, by virtue of a writ of attachment. The defendant claimed a right of entry under a mortgage, the condition of which was not broken, and in which there was no provision that the mortgagor (the plaintiff) should remain in possession, contending that the mortgage gave him a right to enter at any time. A verdict having been found for the plaintiff, under the ruling of the judge, that the mortgage gave the defendant no right to enter without first giving the plaintiff notice to quit, it was set aside by the Supreme Court.*

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up and carrying away the soil. The plaintiff claimed that as the defendant did not, prior to the alleged trespass, enter upon the premises, the mortgage was no defense. The court, in holding otherwise, said: "The defendant had a perfect legal title to the premises as well as a perfect right of entry into them, and he entered peaceably in accordance with that right. The case presented, then, is that of an attempt to charge one with a trespass in entering peaceably upon premises of which he is the owner, and to the possession of which he has a present and perfect right, by one who is in the wrongful possession of them, and for continuing which he himself is, upon well considered decisions, a trespasser. The fact that the defendant had not, at any time prior to the alleged trespass, actual possession of the premises, cannot change the result. A right of entry and possession at the time furnishes a sufficient answer to the action" (referring to Chellis v. Stearns, 2 Fost. 312).

The mortgage of several detached parcels of land in the same county by one deed constitutes them, as between the parties, one tenement or holding for the purpose of securing the performance of the condition; and as between the parties and their privies, an entry on one is an entry on the whole (Bennet v. Conant, 10 Cush. 165).

[1] 11 Metc. 458.

* In Vermont, under the provisions of the statute, it has uniformly been considered that the estate and right of possession are given to the mortgagee after condition broken, and that he may then sustain his action of ejectment against the mortgagor or his grantees, even without notice to quit. And on the death of the mortgagee before foreclosure, his right and interest in the mortgaged premises vest in his executor and administrator, to be administered as assets belonging to his estate (Pierce v. Brown, 24 Vt. 165, citing Atkinson v. Burt, 1 Aik. 329; Lyman v. Mower, 6 Vt. 345). In Wilson v. Hooper, 13 Vt. 653, which was an action of trespass for breaking and entering plaintiff's close, it appeared that a mortgagee, after condition broken, entered upon the land possessed by the assignee of the mortgagor, and there, with the officer, first attached some personal property formerly belonging to the mortgagor, and of which no actual possession had been delivered to any other, and for which another action was pending. He then proceeded to take entire and exclusive possession of the farm, and to secure the crops. It was held that, although he was liable to account for the crops on the mortgage, he was not a trespasser, and that it was immaterial what he did with the crops.

In Clark v. Beach, 6 Conn. 142, which was an action of trespass *quare clausum fregit*, the defendant pleaded that the premises in question at the time of doing the acts in the declaration mentioned, belonged to one A. B., by whose direction

§ 777. Where a mortgagee obtains unlawful possession of the mortgaged premises, by resorting to legal process before condition broken, he makes himself liable to an action of trespass at the suit of the mortgagor.[1] But the mortgagor in possession cannot maintain an action of trespass against the mortgagee for merely entering the premises, although the entry was not for the purpose of foreclosing the mortgage;[2] nor for entering and carrying away a fixture, unless by the mortgage the mortgagor has a right to the possession until condition broken.[3] *

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and command the defendant did them; and in order to establish title in A. B., he offered in evidence a mortgage to her of the land on which the alleged trespass was committed. It appeared that the mortgage was past due, and the possession of the land given up by the mortgagor to the mortgagee before the acts complained of were done, and that at that time the mortgagee was in possession, but that the equity of redemption still remained in the mortgagor. It was held that such evidence was admissible.

A mere survey of land mortgaged by the mortgagee for the purpose of obtaining information respecting boundaries cannot be regarded as a possession under the mortgage, because it is not an entry for the purpose of asserting title, or with a design of foreclosing (Great Falls Co. v. Worster, 15 N. Hamp. 412).

Where the mortgagee of land has made an entry upon it and claimed the possession, such entry will terminate a tenancy at will subsisting between a third person and the mortgagor. And the tenant, by continuing to hold over after the entry, and refusing to attorn to the mortgagee, will be deemed a trespasser (Hill v. Jordan, 30 Maine, 367, citing Smith v. Shepard, 15 Pick. 147; Reed v. Davis, 4 Pick. 216; Mayo v. Fletcher, 14 Pick. 525).

The commencement of a suit by a mortgagee to foreclose the mortgage is not an abandonment of his previous possession (Page v. Robinson, 10 Cush. 99, citing Dorrell v. Johnson, 17 Pick. 263; Merriam v. Merriam, 6 Cush. 91).

Where the tenant of a mortgagor refused to give up possession of the premises to the mortgagee, upon his entry after condition broken, it was held that the mortgagee might maintain trespass against him for *mesne* profits, and that it was immaterial whether the entry of the mortgagee was or was not valid for the purpose of foreclosure (Northampton Paper Mills v. Ames, 8 Metc. 1, citing Putney v. Dresser, 2 Metc. 583).

Although a mortgagee suing in ejectment must prove his debt in order to recover, yet a mortgagee in possession, who sues a stranger in trespass, need not show his note or bond secured by the mortgage (Hull v. Fuller, 7 Vt. 100).

A mortgagee in possession cannot be allowed for making anything new upon the mortgaged premises, but only for keeping them in repair (Russell v. Blake, 2 Pick. 505).

[1] Mooney v. Brinkley, 17 Ark. 340.

[2] Blaney v. Bearce, 2 Maine, 132. [3] Chellis v. Stearns, 2 Fost. 312.

* Where a tenant at will of land mortgages it to a stranger, the landlord may maintain an action of trespass against the mortgagee, although the mortgagee has obtained judgment against the mortgagor, and has been put into possession by the sheriff. In Little v. Palister, 4 Maine, 209, it appeared that the defendant recovered judgment against one McKenney, in May, 1818, on a mortgage of the *locus in quo*, made by him on the 11th of February, 1817; that execution was duly issued on that judgment; and that in March, 1820, he was, by virtue of that ex-

ecution, regularly put into possession of the same. It further appeared that, prior to the mortgage, McKenney entered upon the *locus in quo* as a tenant at will under the plaintiff; and the defendant's counsel contended that, on these facts, the action could not be maintained. The answer was: That the plaintiff was no party to the judgment under which the defendant entered and took possession; that McKenney, being a mere tenant at will under the plaintiff, his conveyance to the defendant was an act inconsistent with his tenure, and which determined his estate; and that the defendant's entry was, therefore, tortious and a trespass, for which the present action well lay.

Where the mortgagor of unseated land, which he holds by articles of agreement, sells the land to the mortgagee, taking back an agreement for reassignment, and the latter has the land assessed to himself, pays taxes thereon, and compels a trespasser to pay for timber cut and carried away, the mortgagor cannot, after the reassignment of the land to him, recover against the trespasser for the timber. His remedy is against the mortgagee as for profits received by him (Guthrie v. Kahle, 46 Penn. St. R. 331).

CHAPTER II.

JUSTIFIABLE ENTRY ON ANOTHER'S LAND.

1. Entry without wrongful intention.
2. Entry by license.
3. Abuse of license.
4. Determination of license.
5. Revocation of license.
6. When a license will be irrevocable.
7. Entry to retake property.
8. Right to search for stolen goods.
9. Complaint for search warrant.
10. Requirements of search warrant.

1. *Entry without wrongful intention.*

§ 778. The motive will sometimes excuse the entry.* If J. S. go into the close of J. N. to succor the beast of J. N.,

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* It would be error in the court to instruct the jury that if the defendant had no license from the owner of the land, his acts were a wanton trespass. One may enter on land of another by virtue of an authority which he believes to be fully sufficient; and if it prove otherwise, his acts cannot be termed wanton, so long as they were prompted by honest intentions (Longfellow v. Quimby, 29 Maine, 196).

In Shaw v. Mussey, 48 Maine, 247, the alleged trespass was committed by the defendant, by entering into the possession of the premises "with the consent of the plaintiff's intestate." Both parties at that time supposed that the premises were embraced in a mortgage then held by the defendant. After the death of the mortgagor, his heirs discovered that the premises were not embraced in the mortgage; and they recovered judgment therefor in a real action. The court, in holding that the present action could not be maintained, said: "The administrator is clothed with the rights of and represents his intestate. The latter, while living, could not have maintained an action of trespass against the defendant, because he consented to the entry and possession. That consent was not revoked during his lifetime; and the defendant, having never been liable to him in an action of trespass, is not liable in such an action to the administrator of his estate, by any principle of the common law, nor by any provision of any statute. The case is not different from what it would have been if the defendant had yielded possession to the heirs without any suit. The mistake in regard to the identity of the premises with those described in the mortgage was mutual. It is true, since the mistake was one of fact, the defendant was liable to pay the plaintiff's intestate whatever he received as rents and profits. For this he is still liable to the plaintiff as administrator, in an action for money had and received, unless the demand is barred by the statute of limitations. But as he is not liable in trespass, according to the agreement of the parties, a nonsuit must be entered."

In an action of trespass by the United States, a license to enter on the land, which contained lead ore, is admissible to show the nature and object of the entry; and a receipt for rent, given by an authorized officer of the government subsequent to the alleged trespass, is a full discharge, though the officer may never have accounted for the money received (U. S. v. Gear, 3 McLean, 571).

the life of which is in danger, an action of trespass will not lie, because, as the loss of J. N., if the beast had died, would have been irremediable, the doing of this is lawful. But if J. S. go into the close of J. N. to prevent the beast of J. N. from being stolen, or to prevent his corn from being consumed by hogs, or spoiled, the action of trespass lies, for the loss, if either of those things had happened, would not have been irremediable. And if a stranger chase the beast of A. out of the close of B., which is *damage feasant* therein, trespass will lie, for by doing this, although it seem to be for his benefit, B. is deprived of his right to distrain the beast.

§ 779. The entry may be excused by necessity. We have seen[1] that if a public highway be impassable, a traveler may go over the adjoining land. But this, as already stated,[2] would not extend to a private way, for it is the owner's own fault if he does not keep it in repair. So, if a man who is assaulted and in danger of his life, run through the close of another, trespass will not lie, because it is necessary for self-preservation. If my tree be blown down and fall on the land of my neighbor, I may go on and take it away. And the same rule prevails where fruit falls on the land of another. But if the owner of a tree cut the loppings, so that they fall on another's land, he cannot be excused for entering to take them away, on the ground of necessity, because he might have prevented it.

§ 780. The right of action sometimes depends on the question as to which is the first wrong-doer. If J. N. had driven the beast of J. S. into the close of J. N.; or if it had been driven therein by a stranger, with the consent of J. N., and J. S. went there and took it away, trespass would not lie, because J. N. was himself the first wrong-doer. But where there is neither an express nor an implied license, nor any such legal excuse as is above stated, a man has no right to enter upon the land of another for the purpose of taking away a chattel. The mere fact that a person owns a chattel

[1] *Ante*, §§ 703, 704.

[2] *Ante*, § 705.

gives him no authority to go upon the land of another to get it.[1] *

2. *Entry by license.*

§ 781. There are cases where an authority to enter is given by law; as, to execute legal process; to distrain for rent; to a landlord or reversioner to see that his tenant does no waste, and keeps the premises in repair according to his covenant or promise; to a creditor, to demand money payable there; or to a person entering an inn for the purpose of getting refreshment.[2] † A wharfinger or warehouseman, by

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[1] Bac. Abr. Trespass, F; 3 Roll. Abr. Pl. 9.

[2] Newkirk v. Sabler, 9 Barb. 652; Adams v. Freeman, 12 Johns. 408.

* A. executed a bill of sale and mortgage of his household furniture to B., keeping possession, but afterward placed the same in another house, which he locked, and went away with his family on a visit. B., supposing that he would not come back, unlocked and entered the house, and removed the furniture. Held, that the entry was a trespass (McLeod v. Jones, 105 Mass. 403).

† Knight v. Mayberry *et al.* 48 Maine, 158, was an action of trespass *quare clausum* against a deputy sheriff and creditor for entering upon land for the purpose of levying an execution against one Morse. It appeared that the plaintiff was in possession, but that he had no deed of the land, and that the record title was in Morse, who had given a bond to the plaintiff to convey the land to him upon payment of certain notes, the last payable in seven years. The Supreme Court, in confirming judgment of nonsuit rendered in the court below, said: "We are not prepared to say, that in such a case, an action of trespass can be maintained against an officer and creditor who enter only to make a levy to transfer the legal title. It would be a dangerous precedent to establish against officers to hold that they may, for such an act, be liable to a suit in which the parties may contest, at immense cost, their titles, and settle their controversies at their expense. It is true that the defendants cannot strictly justify as acting under the legal title afterward acquired and perfected by the levy, because the title does not pass to the creditor until the acts are completed. But the law authorizes the levy, and directs the officer to make it. When made against a debtor in possession, and who is the undisputed owner of the legal title, such debtor clearly could not maintain trespass for the entry for the purpose of making a levy. And yet, the perfect legal title, and full possession, is in him when the officer enters, and during all the preliminary proceedings. The officer's protection is, that he has a right and is bound to levy upon the estate, and do all acts necessary to perfect such transfer of title. And if the land is in possession of another, as the tenant of the legal owner, or holding under him, the officer cannot be held as a trespasser; and if the officer cannot be, the creditor who goes on to point out the land, and the appraisers, cannot be thus held. We may properly say, that the questions presented seem to belong appropriately to the equity jurisdiction of the court, and could in that form of action be best considered and determined" (citing Cool v. Crommet, 13 Maine, 250; Hunnewell v. Hobart, 42 Maine, 565.)

Where lands are sold on proceedings in partition, which are afterward reversed for error, the purchaser is not liable in trespass for acts done upon the premises, while the decree is in force (Dabney v. Manning, 3 Ham. 321).

The following instruction was held erroneous: That "if the jury believe

holding himself out to the public as such, extends a license to enter upon his premises to all persons having occasion to do so in connection with that business. He is however under no legal obligation to allow the use of his wharf or warehouse to every person applying, even if he has suitable accommodations, and a reasonable reward be offered him; but he may limit the general license, or terminate it in the case of any particular persons, by giving them notice not to come upon the premises.[1]

§ 782. To constitute a license which amounts to a defense to an action of trespass, where authority to enter is not given by law, there must have been a permission to enter upon the premises. But this permission may be implied. Thus, it has been held that entry upon another's close, or into his house at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass.[2] Familiar intimacy between families may be evidence from which a general license for such purpose, may be presumed; as where a person has been in the habit of visiting the house of another for years, without objection. In Martin v. Houghton,[3] the defendant had exercised that privilege for thirty years, the families being upon intimate terms; and the court remarked that for this reason alone, the jury would have been justified in finding an implied license, although the defendant's case did not rest wholly on that ground.[4] *

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from the evidence, that the defendant entered the house of the plaintiff by her leave and license, or by the leave or license of any inmate thereof, such entry was not a trespass." The error consisted in asserting that any inmate of the house could give a license to enter. Such a license acted on in good faith, might mitigate the damages for the entry, but would not constitute a defense. A license to enter another's house does not confer a right to take any and all persons there. A person has no right to enter another's house without permission, even to take his own property (Cutler v. Smith, 57 Ill. 252; Hamilton v. Stewart, 59 Ib. 330.

[1] Heaney v. Heeney, 2 Denio, 625; Bogert v. Haight, 20 Barb. 251; Beardsley v. French, 7 Conn. 125.

[2] Lakin v. Ames, 10 Cush. 198. [3] 45 Barb. 258.

[4] See Haight v. Badgeley, 15 Barb. 502; Syron v. Blakeman, 22 Ib. 336; Pierrepont v. Barnard, 2 Seld. 279.

* To trespass for breaking and entering the plaintiff's house and making a noise and disturbance therein, the defendant pleaded a license; to which the

§ 783. If a father give his son verbal permission to sell timber, and receive the avails, an action of trespass cannot be maintained against the vendee of the son, for cutting and removing the timber.[1] But the wife, when she is not the general agent of her husband, nor specially authorized to act in the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom in his absence. In an action of trespass *quare clausum fregit*, for entering on the plaintiff's land, under a writ of attachment against the plaintiff, and cutting and carrying away grass, the defendant set up in justification, permission given him by the wife of the plaintiff, in the plaintiff's absence to the Southern States, he having left her in charge of the farm which she caused to be cultivated. It appearing that the husband did not constitute his wife his agent generally to manage his business, nor specially authorize her to make the contract in question, nor subsequently ratify such contract, it was held that the defense had failed.[2] *

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plaintiff replied *de injuria*. It was held that the plea was supported by evidence that the plaintiff kept a billiard table in the house, at which all persons were usually permitted by him to play at regulated prices, and that the defendant entered the house for the purpose of going to the billiard room, although while in the house, he was guilty of a trespass in assaulting the plaintiff (Ditcham v. Bond, 3 Camp. 524; 2 M. & S. 436).

Haight v. Badgeley, 15 Barb. 499, was an action for breaking and entering the close of the plaintiff, and there enticing his female servant to leave his employment. The gravamen of the complaint was trespass *domum fregit*, and the persuasion of the servant matter of aggravation. The defendant, when first discovered, was in the house; and on being invited into the room, where the wife of the plaintiff then was, by his daughter, she went into the kitchen, shutting the door in the daughter's face. Several times after that, she was found in the kitchen with the girl. The defendant pleaded, as matter in justification, that she went to the plaintiff's house to see the girl. And it was contended that there was an implied license in such cases; and in this case, a license in fact. But it was not proved that the parties were neighbors, or that they were acquainted previous to the alleged trespass, or that the defendant had ever been to the house before. The action was originally tried before a justice of the peace, and a verdict rendered for the plaintiff for $20 damages. The defendant insisted that the damages were excessive, particularly as the servant did not in fact leave before suit. The County Court having set aside the verdict, the Supreme Court reversed the judgment of the County Court, and affirmed that of the justice, with costs.

[1] Coxe v. England, 65 Penn. St. R. 212.

[2] Benjamin v. Benjamin, 15 Conn. 347.

* In Benjamin v. Benjamin *supra*, the court, after discussing at some length the general liability of the husband on contracts made by his wife, said: "The

In Tayler v. Fisher,[1] the defendant had bought goods of J. B., who was the owner of them, the goods then being in the house of the plaintiff; and thereupon defendant went to the house of the plaintiff, and demanded the goods; and the plaintiff being absent from home, the defendant entered the house, by the license of his wife, and took and carried them away; yet he was held a trespasser for such entry. The court said that, as the goods were in the plaintiff's house, and it did not appear how they came there, whether by trespass or otherwise, the defendant could not, of his own head, enter, and the license of the wife to enter her husband's house, was void.

§ 784. The statute of frauds does not prevent a parol license for a qualified use of land or to do certain acts thereon; as to enter on the premises and lay down aqueduct logs to convey water from a spring, and at all times thereafter to enter and repair the same. And where such a license is given,

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plaintiff's wife, on the ordinary principle of agency, would have power to do whatever is necessary or proper in the care and management of the farm intrusted to her, such as keeping in order the buildings, fences, and implements of husbandry, cultivating the land, and preserving the crops, and perhaps disposing of such crops, if necessary, to enable her to do these things; and generally to do whatever is necessary and proper in order to execute the trust reposed in her; and the usual course of such an employment might be shown in order to ascertain what was thus necessary and proper, and the character and design of the trust. Farther than this, her power would not extend. It is scarcely necessary to say, that within these principles, she has no right to dispose of her husband's property in her possession, in the extraordinary and injurious manner, and for the purpose claimed to be proved by the defendant. If it should be held that such an agent might make such a contract, it would be difficult to stop short of investing her with a general and unlimited authority as to all his affairs. The very case of intrusting another with the superintendence of a farm, is put in the books on the civil law, under which it was held that an agency of that description does not authorize the agent to sell the property of the principal for any purpose, unless it be of a perishable nature. Whether we should restrict his powers within limits so narrow, it is unnecessary to inquire; but on no principle can we extend them as is claimed in the present case. * * * We do not find any adjudged case which sanctions the doctrine that the wife, whether the husband is abroad or at home, is presumed to be the agent of her husband generally, or to be intrusted with any other authority as to his affairs than that which it is usual and customary to confer upon the wife. It would be not only unreasonable, and, as it respects the husband's interests, unsafe, but it would be going beyond what could fairly be presumed to be his intention, to extend the powers of the wife, by implication or presumption, farther than this principle warrants; and that it justifies the contract in question, cannot be claimed."

[1] Cro. Eliz. 246.

and entry made in pursuance of it, the individual entering, is not a trespasser. Such a license may extend to setting up a building or erecting a dam on land; digging a ditch, and turning water across the same; permitting an individual to flow land, or to enter upon it, divert and use running water; neither of which would be within the statute of frauds.[1] A. sold and conveyed a farm to B., in July, and remained in possession of the same, until the following July, cultivating the land and harvesting the crops, and having the exclusive use of the farm. B. lived in the immediate vicinity, knew what A. was doing, made no objection, and proposed to buy part of the hay of him. In October, B. brought an action of trespass *quare clausum* and *de bonis asportatis* against A. for taking away the crops. It was held that proof that B., at the time he took his deed from A., verbally agreed that A. might remain on the farm and take the crops, was admissible as tending to show B.'s assent to A.'s subsequent acts.[2*]

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[1] Sampson v. Burnside, 13 N. Hamp. 264; French v. Owen, 2 Wis. 250; Floyd v. Ricks, 14 Ark. 286.

[2] Merrill v. Blodgett, 34 Vt. 480.

* In this case, the Supreme Court, in affirming the judgment of the court below, which was for the defendant, said: "The court admitted the evidence, not to contradict or vary the legal construction of the deed. On the contrary, the jury were told that such parol agreement between the parties, could not have that effect; that by the deed, the plaintiff had the legal title to possession of the farm and to the crops. But the evidence was admitted, as tending to show, in connection with the other evidence in the case, that the defendant's possession of the farm and use of the crops, were by the license and assent of the plaintiff. It does not seem to us that it is material to show that such assent or license was given after the deed was made. If given before, and in contemplation of obtaining the title, it operates to justify the party who, in faith of it, acts upon it. The party who gives the license, or makes the agreement which in law operates as a license, may perhaps revoke it, if he revoke before the other has acted upon it so far as to make a revocation of it unjust. But if he does not revoke, and the other with his knowledge acts under it, the acts so done are clearly justifiable under the agreement or assent so given to them. Clearly, the agreement may well be proved—not as being in conflict with his rights as owner under the deed, but as being consistent with such rights, and an act done in the exercise of them, and in contemplation of their accruing."

A. removed fence rails from land, which were thereon when he sold the land to B. In an action of trespass brought by B. against A., for taking away the rails, it was held that it was admissible for the defendant to prove that the plaintiff told him before the deed was executed that he might remove the rails whenever he should afterward request it (Gibson v. Kephart, 3 Har. & J. 439).

The plaintiff had entered into possession of premises under an agreement, one clause of which was, that if the rent should be in arrear for ten days, it should be lawful for A. and her agents immediately to enter upon and take pos-

Where the owner of land gave another verbal permission to build a bridge on his land, and to have the right of way over the same to the bridge, he was held to be a trespasser for removing the bridge against the wishes of him who erected it. It was proved that some time before the trespass, the defendant had, for a valuable consideration, licensed the plaintiff by parol to enter on the land and erect the bridge. It did not appear that this license was ever revoked, if revocable, nor that any notice was given to the plaintiff to remove the bridge prior to the removal of it by the defendant. It was contended that no rights were conveyed to the plaintiff by the license, because it was not *in writing;* that it was nothing more than a lease at will. To this it was replied that a lease at will is good until the will is determined; and the lessee's rights remain until that time; and that this objection could not avail the defendant, because it did not appear that the lease was determined by the lessor, before the removal of the bridge. Again, it was contended by the defendant that, as the plaintiff claimed an interest in the close, within the statute of frauds, and the proof of this interest was not in writing, the license was void. The answer to this was, that whether or not the defendant's permission was in technical language a license, still that it operated to convey a right to build the bridge and a right of way, and was not within the statute of frauds, inasmuch as the contract set forth was executed on both parts, the consideration received, and the bridge built; and that there was a distinction between agree-

session of the premises, and expel the plaintiff as effectually as a sheriff might do under a writ of *habere facias possessionem;* and in case of such entry, and of any action being brought for the same by any person whomsoever, the defendants might plead leave and license in bar thereof, and the said agreement might be used as conclusive evidence of the leave and license of the plaintiff for the entry, trespasses, or other matters to be complained of in such action; and arrears of rent had become due, and the defendants as agents of the said A., had entered and expelled the plaintiff from the premises. In an action of trespass brought for such entry and expulsion, the declaration also alleging an assault and battery, it was held that the above agreement was a conclusive answer under a plea of leave and license to all the trespasses in the declaration mentioned; and that if the plaintiff intended to rely upon the assault and battery as distinct from the entry and expulsion, he should have new assigned excess (Kavanagh v. Gudge, 7 Man. & G. 316).

ments executory and agreements executed in whole or in part; the statute of frauds being applicable to the former, but not to the latter.[1] *

§ 785. The question has sometimes arisen whether a parol license upon another's land may be for a term of years; as

[1] Ricker v. Kelly, 1 Maine, 117.

* In this case, the court showed the distinction between Cook v. Stearns, 11 Mass. 533, upon which the defendant's counsel relied, and this case as follows: "In the case of Cook v. Stearns, the defendant claimed a permanent interest in the plaintiff's close, and a right to maintain the bank, dam, &c., and at any time to enter on the land to make necessary repairs; and such right the court decided could not pass without deed or writing. In the present case, the plaintiffs placed their own materials in the form of part of a bridge on the defendants' land, by their express consent; and if a right of way over the close, to the bridge did not pass by parol, still the defendants had no right to seize and carry away the plaintiffs' property, and destroy its value. As well might the owner of a ship yard permit another to build a ship in it, and when the ship was on the stocks, cut it in pieces and carry it away with impunity. Again, in Cook v. Stearns, the license relied upon by the defendant was never given by the plaintiff Cook, but by the former owners of the land; and it did not appear that Cook ever assented to and ratified such license, or ever knew of it. In the present case, the license was given by the very persons who have violated it to the prejudice of the plaintiffs. So far at least as regards the building of the bridge, the authority given by a license is good and sufficient, according to the decision in that case, and the authorities there cited. The license stated in the replication, was to do a particular act. It was not intended to give a right to hold the defendant's land, to enter upon it at all times, and exercise dominion over it. Such an interest, the statute requires should be passed by some writing. In Cook v. Stearns, the defendant claimed an easement without any deed or writing, and without prescription. Such a claim, the law does not sanction. Not so, in the present case."

In an action for waste, the plaintiff's counsel objected to the admission of evidence of a parol license to commit the acts of waste complained of. This objection was sustained; but at the same time the court ruled that it was competent for the defendant to give in evidence a parol agreement, mutually beneficial to the parties, by which wood was to be cut, and the land seeded; or, in other words, that the defendant might prove a contract of sale of the wood to him, founded on the consideration that he would seed down the land he cleared. This ruling was held improper; it being a clear case of a license proved by parol, against the express provisions of the statute. The annexing a condition to the license did not render the parol proof of it any more competent than it would otherwise have been. Nothing like an agreement was shown. The defendant did not agree to clear or seed down any of the woodland, but only that he would seed down what he should clear (McGregor v. Brown, 10 N. Y. R. 114).

The statute referred to in McGregor v. Brown, *supra*, is as follows: "If any guardian or any tenant by the curtesy, or for term of life or years, or the assigns of any such tenant, shall commit waste during their several estates or terms, of the houses, gardens, orchards, lands or woods, or of any other thing belonging to the tenements so held, without special and lawful license in writing, so to do, they shall respectively be subject to an action of waste" (N. Y. Rev. Sts. 5th ed. vol. 3, p. 621). The object of the qualification respecting the evidence of a license is the same with those provisions of the statute of frauds requiring certain transactions to be put in writing, namely, to prevent agreements from being set up by false or mistaken oral testimony (McGregor v. Brown, *supra*, per Denio, J.)

in the case of Wood v. Lake,[1] in which a verbal agreement to permit coal to be piled in any part of the close, for seven years, was held valid. Although licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed, and amount to nothing more than an excuse for the act which would otherwise be a trespass; yet a permanent right to hold another's land, for a particular object, and to enter upon it at all times without his consent, is an important interest which ought to be conveyed in writing. Were a contrary rule adopted, it is easy to see how, without questioning the credibility of witnesses, by a slight misunderstanding of the language of the ancestor, permission to make a temporary erection might be converted into a license to occupy indefinitely, and thus create an estate scarcely less than a fee.[2]

§ 786. A license to do an act necessarily implies every privilege essential to the enjoyment of the principal thing.* If a man make a lease reserving the trees, he has a right to enter and show them to the purchaser. Where the owner of the soil sells a chattel thereon—as if he sell a tree, or a crop, which remains within his close—he at the same time passes to the vendee, as incident to such sale, a right to go upon

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[1] Sayer's R. 3.

[2] Cook v. Stearns, 11 Mass. 533; Houghtaling v. Houghtaling, 5 Barb. 379.

* A. and B. agreed to build a rail fence on the boundary of their lands; A. the eastern half, and B. the western. B., having placed a part of his fence on A.'s land, afterward gave A. written notice that he intended, on a specified day, to have his land surveyed, and to place his fence on his own land, and that A. might be present, and see it done. The surveyor not coming, another day was named, but before it arrived B. removed his fence; and on the day set the parties made the survey. It was held that although there was no proof of a license from A. for the removal, yet that he could not maintain trespass *quare clausum fregit* therefor (Whitfield v. Bodenhammer, Phill. N. C. R. 362).

A license is not implied by law to the purchaser of goods (though sold under an execution or distress), to enter upon the premises of the former owner and take them away, notwithstanding they have remained there with his assent. To support a plea of leave and license to an action of trespass for taking away goods under such circumstances, there must be proof of an express agreement that the purchaser should enter on the premises and take the goods (Williams v. Morris, 8 Mees. & W. 488).

the premises, and take away the subject of the purchase.[1] The grant of timber proper for rafting and sawing, confers on the grantee and his assigns, not only the right to enter upon the land for the purpose of cutting and removing suitable timber, but also to select and judge of its suitableness.[2] By the grant of the use of a pump, the grantee has a right to enter upon the grantor's land to repair the pump, although neither the pump itself nor the soil on which it stands, be granted to him; and if a person gives me a license under seal to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes.[3] If grass is sold to be cut and made into hay, when fit, the purchaser has an implied right to make it into hay on the land.[4] Where the owner of land grants the right to dig and carry away coal from his land, the grantee has a right to erect sheds and steam engines, and fix such machinery as may be necessary to prosecute the work, although nothing be said in the grant as to any such erections.[5] A license to erect a tomb in a burying ground, conveys also a right of suitable access; and the removal of an obstruction thereto, by the owner, does not make him a trespasser.[6]

§ 787. When a mill-dam abuts upon the opposite shore by the consent of the owner of the shore, the materials of the dam belong to the builder. Consequently, it may be withdrawn at any time, and the owner of it may take away the materials of which it is composed, without being liable to anything beyond nominal damages.[7]* The grant of a right to build a dam of a given height and extent, is a grant or demise of so much of the grantor's land as it will be neces-

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[1] Newkirk v. Sabler, 9 Barb. 652.

[2] Boults v. Mitchell, 15 Penn. St. R. 371.

[3] Pomfret v. Ricroft, 1 Saund. 321; Liford's Case, 11 Co. 52, *a*.

[4] 1 Roll. Abr. Pl. 23.

[5] Dand v. Kingscote, 6 M. & W. 196.

[6] Lakin v. Ames, 10 Cush. 198.

[7] Trask v. Ford, 39 Maine, 437; Wells v. Banister, 4 Mass. 514.

* One who has a right to go on to land is not liable as a trespasser for entering against the will of the person in possession (Yeates v. Allin, 2 Dana, 134; Walton v. File, 1 Dev. & Bat. 567.)

sary to occupy by such dam. If, therefore, a person owning land on both sides of a stream not navigable, should grant to another the land on one side bounded by the thread of the stream, and should, at the same time, grant a right to erect a mill on the land, with a dam of sufficient height to raise the water to drive the mill; as such dam could not raise the water without being extended across the river, the grant would, by necessary implication, carry the right to build that part on the grantor's land, and to occupy the grantor's land as far as necessary to maintain the dam. It would not be a mere easement; but a freehold, determinable upon the abandonment of the mill, and a right of possession, for the violation of which an action of trespass would lie.[1] But the owner of the dam must in such case show either a grant or a prescriptive right.[2]

§ 788. A contract to sell does not, in itself, contain a license to enter; or at most it gives an implied permission to occupy as tenant at will merely.[3] Where a person in the occupancy of land under a contract of purchase, has a license to cut timber, he is not liable for the cutting of timber during the existence of the license, although he has forfeited his right to the land by failing to fulfill the terms and conditions of the contract.[4] A parol contract, although without consideration, will be a justification of an act which would otherwise be a trespass; and it will protect the agents and servants of the licensee whenever, from the circumstances, it can be presumed that there was an implied license to such persons.[5]*

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[1] Jepherson v. Dryden, 18 Pick. 385; Conwell v. Brookhart, 4 B. Mon. 580.

[2] Trask v. Ford, *supra;* Marsh v. Brooks, 2 Hill, S. C. 427.

[3] Suffern v. Townsend, 9 Johns. 35; Cooper v. Stower, Ib. 331; Ives v. Ives, 18 Ib. 235; Erwin v. Olmsted, 7 Cowen, 229.

[4] Pratt v. Ogden, 34 N. Y. 20.

[5] Sterling v. Warden, 51 N. Hamp. 217; Rawson v. Morse, 4 Pick. 127.

* It does not follow that because a license is void for the purpose of carrying an interest irrevocable, it may not inure as a personal authority, and until revoked protect the defendant against an action for a wrong. Indeed, there cannot, in the nature of things, be any legal wrong until the license is countermanded (Miller v. The Auburn & Syracuse R. R. Co. 6 Hill, 61). Where a per-

3. *Abuse of license.*

§ 789. A material deviation from the license, whereby the licensor sustains injury, will be a ground of action against

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son was granted permission by the owner to shoot game on his land, and the permit was countermanded after he had entered and while he was upon the premises, it was held that his remaining there afterward did not make him amenable to the following statute: "Any person who shall enter the lands or premises of any resident of this State with any fire-arms or other implements, for the purpose of hunting or fishing contrary to the provisions of this act, at any season of the year, without the consent of the owner of said land or premises, shall be deemed guilty of a trespass, and shall forfeit and pay to the owners or possessors of such lands and premises the sum of ten dollars," &c. "The unlawful entry upon the land which calls down the penalty of the law, is the first crossing of the owner's line. This is one entire and single act. It cannot be divided or multiplied, and it constitutes a complete offense. But the act in this case was by consent of the plaintiff. It is true that there are certain instances where an entry having been made under authority of the law, and not merely by consent of the owner, subsequent acts of abuse render the party a trespasser *ab initio*. But the principle is not applicable to a case like this, instituted upon a penal statute in relation to which, the construction is so familiar. The legal fiction, that a fresh step on the land after revocation of the license, is a new entry, ought not to be adopted for the purpose of creating a crime and inflicting a penalty" (Kellogg v. Robinson, 32 Conn. 335, per McCurdy, J.) It has been held that a claim by one landowner to enter upon his neighbor's land and cut down trees and sell them, cannot be made appurtenant to land, as it is in no wise accessorial to the use and enjoyment of an estate; but that a claim to cut down thorns and firewood to burn in the dwelling-house of the claimant, is accessorial to the use and enjoyment of the dwelling-house, and may be made appendant or appurtenant thereto, so as to give the owners or occupiers thereof, for the time being, a right to the privilege (Dowglas v. Kendal, Cro. Jac. 256). In an action of trespass *quare clausum fregit*, it appeared that the plaintiff and defendant entered into a written agreement, not under seal, that the defendant, for a stipulated sum, should superintend the plaintiff's cotton factory for the period of five months from the 14th of November; that the defendant acted as such superintendent under the agreement until the 3d of January, when, having used insulting language to the plaintiff, and threatened him with personal violence, he was dismissed from the plaintiff's employment and forbidden to enter the premises; and that the defendant, notwithstanding such dismissal and prohibition, entered and tried to persuade the workmen not to obey the plaintiff. At the trial in the court below, the judge charged the jury that the contract gave the defendant a right to enter the factory, notwithstanding the plaintiff's dismissal, and a verdict was accordingly found for the defendant. But the Supreme Court set the verdict aside (Champion v. Hartshorne, 9 Conn. 564). Daggett, Ch. J., dissenting, said: "It is very clear, that by virtue of this contract between the plaintiff and defendant, he, the defendant, had a right to enter and occupy the premises till the contract had expired. This original entry, then, could not have been unlawful. The contract necessarily gave the defendant a right to enter; for, by the terms of it, he was to superintend it and its concerns. There was a full implication, then, of an authority to enter and remain. This doctrine is too clear to admit of doubt. He was hired for the express purpose of being and remaining there in fulfillment of his contract. The plaintiff should have, at least, offered to pay the defendant the proportion of his salary due from November to January, and tendered it, too, before he could insist on dismissing him from his employment, and forbidding him to enter, and on maintaining trespass against him, when, as the case finds, he had not violated the contract on his part. It appears to me such a principle is opposed to all the doctrine of contracts. It enables one party to rescind an agreement at pleasure, and thereby give to himself a right of action."

the licensee for damages.* A tenant from year to year, being desirous of letting his house for a quarter, quitted and left it locked, with authority to his landlord to let it during his absence, if an opportunity offered, and for that purpose left the key with a neighbor. An opportunity for letting the house occurred; but the person who had the key having absconded, the landlord entered by placing a ladder against the house, and raising the first floor window, and after showing the inside of the house, left it in the same state as before. The house was afterward entered by persons unknown, and some of the tenant's furniture and wearing apparel were stolen. The tenant having brought an action against the landlord for breaking and entering the house, and leaving it insecure, in consequence of which his furniture and wearing apparel were

* In Abbott v. Wood, 13 Maine, 115, which was an action of trespass *quare clausum*, the plaintiff, in 1827, owned the undivided half of the premises in question. The other undivided half belonged to one Abbott, who, in 1829, with the plaintiff's knowledge, leased said undivided half to the defendant, for the term of six years. The defendant made a parol division with the plaintiff, and occupied about four years, when he transferred his right to one Hodgman, reserving the right to have a hired man board at the house; and also reserving the right to remove his property from the house. In February, 1834, Hodgman underlet that half of the house to the plaintiff, who then occupied the whole. In March, 1834, the defendant, accompanied by an officer, to whom he had delivered an execution in his favor against the plaintiff, broke and entered the house, ostensibly for the purpose of removing some grain which he had there. The court, in holding that the defendant thereby became a trespasser, said: "Had the defendant entered the house, even with force, if necessary, for the purpose of removing his grain, we are not prepared to say that trespass could have been maintained against him. That right he had reserved to himself, when it belonged to him, to prescribe on what conditions he would part with his interest. But it is very manifest that his object was to put the officer having an execution in his favor against the plaintiff into the house, and there is reason to believe that the removal of the grain at that time was to give color of right to the transaction. He claimed access for the officer, and called upon him to break the door, and when he declined, the defendant forced an entrance for him. The plaintiff had before offered to deliver to the defendant any articles of his own he might desire to remove from the house. It appears to us that the defendant has made out no justification for the act with which he is charged, but that an entry was forced through the outer door of the plaintiff's house, without right and against law, to enable the officer to serve therein civil process." The court, in defining the interest which the defendant had in the premises, said: "We are of opinion that the right of ingress and egress for the removal of his property in the house, reserved in the lease made by the defendant to Hodgman, and the reservation of the right to have a man board in the house, did not constitute the defendant a tenant in common in the estate. It was a privilege reserved for a temporary purpose. If it might be exercised even forcibly, against the will of Hodgman or those claiming under him, by the defendant, without being charged as a trespasser, it gave him no interest in common in the estate. It was not in its nature tangible or capable of partition."

stolen, it was held that a plea of leave and license was no answer.[1]

§ 790. A person who goes upon another's premises by public license or authority of law, and afterward does an unwarrantable act, is deemed a trespasser *ab initio*, and is held responsible for all the injury committed.[2] One who, under color of lawful process, enters upon the premises of another, and subsequently commits there acts of trespass not authorized by the process, is presumed to have entered, not with the purpose of its lawful execution, but of committing the subsequent acts of trespass of which he may have been found to have been guilty. In such case, he will be presumed to have abandoned the authority given him, and to have acted in his own wrong, and will not be allowed to derive from it the advantage of its protection for the entry made, but will be holden to have forfeited it by reason of its abuse.[3]* In an action for breaking and entering the plaintiff's premises and taking therefrom a printing press and certain other property, it was held that, although the defendant had a right to enter and take the printing press, yet, as he also took types and other materials belonging to the plaintiff, he thereby became a trespasser *ab initio*.[4] And the same was held where a person, acting as the servant and assistant of a newly appointed postmaster, entered the dwelling-house of the former postmaster, in which the post office had been kept, for the purpose of removing the furniture and fixtures belonging to

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[1] Ancaster v. Milling, 2 D. & R. 714.

[2] Six Carpenters' Case, 8 Co. 146 *a*; Reed v. Harrison, 2 W. Blk. 1218; Aitkenhead v. Blades, 5 Taunt. 197; Ballard v. Noaks, 2 Pike, 45.

[3] Ferrin v. Symonds, 11 N. Hamp. 368. [4] Holly v. Brown, 14 Conn. 255.

* The abuse of the authority of law, which makes a man a trespasser *ab initio*, is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts lawful which the law does not forbid.

Where a person, who had no right of entry upon premises, went before justices and obtained an order of ejectment pursuant to the statute (1 & 2 Vict. c. 74), it was held that he might be sued in trespass by the occupier for thus wrongfully asserting a right (Darlington v. Pritchard, 5 Scott, N. R. 610; 2 Dowl. N. S. 664.

the government to the new office, and committed an assault and battery upon the former postmaster and his wife.[1]

§ 791. When the party himself gives an authority or license to do anything, as to enter upon land, he cannot, for any subsequent cause, convert that which was originally done under the sanction of his own authority or license into a trespass *ab initio;* and in this latter case, therefore, the subsequent act only will amount to a trespass.[2] * Stone v. Knapp[3] was an action of trespass, to which the defendant pleaded a right of way across the premises in question. It was replied that the defendant did not keep up the bars, but left them open during the day and also the night, and that, by reason thereof, damage was done by cattle running in the highway. The question was, whether the omission to keep up the bars would deprive the party of the benefit of the license. As there was no proof that the license was given, to be void if the bars were not properly kept up, the question was to be decided upon general principles. It was held that, as it was not a license in law, but in fact, no abuse of it would render the party a trespasser *ab initio*, and that the plaintiff's remedy was trespass on the case.† The general doctrine, as laid

[1] Sterling v. Warden, 52 N. Hamp. 197; s. c. 51 Ib. 217.

[2] Dumont v. Smith, 4 Denio, 319. [3] 29 Vt. 501.

* The remark of the court in Adams v. Freeman, 12 Johns. 408, that "if the defendant had received permission to enter, as by being asked to walk in, upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*," was extrajudicial, and is not supported by principle; and besides, has been virtually overruled by Van Brunt v. Schenck, 13 Johns. 414; and see Allen v. Crofoot, 5 Wend. 506.

† Where a person entered upon the lands of the Stockbridge Indians, with their written consent, and cut down trees, of which he made shingles, it was held that he was a trespasser, notwithstanding such consent, and acquired no property in the timber or shingles, such a transaction being contrary to the statute of New York, and therefore void. The provisions of the statute on the subject were substantially recited by the Supreme Court in its opinion, as follows: "The decision of this case turns upon the question whether a person can, with the consent of the Indians, lawfully enter, cut and carry away the timber growing upon the lands of the Stockbridge Indians. The court are of opinion that the entry was unlawful and contrary to the provision in the act relative to Indians, passed 4th April, 1801. The first section of that act prohibits all persons, without the consent of the legislature, from entering on any Indian lands, by pretext or color of any right or interest in the same, in consequence of any Indian contract. The second section, among other things, declares that no person shall sue on any contract made with the Stockbridge Indians; and the ninth section declares that

down in the Six Carpenters' Case,[1] is, that when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*. But when an entry, authority or license is given by the party, and he abuses it, then he must be punished for the abuse, but he shall not be a trespasser *ab initio*.* In accordance with this distinction, it is held that, if a man enter an inn or tavern,

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these Indians have no power to alienate, or lease, or dispose of their lands, or any part thereof. These several legislative provisions appear to be decisive against the validity of any Indian contract or license to enter and appropriate their timber. If a person cannot enter under pretext of any interest in their lands, and if they cannot even lease them, and if all contracts with the Indians are void, there cannot be a pretence for holding valid the agreement in the case before us. The fourteenth section of the act contains nothing repugnant to the other provisions. It only superadds a penalty against every person who shall enter and cut down the timber on the Indian lands, without consent of the peacemakers. That consent may exempt him from the penalty, but will not make the contract valid. There is the same penalty for occupying and improving their lands without consent; and it cannot surely be said that the Indian consent to occupy and improve their lands could be valid, for that would be equivalent to a lease of them, and directly contrary to a preceding section in the act. It was the wise policy of the statute to interdict all individual whites from any negotiation, or any contract with the Indians, in respect to their lands, or any interest therein. Such a complete and total interdict was indispensable to save the Indians from falling victims to their own weakness, and to the intelligence and sometimes the cupidity of the whites" (Chandler v. Edson, 9 Johns. 362).

In New York, it is provided by statute (Laws of 1855, ch. 26, § 1) that "All contracts which shall hereafter be made by any person or persons, other than Indian, with any Indian or Indians of the Onondaga nation, or with any Indian of any other nation or tribe residing or living with said Onondaga Indians, without the written consent of the agent of said Indians, for or concerning any stone, or any wood, timber, or bark of any kind, growing or being on the lands of said Onondaga nation, or that may have been taken or removed from said lands, shall be absolutely void. And any person or persons receiving, without such written consent, from any such Indian or other person, any such stone, wood, timber, or bark of any kind, either on said reservation, or that may have been removed therefrom, knowing the same to have been taken or removed from said reservation, shall be liable as trespassers for five times the value of such stone, wood, timber, or bark, to be prosecuted for by the agent of said Onondaga Indians, in the name of the people of this State."

[1] 4 Co. 290; 8 Ib. 146 *a*; see 1 Smith's Leading Cases, 5th Am. ed. 216, 221; Allen v. Crofoot, 5 Wend. 506; State v. Moore, 12 N. H. 42.

* The reason of the difference is said to be that, in case of a license by law, the subsequent tortious act shows *quo animo* he entered; and having entered with an intent to abuse the authority given by law, the entry is unlawful; but that where the authority or license is given by the party, he cannot punish for that which was done by his own authority. A better reason is given for it in Bacon's Abridgment (Tit. Trespass, B). Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith.

and afterwards commits a trespass; if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress; or if he who enters to see waste, breaks the house or stays there all night; or if a commoner cuts down a tree—in these, and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be deemed a trespasser *ab initio*. In all the cases put by Coke, the acts complained of as abuses of the power were distinct acts of trespass. And it seems to be the better opinion that a man cannot become a trespasser *ab initio* by any act or omission which would not itself, if not protected by a license, be the subject of trespass.

4. *Determination of license.*

§ 792. Verbal permission to enjoy an easement over or upon the land of another is determined by the death of either party;[1] but not where a written license is granted to two to take personal property from the land of another, and one of the two afterward dies.[2] A license will be determined by the assignment of the subject-matter in respect to which the privilege is to be enjoyed; and the grantee of the license will be deemed a trespasser, if he subsequently enter upon the land, although he does so without notice of the transfer.[3] In Hull v. Babcock,[4] where Goodrich gave a license to Hitchcock to build a house about the pool at New Lebanon, and occupy it during his necessity or pleasure, and Hitchcock built a small house and occupied it seventeen years, and then sold it to one Cragie, it was held that Hitchcock had only a personal license or privilege to inhabit, and had no title to the premises, and that his sale to Cragie put an end to this privilege. In an action for trespassing upon the plaintiff's farm, the defendant pleaded

[1] Johnson v. Carter, 16 Mass. 443; Miller v. The Auburn & Syracuse R. R. Co. 6 Hill, 61; Prince v. Case, 10 Conn. 375.

[2] Chandler v. Spear, 22 Vt. 388.

[3] Wallis v. Harrison, 4 M. & W. 538. [4] 4 Johns. 418.

that the plaintiff had granted to A., for a valuable consideration, the peaceable possession of a certain ten acre lot, for life, which lot was a part of the said farm; with the privilege of taking from the said farm all the fruit and fire-wood A. should desire for his own use; that A. rented the said lot to the defendant, with his rights, privileges and appurtenances, thereunto belonging; and that the defendant by virtue of said lease, entered the plaintiff's close from the said lot, and took the apples and fire-wood mentioned in the declaration. It was held that as the agreement was a personal one, and did not pass to the defendant under his lease, the plea was bad.[1] *

§ 793. Where a party assents to the entry of another on his land, with an understanding between them, that the other is to buy the land, and take a deed in due time, and the other afterward refuses to buy, it is a forfeiture of the license to enter. In such case, the owner of the land may bring an action of trespass, or may waive the tort, and proceed upon the implied promise for use and occupation.[2]

5. *Revocation of license.*

§ 794. A license may be revoked, notwithstanding it is founded on contracts mutual, so far that one is the consideration, though not the condition precedent of the other. A license of this character falls within Lord Mansfield's first division of covenants, mutual to a certain extent, but yet independent. In such a case, either party may not only

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[1] Gronendyke v. Cramer, 2 Carter, 382.

[2] Clough v. Hosford, 6 N. Hamp. 231; Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 Ib. 489; and see Williams v. Noiseux, 43 N. Hamp. 388.

* By lease not under seal, R. & C., trustees on behalf of themselves and the other proprietors of a theater, demised to S. for three years, reserving to themselves and the other proprietors free liberty of admission to the theater. S. by lease not under seal, let the theater to the plaintiff for two nights, subject to the terms on which he held the theater. Held that the license was determined, and that an action of trespass might be maintained against the defendant, a proprietor who entered the theater during his tenancy (Coleman v. Foster, 1 H. & N. 37).

have his action for a breach of the contract, without regard to the performance of his contract to the other party, but may revoke his license, whether the other party revokes his or not, provided the license be on other grounds revocable. In Dodge v. McClintock,[1] which was an action of trespass for breaking and entering the plaintiff's close and cutting and carrying away wood and timber, it appeared that there had been a mutual agreement between the parties, that the one should have leave to cut timber and wood, and that the other might flow lands by a dam to a certain extent. The plaintiff had revoked the license to the defendant to cut wood and timber on his land, before the alleged trespass. But it was urged that this revocation could not be effectual until the plaintiff should cease to flow the defendant's land; that these licenses were mutual and dependent, in the nature of conditions precedent, so that neither could revoke the license given to the other, so long as he enjoyed the benefit given to him. It was however held, that the plaintiff was entitled to recover.*

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[1] 47 N. Hamp. 383.

* In Marston v. Gale, 4 Fost. 176, the defendant's land upon which he built a dwelling lay back of the land of the plaintiff, the defendant having no access thereto without trespassing upon others. The plaintiff thereupon gave him verbal leave to pass across the plaintiff's land, in going to and from his house on condition, that the defendant would not petition for a road to be laid out so as to compel the plaintiff to fence it, and would keep the gates on the passway shut; the plaintiff to pay for putting up the gates. It appeared that the defendant fulfilled his part of the agreement; that he used the passway eight or ten years without objection; and that he had done some work on the passway. The plaintiff a few days before bringing the action made a verbal revocation of the license, and told the defendant if he passed again over his land he should prosecute him. A verdict having been found for the plaintiff, the Supreme Court, in directing judgment to be entered on it, said: "In the present case, so far as the right to pass was exercised before the plaintiff revoked the license, no question is made. The only question is, whether the defendant was justified in the exercise of that right, after the plaintiff forbade it. We think it quite clear, that he was not. So far, the license was unexecuted at the time of the revocation. The subsequent acts of the defendant were not done under the protection and shield of the license, for that no longer existed, and was as to those acts, as if it had never been given. To hold otherwise, would be giving to a parol license the force of a conveyance of a permanent easement in real estate. Such a doctrine cannot be sustained. No such right or interest in real estate, can be created by parol. And we think it can make no difference that the parol license was given upon an agreement of the defendant that he 'would not petition for a road to be laid out, and would keep the gates on the passway closed.'' That fact could not change the character of the parol license,

§ 795. A license may be revoked by the wife in her husband's absence, if she has been specially authorized by him to do so, without previous notice to the other party of her authority. In an action for trespass on land, the defendant claimed that he entered the premises to hunt by consent of the owner. The plaintiff replied that the license was revoked by his wife, acting under his express authority, and that the defendant continued to hunt after the revocation. The defendant denied that he had any knowledge or means of knowing that she had such authority. The facts proved were, that the plaintiff was absent from home on the day of the occurrence; that he left the premises in the sole care of his wife; that he gave her express directions to forbid hunting, and to order trespassers away; that she ordered the defendant away; that he knew she was the plaintiff's wife, but did not ask for her authority, or refuse to leave on that account. The question was, whether the defendant, from the facts within his knowledge as proved, was bound to understand that the wife had the authority claimed, or at least to suppose so, and to make inquiry on the subject. It was held that the wife could not revoke her husband's license, unless specially authorized by him; that there was no necessity that her authority should be expressly disclosed to the defendant; but that it was sufficient if the circumstances indicated to him an apparent authority.[1]

§ 796. Where a parol license has been given to enter upon another's land, and do acts which involve an expenditure of money, and the license becomes executed by an

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or alter its legal effect. It was nevertheless revocable in its character, and furnished no justification or excuse for acts done subsequently to its revocation."

The subject of dependent and independent covenants and contracts, is fully considered in Pordage v. Cole, 1 Saund. 319, in note 4 by Sergt. Williams, and numerous authorities cited.

The plaintiff who was the owner of land on both sides of a highway at a point where it was crossed by a brook, obstructed access to the brook at which the defendant had watered his cattle for over twenty years, but without interfering with the traveled portion of the highway. It was held that the defendant had no right to remove the obstructions, and that in so doing he became a trespasser and liable to exemplary damages (Strickland v. Woolworth, 3 Thompson & Cook, N. Y. Supreme Ct. R. 286).

[1] Kellogg v. Robinson, 32 Conn. 335.

expenditure incurred, it is either irrevocable, or cannot be revoked without remuneration, for the reason that a revocation under such circumstances, without remuneration, would be fraudulent and unconscionable.[1] The later cases sustain the doctrine that the license is in all cases revocable so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned.[2]* In Prince v. Case[3] it was held that when a license is given by parol, it is countermandable at will, even when executed, so as to make any further enjoyment of it a ground of action; and that, in such cases,

[1] Harris v. Gillingham, 6 N. H. 9; Putney v. Day, Ib. 430; Woodbury v. Parshley, 7 Ib. 237; Ameriscoggin Bridge v. Bragg, 11 Ib. 102; Sampson v. Burnside, 13 Ib. 264; Carleton v. Redington, 21 Ib. 291; Cowles v. Kidder, 24 Ib. 364; Miller v. Tobie, 41 Ib. 84; Liggins v. Inge, 7 Bing. 682; Tayler v. Waters, 7 Taunt. 373; Ricker v. Kelley, 1 Greenlf. 117; Clement v. Durgin, 5 Greenlf. 9; but see Cook v. Stearns, 11 Mass. 533; Bridges v. Purcell, 1 Dev. & Bat. 492.

[2] Ruggles v. Lesure, 24 Pick. 187; Stevens v. Stevens, 11 Metc. 251; Marston v. Gale, 24 N. H. 176; Hall v. Chaffee, 13 Vt. 150; Hyde v. Graham, 32 L. J. Exch. 27.

[3] 10 Conn. 375.

* A parol license to enter upon another's premises to cut a drain, to construct a culvert, to flow the land, or to erect and maintain a house, is revocable, and confers no right whatever upon the licensee to occupy the premises after it is revoked (The People v. Fields, 1 Lansing, 222, per Morgan, J., citing Harris v. Gillingham, 6 N. H. 9; Bachelder v. Wakefield, 8 Cush. 243). In Jackson v. Babcock, 4 Johns. 418, it was held that a written license by the owner to another to build upon and occupy his lands was revocable, and gave to the licensee a mere license or personal privilege to inhabit, and conferred no title to the possession. Such a license of the owner of the land to another to erect a house on such land for his use, operates only as an excuse for the act, and passes no interest in the land. In Haywood v. Miller, 3 Hill, 90, the plaintiff entered into possession of a house upon the defendant's premises, under a contract to work the defendant's land for a year, and it was held that it created no tenancy; and the defendant having entered the house, and put the plaintiff's furniture out, the plaintiff sued him in trespass, but judgment was rendered for the defendant, the possession of the plaintiff in such case being the possession of the owner.

The plaintiff brought an action of trespass for cutting and carrying away timber in the year 1807; and he showed title, possession and the trespass committed, by direction of the defendant, to the amount of the damages claimed. The case then turned upon the justification set up by the defendant, which was attempted by the production of a letter written to him by the plaintiff in 1804, in which the plaintiff consented to his taking timber upon the terms proposed in a letter of the defendant. To countervail the justification thus attempted to be set up, the plaintiff proved that a revocation of this permission was duly notified to the defendant in 1806, by which the defendant refused to abide, but caused the timber in question to be subsequently cut. Held, that the permission given by the plaintiff in 1804 was a mere license to cut timber, which was revocable, and that the act of the plaintiff in 1806 did away with the force of the permission given in 1804; that if the letter was founded upon any proposition of the defendant so as to form a contract which would justify the trespass, it lay with the defendant, and not with the plaintiff, to show that fact (Tillotson v. Preston, 7 Johns. 285).

where money has been expended upon the faith of such license, so that the parties cannot be placed *in statu quo*, a court of equity will grant relief, as in other cases of part performance of a parol contract for the sale of land or any interest therein. The cases do not agree as to the form of the remedy which the licensee should pursue to recover the money he has expended; some holding that it may be by action at law for breach of contract; others that it must be in equity, by compelling specific performance.[1] *

§ 797. If a person enter on land under a contract to do work, and the license to enter be afterward withdrawn, such withdrawal will render his subsequent entry wrongful, and will consequently excuse his non-performance of the contract. Where one covenanted by indenture to build a house of certain dimensions within a certain time for ten pounds, and an action of covenant was brought for the non-performance of the contract, and the defendant pleaded that he went and was ready to have built the house, and that the plaintiff commanded him not to build it, by reason of which he left it undone, Littleton, J., held that this was a good plea; for, if the carpenter had entered the plaintiff's premises after com-

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[1] Houston v. Laffee. 46 N. H. 505; Morse v. Copeland, 2 Gray, 302; Foot v. the New Haven &c. Co. 23 Conn. 214, 223; Mumford v. Whitney, 15 Wend. 380; Wood v. Leadbitter, 13 M. & W. 838; Wood v. Manley, 11 Adol. & El. 34.

* Giles v. Simonds, 15 Gray, 441, turned upon the question whether an owner of land who had entered into a verbal contract for the sale of standing wood or timber, to be cut and severed from the freehold by the vendee, could, at his pleasure, revoke the license which he gave to the purchaser to enter on his land and cut and carry away the wood or timber included in the contract. It was held that, so far as the license was executory, it was revocable, and that the licensee, by entering after its revocation, became a trespasser.

After a recovery of premises by ejectment, any one in possession is a trespasser, and cannot justify in an action for damages under a license of the defendant in the ejectment suit (Girdlestone v. Porter, Woodf. L. & T. 428).

Where a person works a mine under an agreement with the owner of the mine which, by its terms, may at any time be revoked, the privilege is a mere license, and if he continues to work the mine after it is withdrawn, he will be a trespasser (Lockwood v. Lunsford, 56 Mo. 68, referring to Lunsford v. The La Motte Lead Co. 54 Ib. 426).

As to what acts amount to a revocation of leave and license, and what conclude the party giving the license, see Harvey v. Reynolds, 12 Price, 724.

mand not to do so, the plaintiff might have maintained an action of trespass against him therefor.[1] *

6. *When a license will be irrevocable.*

§ 798. A beneficial license to be exercised upon land, when acted upon under a valid contract, cannot be countermanded. Where persons wishing to supply a town with water sought from the defendant liberty to make a water-course through his land, and permission was granted verbally, and the water-course was constructed at large cost, and was used for nine years, when a controversy arose and the defendant cut the water off, the English Court of Chancery restrained the defendant, by injunction, from obstructing the flow of water, on compensation being made to him for the use of his land.[2] A., with the permission of B., placed a log and rails in a ditch which bounded their lands, to prevent the ditch from being stopped up with silt. Subsequently, B. removed the obstruction from his own half of the ditch, and the ditch was filled with sand which caused A.'s land to be overflown. It was held that A. could maintain an action of trespass against B. therefor.[3] †

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[1] 1 Powell on Contr. 418.

[2] Devonshire v. Eglin, 14 Beav. 530.

[3] Hogwood v. Edwards, Phill. N. C. 350.

* It has been said that the reason here given for the judgment was not the opinion of the court, but the mere *dictum* of Littleton, J. Admitting this to be true, it will not be denied that the authority of Littleton is entitled to great respect, and Mr. Powell cites the opinion with apparent approbation.

† The plaintiff, being distrained on for rent, gave the defendant, her landlord, the following undertaking: "In consideration of Mr. C. giving me the furniture distrained for rent, I undertake to give him possession of the premises on or before one week from the date hereof." The plaintiff acted on this instrument, by selling some of the furniture for his own use, and at the end of a week the defendant took possession. The plaintiff having sued him in trespass, and the defendant having pleaded leave and license, it was held that the foregoing instrument established the plea; that the license was not revocable, or if it were so, that no evidence of revocation could be given without being replied (Feltham v. Cartwright, 5 Bing. N. C. 569; 7 Scott, 693; 3 Jur. 606).

In Web v. Paternoster, Palm. 71, where license was given to put a stack of hay upon land, it was held that it could not be countermanded until after a reasonable time had elapsed. But this was before the statute of frauds. In Winter v. Brockwell, 8 East, 308, the plaintiff permitted the defendant to create a skylight over his own premises, through which the plaintiff claimed a right to air and light; and Lord Ellenborough held that it was not countermandable, at least without placing the party in the situation in which he was before. In

§ 799. A license to enter on land for the purpose of removing trees or timber therefrom, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. By virtue of the contract, and with the express or implied consent of the owner of the soil, the vendee has been induced to expend his money and his services. The trees, so far as they have been severed from the freehold, have become converted into personal property, and vested in the vendee. A revocation of the license would, to the extent to which it had been executed, operate as a fraud on the vendee, and deprive him of property to which he had become legally entitled. Besides, the owner of land cannot, by a subsequent revocation of his license, render that unlawful which, with all its incidents and necessary consequences, was lawful at the time it was done, by virtue of his own authority and consent. The true distinction between an executory verbal license to enter on land under a contract for the sale of timber or trees growing thereon, and a similar license executed, seems to be this: The former confers no vested interest or property, no money or labor is expended on the faith of it, and no right or title is impaired or lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licenser for a breach of the contract. It cannot be held to extend further, so as to confer a right to use the land of another without his consent, because it would thus confer *ex proprio vigore* an interest in land which cannot be created except by writing. But such a license executed to the extent to which it has been acted on, has

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Liggins v. Inge, 7 Bing. 682, the parties were both mill owners on the same stream. The defendant cut down a bank on his own land, and erected a weir by consent of the plaintiff's father, by which the water was diverted from the plaintiff's mill. Finding an injury to result, notice was given to the defendant to raise the bank as before, and a suit was brought. It was held that as the plaintiff's father had in effect consented to this diversion of the water, he must be considered as having abandoned his right to have the water flow in that course, and could not complain. In these cases it was held that no interest was conveyed in the land; and in the last case, the court intimate very strongly that if that was attempted the conveyance would be void.

operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has, therefore, been held that such a license, while it is executory, may be countermanded, but that when executed, it becomes irrevocable.[1] Nettleton v. Sikes,[2] was an action for cutting down and carrying away trees from the plaintiff's land. The defendant proved that the plaintiff agreed with him verbally, that he might cut down the trees and take the bark at a price specified. The plaintiff proved that after the trees were cut and peeled, and before the bark was removed, he forbade the defendant to go upon the land and carry away the bark. The judge charged the jury, that the plaintiff could not, by his own act or prohibition, after the trees had been cut and the bark peeled by virtue of the agreement, rescind or revoke the contract so as to make the defendant a trespasser by reason of his subsequent entry on the land for the purpose of removing the bark, and a verdict having been found for the defendant, the Supreme Court refused to set it aside.*

§ 800. If the owner of land sells personal property situated on the land, the vendee thereby obtains an implied license to enter on the premises and take possession of and remove the property. In such case, the license is coupled with, and supported by a valid interest or title in the property sold, and cannot be revoked. It is not essential to the condition of such a license that the right or title to the prop-

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[1] Wood v. Manley, 11 Ad. & El. 34; Heath v. Randall, 4 Cush. 195; Patrick v. Colerick, 3 M. & W. 483; Russell v. Richards, 1 Fairf. 429; 2 Ib. 371; Smith v. Benson, 1 Hill, 176; Cook v. Stearns, 11 Mass. 533; Cheever v. Pearson, 16 Pick. 273; Ruggles v. Lesure, 24 Pick. 190; Claflin v. Carpenter, 4 Metc. 580.

[2] 8 Metc. 34.

* When the bark was peeled it became the property of the defendant by the terms of the contract; and if the plaintiff had taken it away he would have been liable to the defendant in an action of trover. The bark being the property of the defendant, and being on the plaintiff's land with his consent, and in pursuance of the contract, he had no right to prevent the defendant from taking it away.

erty sought to be removed, should have been derived from the licenser; provided the party granting the license has assented to the contract or other condition of things whereby the licensee gains the title or right of possession. And such assent may be inferred from the duty of the licenser to recognize the contract or circumstances from which the other party's right is derived.[1] Goods which were upon the plaintiff's land were sold to the defendant, the condition of the sale being that the buyer might enter and take them. The defendant, the purchaser, having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injuria*, it was held that the defendant was entitled to a verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter, and the defendant had broken down the gates and entered to take the goods.[2] Where standing trees, after being sold, are cut by the vendee and left on the land, they do not pass with the land, but are subject to the legal rights of the vendee. Any one buying the timber thus cut has a right to go upon the land to take it away; and should the owner of the land try to prevent his doing so, he would be justified in using so much force as might be required to overcome the hindrance.[3]* So too, if the owner of personal property, by virtue of a contract with, or the permission of the owner of land, places his property on the land, the license to enter upon it for

[1] Sterling v. Warden, 51 N. Hamp. 217.

[2] Wood v. Manley, 11 Ad. & E. 34. [3] Yale v. Seely, 15 Vt. 221.

* By the grant of trees by a tenant in fee simple, they are absolutely passed from the grantor and his heirs, and vested in the grantee, and go to his executors or administrators, being, in understanding of law, divided as chattels from the freehold, and the grantee hath power, incident and implied from the grant, to fell them when he will, without any other special license; and the law gives him power, as incident to the grant, to enter upon the land and show the trees to those who would have them, for without such right none would buy, and without entry none could see them; and he may assign over the property in the trees, and his assigns may enter upon the land, so long as it remains the property of the grantor, and fell trees and carry them away (Palmer's Case, 5 Co. 126 *b*; Basset v. Maynard, Cro. Eliz. 819; Stukely v. Butler, Hob. 168; Cardigan v. Armitage, 2 B. & C. 210; Liford's Case, 11 Co. 51 *b*, 52 *a*).

the purpose of removing the property, is irrevocable. The right of property in the chattels draws after it the right of possession. It would be a manifest breach of good faith to permit such a license to be revoked. No man should be permitted to keep the property of others, by inducing them to place it upon his land, and then denying them the right to enter to regain its possession. A party is not, therefore, permitted to withdraw his consent by setting up his title to the land after it has been acted on by others, and when their rights will be impaired or lost by its withdrawal.

§ 801. A license to erect a building on the land of another, cannot be revoked so as to make the owner of the building a trespasser for entering and removing it, or materials of construction, after the license is countermanded. Where, in an action for carrying away stones from the plaintiff's land, it was proved that the stones were placed on the land in pursuance of a building contract between the parties, which was afterward rescinded, it was held that the defendant had a right to remove the stones from the premises of the plaintiff, within a reasonable, and at a proper time, doing no unnecessary damage.[1] So, likewise, where a building, on the land of another, is sold at a sheriff's sale, if the owner of the land, at the time of the sale, declares his willingness that the purchaser may enter and remove the same, this assent cannot be revoked after the sale is made.[2] *

[1] Arrington v. Larrabee, 10 Cush. 512.

[2] Barnes v. Barnes, 6 Vt. 388; Web v. Paternoster, Palmer's R. 71.

* Doty v. Gorham, 5 Pick. 487, was an action of trespass for entering on the plaintiff's land and removing therefrom a shop. The defendant proved that the shop belonged to one Coombs, who moved it on to the premises and occupied it there with the plaintiff's permission; and that the defendant having bought the shop at a constable's sale, on a judgment and execution against Coombs, he entered the close and removed the shop, doing to the plaintiff as little injury as possible. The jury having found for the defendant in the court below, the Supreme Court, in refusing a new trial, said: "The shop was a chattel liable to attachment and seizure, and Gorham, the principal defendant, acquired a good title to it by his purchase under the constable's sale on the execution. Coombs, the debtor, having placed the shop upon the plaintiff's soil by his permission, was tenant at will of the land on which it stood. He had not only a right in the soil covered by the building, but also a right of ingress and egress over the plaintiff's close, to and from the highway, as necessary to the enjoyment of the shop. There is no evidence of the determination of this tenancy at will.

§ 802. If the license be given by deed, the question will be on the construction of the deed, whether it amounts to a grant, in which case the license will be irrevocable.[1] It is said by an old authority, that a license of pleasure, such as to hunt over a man's land, whether made by deed or by simple contract, is revocable; but that a license to hunt and carry away the game killed, amounts, if under seal, to a grant, and cannot be revoked.[2]

7. *Entry to retake property.*

§ 803. We have already spoken[3] of the right to enter on another's land and retake property by an implied license. It may be further observed, that if one man takes the goods or cattle of another and places them on his own land, the owner of the property may enter and retake it; and the same may be done where it is wrongfully taken and placed on the land of a third person with the assent of such third person,[4]* or when goods are on another's premises through

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The shop being erected for the purposes of trade, the tenant had a right to remove it at any time during the continuance of the estate. And had the landlord determined the estate, the tenant would have been entitled to sufficient time to remove his shop and other property. The debtor, therefore, might rightfully have removed the shop while he continued to own it; and Gorham having acquired his property in the building, and his right to the enjoyment of the soil, was guilty of no trespass in entering with the other defendants, as his servants, and removing the shop" (citing Elwes v. Maw, 3 East, 52; Rising v. Stannard, 17 Mass. 282; Ellis v. Paige, 1 Pick. 43).

[1] Wood v. Leadbitter, 13 M. & W. 845; Lee v. Stevenson, E. B. & E. 512; 27 L. J. Q. B. 263.

[2] Bro. Abr. Licenses.

[3] *Ante*, § 800.

[4] Patrick v. Colerick, 3 Mees. & W. 483.

* In Patrick v. Colerick, *supra*, Mr. Baron Peake remarked that, according to all the old authorities, "when a party places the goods of another upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption." There are many authorities to that effect in Viner's Abridgment. Thus, in title Trespass (*a*), it is said: "If a man takes my goods and carries them into his own land, I may justify my entering to take my goods again, for they came there by his own act. A man is never a trespasser in peaceably obtaining possession of his own property" (Spencer v. McGowan, 13 Wend. 257). "If J. S. has driven the beast of J. N. into the close of J. S., or if it had been driven therein by a stranger, and J. N. go thereinto to take it away, the action does not lie, because J. S. was the first wrong-doer" (Bacon's Abr. Trespass, F). So the owner may enter where it is the fault both of the owner of the goods and the owner of the land, as when the cattle of the defendant escaped through a defective partition fence maintainable jointly by both parties (1 Dane's Abr. c. 134, § 13).

Where a party has a legal right to enter into possession of land in one charac-

the fraud of the latter. Therefore a plea to a declaration in trespass for breaking and entering the plaintiff's close, that the defendant, being possessed of certain goods, the plaintiff, without his leave and against his will, took the goods and placed them on the close in the declaration mentioned, wherefore the defendant made fresh pursuit, and entered to retake the goods, is a good plea and a good justification of the entry.[1] Wheelden v. Lowell[2] was an action for breaking and entering the plaintiff's barn and taking and carrying away his horse. The defendant justified, that having been defrauded in the exchange of his horse for the note of one Lambert, by the false and fraudulent misrepresentations of the plaintiff's agent, he had the right to rescind the contract thus made; that he exercised that right by tendering to the plaintiff the note and demanding back his horse, and that the plaintiff, declining to give up the same, he entered the premises peaceably, and without being forbidden, and took therefrom his own horse, of which the plaintiff had acquired possession only by the fraud of his agent. A verdict having been found for the defendant, the Supreme Court refused to disturb it. It has sometimes been said that the owner of goods may lawfully enter the land of another upon which they are placed and remove them, provided they are there without his default.[3] In Chapman v. Thumblethorp,[4] it was held, that when the defendant's beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place where he may find them. But the foregoing propo-

ter and under one title, the law will presume that he entered in that character and under that title, and not in the character of a mere trespasser (Benson v. Bolles, 8 Wend. 175).

The owner in fee of land has a right to enter thereon in a peaceable manner, as against the grantee of a person who holds an executory contract of purchase. Accordingly, where A. held a deed of land from B., who had a bond for a conveyance upon payment of the purchase money, which payment was not made, and C., claiming under a subsequent conveyance from the party who had executed the title bond to B., entered peaceably into possession of the premises, it was held, that trespass would not lie by A. against C. for such entry (Dean v. Comstock, 32 Ill. 173, Caton, C. J., dissenting).

[1] Ibid.
[2] 50 Maine, 499.
[3] Hammond's Nisi Prius, p. 153.
[4] Cro. Eliz. 329.

sitions are stated more broadly than the authorities warrant. It seems, however, never to have been questioned, that if the goods of one are in the possession of another, without any fault of the owner, and by the wrongful act of the person in possession, the owner may reclaim them.[1] * And if A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building for the purpose of removing and depositing the goods there for A.'s use.[2]

§ 804. The owner of goods cannot lawfully take them by force from the peaceable though illegal possession of another. A. having goods on the land of B., was forbidden by the latter to enter for the purpose of taking them away, and persisting in the attempt to enter was forcibly repelled by B. It was held, that if A. then inflicted personal violence upon B., he was liable as a trespasser therefor.[3] And when a man has personal property on another's land, which came there without the latter's consent, he has no right to enter thereon, in order to take such property, even though he do no unnecessary damage.[4] † He should demand the property,

[1] Richardson v. Anthony, 12 Vt. 273.

[2] Rea v. Sheward, 2 Mees. & W. 424.

[3] Huppert v. Morrison, 27 Wis. 365; *ante*, § 167.

[4] 2 Selw. N. P. 1342; Patrick v. Colerick, 3 M. & W. 483; Anthony v. Haney, 8 Bing. 186; Mussey v. Scott, 32 Vt. 84; Sterling v. Warden, 51 N. Hamp. 217.

* There is a passage in Blackstone, and another in Swift's Digest, in support of the proposition that one cannot enter the grounds of a third person to retake property unless it is feloniously stolen. The case from Rolle's Reports on which these *dicta* are founded makes this distinction—that if property is feloniously stolen, the owner may pursue and take it wherever it is found, although the person in whose custody it is found never consented to its being placed there. But if it is taken not feloniously, and put upon the land or inclosure of another against his will, and without his consent, he shall not be exposed to another trespass by the owner of the property. A distinction was made between a felony and a trespass, probably because the owner of the goods had no remedy against the felon, but had against the trespasser. But in the latter case, if the owner of the land consented to have the goods put into his possession, the right of the owner to enter and retake them was recognized. Swift, in his Digest, recognizes this right of the owner to enter the land of another and take his goods, not only when they are stolen, but also when they are put there by the owner of the land, or by a stranger with his consent.

Where a wife has been divorced from her husband for fault on his part, an entry by her servants on his premises to remove her property, peacefully and without objection made by him, is justifiable (Kallock v. Perry, 61 Maine, 273).

† In an action of trespass for breaking and entering the plaintiff's close, evi-

and if the owner of the land refuses him permission to get it, such refusal will be evidence of a conversion for which trover will lie.[1] Therefore, in an action of trespass for entering the plaintiff's close, a plea that certain goods of the defendants were there, and that they entered to take them, doing no unnecessary damage, was held bad.[2] So, a plea that the defendant entered on the land to take his corn, growing there, which had been distrained by the plaintiff for rent due from a third person, but which corn, on a trial of the right of property, had been adjudged to belong to the defendant, was held insufficient.[3] The justification of an entry on the plaintiff's land, on the ground that the plaintiff took the defendant's goods and carried them on to his own land, wherefore the defendant entered upon the plaintiff's land, and took his goods back again, is not made out by proving the mere fact of the defendant's goods being on the plaintiff's land. It must be shown that they came there by the plaintiff's act, or assent.[4] In an action for assault and battery, it was proved that the plaintiff's horses and wagon were on the land of the defendant, where they had been left by the servant of the plaintiff, after he had been forbidden to go there; that the plaintiff attempted to enter on the defendant's land, against his will, for the purpose of taking away his property; that, in pursuing this object, the plaintiff tore down the defendant's fence after he had been forbidden to enter, and after he had been ordered by the defendant to desist; that thereupon a fight ensued, in which the plaintiff received the injuries complained of; but that the plaintiff got away his team. The circuit judge, before whom the cause was tried, charged the jury that the plaintiff had a right to enter upon

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dence that the defendant erected valuable buildings thereon, is not admissible in defense (Haynes v. Thomas, 7 Ind. 38).

A person cannot lawfully go on to the land of another and remove a house therefrom, although the larger part of the house is on his own land (Bolling v. Whittle, 37 Ala. 35).

[1] Roach v. Damron, 2 Humph. 425; Allen v. Feland, 10 B. Mon. 306, *contra*.

[2] Anthony v. Haney, *supra*.

[3] Chess v. Kelly, 3 Blackf. 488.

[4] Patrick v. Colerick, *supra*; Williams v. Morris, 8 M. & W. 488.

the lands of the defendant for the purpose of regaining possession of his property; and a verdict was accordingly found for the plaintiff. The Supreme Court, in reversing the judgment of the Circuit Court, said: "The plaintiff had been guilty of a trespass in sending his team across the lands of the defendant, after he had been forbidden to do so. And I think the defendant had the right to detain them, before they left the premises, and to distrain them *damage feasant.* But it is not necessary to decide whether the defendant detained the property rightfully or wrongfully. If the plaintiff could not regain possession of his property peaceably, he should have resorted to his legal remedy, by which he could, after demand and refusal, have recovered either the property itself or its value. He had no right to redress himself by force. The defendant had a right to protect himself, in the enjoyment of his possession and his property, by defending them against such aggression. The defendant cannot be held liable for the injuries inflicted upon the plaintiff, on the occasion in question, unless he used more force than was necessary for the defense of his possession; and it seems he did not use enough to prevent the plaintiff's effecting his forcible entry and taking away the property. But that was a question proper to be submitted to the jury."[1]*

[1] Newkirk v. Sabler, 9 Barb. 652.

* Richardson v. Anthony, 12 Vt. 273, was an action of trespass for breaking and entering the plaintiff's close and taking away two heifers. The court below instructed the jury that if they should find that, when the defendant entered the plaintiff's close and took away the heifers, he was the owner of the heifers, and entered the plaintiff's close only to take them away, and did no other damage, notwithstanding they had been in the possession of the plaintiff a year, and notwithstanding the plaintiff had forbidden the entry, the defendant would be justified in so doing, but would not be justified in entering at any other time, or for any other purpose. The jury having found for the defendant, the Supreme Court said: "In the absence of any testimony as to the manner in which the heifers in question came into the inclosure of the plaintiff, when it may as well be presumed that they came there with his consent, and without any neglect of the defendant, as the contrary, and when they were evidently detained by him under a wrongful claim, we consider that the defendant was justified in entering the inclosure to take his own property; and the fact of his having entered at any other time or for any other purpose, is negatived by the verdict of the jury. The question as to breaking and entering the close was comparatively of small importance in the case, and neither party prepared the case with a view to that alone. Nor could the plaintiff admit the ownership of the cattle, and contend that they were in his possession, without his consent, and, by the tort of the de-

8. *Right to search for stolen goods.*

§ 805. An officer in the execution of a search warrant, may lawfully enter the house in the day time, the doors being open, and make search for stolen goods; and thus far, he has the same power that he has in the service of civil process, by virtue of which he may peaceably enter the dwelling-house to serve the same, the doors being open. And he may break open the doors to execute a search warrant, if admittance be denied; and whether the goods are found or not, the officer and his assistants are justified. But if any other person than the proper officer undertake to

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fendant, without abandoning the real subject in dispute." Bennett, J., dissenting, said: "I cannot but think that the charge of the court below to the jury, was incorrect as applied to the facts of this case. There was no evidence in the case, showing by what means the heifers went out of the possession of the defendant, or how they came upon the premises of the plaintiff; but it was admitted by the defendant, that they had been in the possession of the plaintiff about one year, when he entered the plaintiff's close and drove them away. Can the defendant, upon such a state of facts, justify the breaking of the plaintiff's close to regain the possession of the cattle? I think not. It is undoubtedly true, that if A., by wrong, takes the goods of B. and puts them upon his own land, B. may justify an entry upon the close of A. to retake them. So, if, in such case, A. were to put them on the lands of a third person, by his consent, the owner might enter to reclaim them. The landholder would become a *particeps* in the wrong. But that is not this case. The defendant undertakes to justify what would otherwise be a trespass. And if he pleads specially, his plea must set forth all the facts necessary to constitute a justification. And if he gives notice, under the general issue, his notice must contain all the material facts necessary to constitute a legal justification, and those facts must be proved on the trial. Neither the facts contained in the notice, nor those proved on the trial, to my mind, constitute any justification. For aught that appears, these heifers were upon the premises of the plaintiff through the default of the defendant. The parties may have owned adjoining lands, and the defendant may have suffered that portion of the fence, which he was bound to have repaired, to have gone to decay, over which they may have escaped upon the lands of the plaintiff, and in such case he could not justify an entry to drive them off. So, if they escaped and came into the lands of the plaintiff, through the insufficiency of the fence which he was bound to repair, though the defendant might enter and retake them immediately after the escape, yet if he suffered them to remain after notice, they were there through his default, and he could not enter to retake them. In this case, the defendant admitted that the heifers had been upon the premises of the plaintiff one year before he entered to retake them; and if with his knowledge, upon well established principles, they were there, at the time of the entry, through the default of the defendant, though they might have come into the premises originally through the plaintiff's default. Indeed, I think in cases where property is stolen, the owner cannot justify the entry upon lands, wherever it may be found, to retake it, unless he uses reasonable diligence in pursuing and retaking it. In the present case, there is no evidence that the heifers went into the possession of the plaintiff through any default of his; and this we cannot presume in order to make out a justification for the defendant."

execute a search warrant, it would not afford him any protection.[1] Lord Hale says: "Whether the stolen goods are in the suspected place or not, the officer and his assistants in the day time may enter *per ostia aperta* to make search; and it is justifiable by this warrant. If the door be shut, the officer after demand to open it, and refusal, may justify breaking the door, whether the stolen goods are there or not; but as to the party upon whose suggestion the warrant issued, the breaking the door is *in eventu*, lawful or unlawful; viz., lawful, if the goods are there, unlawful, if they are not there."[2] *

§ 806. Where an officer enters a dwelling-house with a search warrant, the door being open, without doing any unnecessary damage, the owner of the house cannot maintain trespass against the party who got out the search warrant, although the stolen goods were not found.[3] In Beaty v. Perkins,[4] which was an action of trespass for entering the plaintiff's house under a search warrant, to search for stolen

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[1] Halsted v. Brice, 13 Mo. 171.

[2] P. C. v. 2, p. 151; Ib. 116.

[3] Chapman v. Bates, 15 Vt. 51; but see Reed v. Legg, 2 Harring. 173.

[4] 6 Wend. 382.

* This passage in Hale is quoted by Burns (3 Burns' Justice, 106). Mr. Chitty in his criminal law, Vol. 1, p. 66, after stating the general rules concerning search warrants—as that they must be granted on oath; must specify the places to be searched; must be executed in the day time, &c., says; that "the door may be broken after demand, and the officer will be excused, though if the party obtaining the warrant acted maliciously, he is liable to a special action on the case, but not to an action of trespass;" and he refers to 2 Hale's P. C. 151; 2 Hawk, ch. 13, sect. 17, and 3 Esp. 135, which do not support that proposition in terms, though the last case certainly goes far to establish it.

Trespass is the proper remedy against a justice of the peace, "for maliciously and corruptly, with intent to injure and oppress the plaintiff, and without probable cause," issuing a search warrant, under which an officer forcibly entered the close of the plaintiff, and took and carried away property (Muse v. Vidal, 6 Munf. 27).

The provision of the constitution against unreasonable searches and seizures, does not prohibit a search or a seizure made in attempting to execute a military order, authorized by the constitution and a law of Congress, when the jury, under correct instructions from the court, have found that the seizure was proper and reasonable (Allen v. Colby, 47 N. Hamp. 544, per Perley, C. J.)

The wife has no authority in the absence of her husband, to license a search of his house for stolen goods. Were it otherwise, an artful man might impose on the wife, in the absence of her husband, and for malicious and unlawful purposes obtain from her a license to search her husband's desks and private papers (Humes v. Taber, 1 R. I. 464).

goods, the plaintiff maintained that notwithstanding such a warrant might be a justification to the officer, although no stolen goods were found, yet that it was not so with respect to the prosecutor upon whose oath the warrant issued; and that if no goods were found upon search, trespass would lie against him. It appeared that the defendant, after obtaining the warrant, went with the officer to the house of the plaintiff, which they entered without using any force; that the plaintiff being from home, the officer told the wife of the plaintiff that they had a search warrant to search the house; to which she replied, that if they had authority, they must search; and that search was accordingly made, but no stolen property found. At the trial in the Common Pleas, the plaintiff submitted to a nonsuit, the court holding that the action could not be maintained; and the judgment was affirmed by the Supreme Court.*

9. *Complaint for search warrant.*

§ 807. In framing the complaint, care should be taken to comply fully with the statute. Where the statute required the complainant to make oath or affirmation that he believed that the stolen goods were concealed in some place in the county, and the language of the complaint was, that the com-

* In this case, the Supreme Court said: "If the process is recognized as a valid and legal one, it seems indeed to be a solecism to say that any party acting under legal process can be a trespasser. If a person is arrested upon suspicion of felony, it is upon the *ex parte* oath of the complainant; yet no dictum is to be found, saying that the informer in such case is liable for trespass in arresting the defendant, though he may be discharged by the justice before whom he is brought. An action may possibly be brought for malicious prosecution, if malice appear. So too, an action on the case might perhaps be brought in a case like this, if it appeared that the complainant had no ground for his proceedings, and was actuated by malicious motives. But if we take the law as laid down by Lord Hale, it will not sustain this suit. The officer and the defendant entered, as Lord Hale expresses it, *per ostia aperta*. The doors were open; there was no force used; no doors were broken; and it is only where the doors are broken, as I understand Lord Hale, that he considers the complainant a trespasser, no goods being found on search. Upon general principles however, I think the action cannot be sustained. The warrant having been legally and regularly issued, and duly executed in the day time, is a protection to those who executed it in an action of trespass."

In an action for unlawfully entering the plaintiff's house, under pretence of searching for stolen money, the plaintiff may prove injury to character thereby (Anon. Minor, 52).

plainant "has cause to suspect, and does suspect," &c., the complaint was held insufficient, the statute not authorizing a warrant to issue upon the suspicion of the complainant, which imports a less degree of certainty than belief.[1] The same statute provided that the house or place in which the stolen goods were believed to be concealed should be particularly described, and that the magistrate should command the sheriff diligently to search the house or place therein described, and the description in the complaint was, "the premises of Hiram Ide and Henry Ide," without naming the county or town in which the premises lay, or whether they were a dwelling-house, or store, or building of any kind, although the complaint afterward prayed that process might issue to search "the houses and buildings of Hiram Ide and Henry Ide;" it was held that, as the latter description did not aid the defendant in the stating part of the complaint, which was the part to which the magistrate must look for authority in issuing his precept, the complaint was fatally defective.[2] *

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[1] Humes v. Taber, 1 R. I. 464. [2] Ibid.

* In trespass for searching the plaintiff's house without warrant, grounds of reasonable suspicion that tools or other evidences of crime are there concealed may be proved in mitigation of damages (Simpson v. M'Caffrey, 13 Ohio, 508).

In Sailly v. Smith, 11 Johns. 500, Yates, J., in delivering the opinion of the Supreme Court, remarked that it was not necessary to decide whether the revenue collector was at all times authorized to enter and search a dwelling-house, without first obtaining a warrant from a magistrate; that this would be an extensive and highly important authority, and if it did exist, it ought to be used with great prudence and sound discretion, because it was liable to be abused, yet that public convenience, in many instances, might require that it should be exercised; that cases, however, might occur in which the officer acted unwarrantably, by proceeding, without probable cause, to break open a dwelling-house; that his conduct in such a case would make him liable, notwithstanding the law, to respond in damages to the owner of the house; and that, therefore, when such suspicions existed, it would be more correct for him to apply to a magistrate, whose warrant would effectually protect him, and prevent the necessity of showing probable cause afterwards by other testimony.

The section of the act of Congress referred to in Sailly v. Smith, *supra*, was as follows: "The collector, naval officer, surveyor, and other officer of the customs, shall have the like power and authority to seize goods, wares and merchandises imported contrary to the intent and meaning of the act; to keep the same in custody until it shall have been ascertained whether the same have been forfeited or not; and to enter any ship or vessel, dwelling-house, store, building or other place, for the purpose of searching for and seizing any such goods, wares and merchandises which he or they may have by law, in relation to goods, wares and merchandises subject to duty" (Act of Cong. § 8).

§ 808. It follows, from the well recognized principles of law which we have heretofore discussed,[1] that if the search warrant be legal in form, and issued by a magistrate having jurisdiction of the subject-matter, the officer is not answerable for any defects in the complaint on which it is founded; but is only obliged to notice defects and irregularities upon the face of the warrant.[2]

10. *Requirements of search warrant.*

§ 809. A warrant commanding the officer to search the dwelling-house of a person, means the house in which the person lives, and not houses which he owns and rents to others.[3] A warrant which directs the search of several different places, is not for that reason void. Gray v. Davis[4] was an action of trespass for breaking into the plaintiff's house, and taking away a jar and a small quantity of brandy belonging to the plaintiff. The defendant justified as the servant of a constable in the execution of a warrant directed to the officer, requiring him to search for and seize the liquor and vessel containing it, under the twelfth section of the statute of Connecticut for the suppression of intemperance. It was objected to the warrant that it directed the search to be made in several buildings, when it should have been confined to one. In support of this objection, the court were referred to the eighth section of the first article of the Constitution of Connecticut, and to a like provision in the Constitution of the United States. The articles referred to provide that, "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches or seizures; and no warrant to search any place, or seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation." It was held that a separate warrant for each suspected place to be searched, was not called for, either by

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[1] *Ante*, §§ 334, 461.
[2] Humes v. Taber, *supra*.
[3] Humes v. Taber, *supra*.
[4] 27 Conn. 447.

the letter or spirit of the Constitution, nor required for the protection of public peace, or individual security; and that to require it would occasion useless delay and expense, and tend to defeat the salutary objects of the law. But a warrant which directs the search of various places without specifying any place in particular, will be bad. The following search warrant was held to be illegal: "Search every house, store or barn within the town of Wilton, that is suspected of having certain bags concealed in it, said to be stolen, and all persons suspected of having stolen them."[1]* Where a search warrant for the seizure of liquors, stated that the liquors were "owned or kept by the said G., and are intended by him to be sold in violation of the act," it was held that this allegation was merely that of averment and not of description, and that the officer was protected under the warrant, although the liquors seized were not in fact owned or kept by G.[2]

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[1] Grumon v. Raymond, 1 Conn. 40. [2] Gray v. Davis, *supra*.

* In Grumon v. Raymond, *supra*, Reeve, Ch. J., pointed out the objections to the warrant as follows: "That this warrant was such as no justice ought to have issued will be admitted; for it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to search all suspected places, stores, shops and barns in Wilton. Where those suspected places were in Wilton is not pointed out, or by whom suspected, so that all the dwelling-houses and outhouses within the town of Wilton were by this warrant made liable to search. The officer also was directed to search suspected persons and arrest them. By whom they were suspected, whether by the justice, the officer, or complainant, is not mentioned, so that every citizen of the United States within the jurisdiction of the justice to try for theft, was liable to be arrested and carried before the justice for trial. In all the history of legal proceedings there is no such warrant to be found as to arrest all suspected persons. In those general warrants issued by Lord Halifax, as secretary of State, in search of libels, the persons to be arrested were pointed out in every warrant; but it was to ransack a man's house, and to bring all his books, papers, &c., before Lord Halifax. A number of suits were brought against those employed by Lord Halifax for having executed these warrants; and in every instance the plaintiff prevailed and recovered exemplary damages."

CHAPTER III.

INVASION OF ANOTHER'S PREMISES.

1. In general.
2. Inviolability of house.
3. Causing injury by improper use of one's own land.
4. Interruption of easement.
5. Encroaching on land with fence.
6. Continuance of obstruction.
7. Wrongful cutting of timber.
8. Interrupting enjoyment of church pew.
9. Removing dead bodies.
10. Removal or injury of tombstones.
11. Forcibly passing turnpike gate.
12. Obstructing private way.
13. Interfering with ferry or market.
14. Defiling stream.
15. Diversion of water beneath the surface.
16. Interfering with fishery.
17. Interfering with oyster bed.

1. *In general.*

§ 810. Every entry upon the land of another without lawful authority is a trespass, though only the grass be trodden,[1] and whether the land be inclosed or not.[2]* If a man's land is not surrounded by a fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property, although no actual damage may be done.[3]† The gist of the action is the wrongful

[1] Norvell v. Gray, 1 Swan, Tenn. 96.

[2] Dougherty v. Stepp, 1 Dev. & Batt. 371.

[3] Hammond's N. P. 151; Merest v. Harvey, 5 Taunt. 442; McCall v. Capehart, 20 Ala. 521.

* A builder cannot retain possession of a building as against the owner after the expiration of the time set for the fulfilment of the contract, for the purpose of enforcing payment of the contract price, the builder, if entitled to payment, having a remedy by action or by proceedings to enforce his lien (Beller v. Stange, 27 Mich. 312).

† Arden v. Kermit, Anthon's N. P. R. 112, was an action of trespass for an encroachment of about six inches by the defendant's wharf on the plaintiff's

entry, whatever is done after the breaking and entering being but aggravation of damages.[1] Therefore, unless the entry be proved, there can be no recovery.[2] * The action will lie for the wrongful entry on land covered with water.[3] A navigable water-course surrounding a person's land is a sufficient inclosure to render an entrance thereon a trespass.[4] But an action of trespass cannot be maintained for being prevented from using the water of a well on the land of the defendant which the plaintiff had a right to use.[5] †

§ 811. The wrongful entry may be made by an agent. When, in an action for trespass to land, it was proved that the defendant claimed the land, and that his son entered supposing that it was his father's, and remained on the land with his knowledge and without his objection, it was held, on appeal, that a verdict finding the father a trespasser would not be disturbed.[6] ‡ And a master will be liable

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water lot. The court was of opinion that the encroachment was occasioned by the sliding of the dock, which was a trespass for which the plaintiff was entitled to damages.

The statute of California, in permitting miners to go upon public lands occupied by others, has legalized what would otherwise have been a trespass, and it cannot be extended by implication (Fitzgerald v. Urton, 5 Cal. 308).

[1] Taylor v. Cole, 3 Term R. 292; Van Leuven v. Lyke, 1 Comst. 515; Smith v. Ingram, 7 Ired. 175; Dobbs v. Gallidge, 4 Dev. & Batt. 68; Wendell v. Johnson, 8 N. Hamp. 222; Ferrin v. Symonds, 11 Ib. 363; Mundell v. Perry, 2 Gill & Johns. 193; Curtis v. Groat, 6 Johns. 168; Brown v. Manter, 2 Fost. 468; Adams v. Blodgett, 47 N. Hamp. 219; Anderson v. Nesmith, 7 Ib. 167; Esty v. Baker, 48 Maine, 495.

[2] Pico v. Colimas, 32 Cal. 578.

[3] Smith v. Ingram, *supra*.

[4] Fripp v. Hasell, 1 Strobh. 173.

[5] Shafer v. Smith, 7 Har. & J. 67.

[6] Binda v. Benbow, 11 Rich. 24.

* In an action of trespass by husband and wife, for removing the curb and fixtures of a well, it was held that if the entry, severance, and removal were one continuous act, and the defendant entered for that purpose, the plaintiffs were entitled to recover (Barnes v. Burt, 38 Conn. 541).

†. A person cannot become a trespasser by entering upon his own land in the possession of another and exercising a right of ownership; nor can any unlawful acts committed in such exercise be so connected with it as to make him a trespasser *ab initio* (Johnson v. Hannahan, 1 Strobh. 313).

‡ In Blake v. Jerome, 14 Johns. 406, Jerome brought an action against Blake before a justice of the peace for trespass in entering on the plaintiff's land by an agent and taking away a mare and colt, after they had been demanded and refused, and the defendant had been forbidden to take them. Both parties claimed to own the property. The Supreme Court, in affirming the judgment, which was for the plaintiff below, said: "The evidence as to the right of property in the mare and colt may be somewhat questionable; but the defendant

who directs his servant to maintain a wrongful entry, although the servant uses more force than he was authorized by the master to do.[1]

2. *Inviolability of house.*

§ 812. The doctrine that a man's house cannot be forcibly entered for the execution of civil process, whether the owner or possessor be within at the time or not, is well established;[2] and the protection includes every guest and also his goods, unless he has fled to the house, or carried his goods there, in order to avoid the process.[3] Coke, Foster, and Hale, in treating of the inviolability of dwelling-houses, say that the outer doors or windows shall not be forced by an officer under such circumstances, against the occupier or any of his family who have their domicile or ordinary residence there; but that the house shall not be made a sanctuary for other persons; so that, if a stranger whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, the house is not his castle, and the officer may break open the doors or windows, in order to execute his process, after de-

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below was, at all events, guilty of a trespass in sending a person on the land of the plaintiff to take them away. The action was, therefore, technically supported; and where the evidence as to the true ownership of the property is so nearly balanced, the judgment ought not to be disturbed."

The agent may be personally liable, although he did not know that he was trespassing. In Higginson v. York, 5 Mass. 341, the defendant, who was the master of a coasting vessel, was employed by one Kenniston to go with his vessel to an island belonging to the plaintiff, and take on board several cords of wood, which he carried to Boston and sold, accounting to Kenniston for the proceeds. It was proved that one Phinney originally cut the wood without authority, and that he sold it to Kenniston. There was nothing to show that the defendant knew of the trespass committed by Phinney, or that he was concerned therein in any other way than in going to the island, getting the wood, and carrying it to Boston. It was held that the defendant was clearly a trespasser. "Phinney acquired no property in the wood by cutting it, as against the owners of the soil. Kenniston could acquire none from him, and could transfer none to the defendant. And the defendant broke the close of the plaintiff in going upon the island, and was a trespasser, and as such chargeable in damages, at least to the value of the wood taken and carried away."

It is no defense to an action of trespass, for a wrongful entry on land, that the defendant was permitted to remain a month or more in possession (Meyers v. Farquharson, 46 Cal. 190).

[1] Barden v. Felch, 109 Mass. 154.

[2] Fitch v. Loveland, Kirby, 386; Hubbard v. Mace, 17 Johns. 127; Gordon v. Clifford, 8 Fost. 402.

[3] Curtis v. Hubbard, 1 Hill, 336; s. c. 4 Ib. 437; Lee v. Gausel, Cowp. 6.

mand of leave to enter and refusal.[1] * The purpose of the law is to preserve the repose and tranquility of families within the dwelling-house; and these would be as much disturbed by a forcible entry to arrest a boarder or a servant who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as he pleased, as if the object were to arrest the master of the house or his children. A stranger, or perhaps a visitor, would not enjoy the same protection; for as they have acquired no right to remain in the house, if the occupant should refuse admission to the officer, after his purpose and authority were made known, the law would consider him as conspiring with the party pursued, to screen him from arrest, and would not allow him to make his house a place of refuge. In Gordon v. Clifford,[2] which was an action against tax col-

[1] 5 Coke, 93; Foster's Crown Law, 320; 1 Hale, 459; 2 Ib. 117; Burton v. Wilkinson, 18 Vt. 186.

[2] 8 Fost. 402.

* In England, this question, at a very early day, was a matter of some doubt. Fitzherbert has a note of a case said to have been decided as early as 1325, which is in favor of the right of the sheriff to enter the dwelling-house forcibly to seize goods upon execution. No such case, however, is to be found in the year-books of that term; nor is it stated by Fitzherbert whether the execution was in favor of the king, or of a private person. The question came before the Court of King's Bench about one hundred and fifty years afterwards (Year-book, 18 Edw. 4, fol. 4); and the decision was against the right of the sheriff to break the defendant's dwelling-house with the view of levying an execution upon his goods therein. Again, in the latter part of the reign of Queen Elizabeth (1602), in the case of Semayne v. Gresham (Cro. Eliz. 908; Moor. 668; Yelv. 29), the question was presented to the Queen's Bench for decision, in a suit brought against the owner of a house who had closed his doors against the sheriff, so that he could not enter to take the goods therein, which belonged to the defendant in the execution. Upon the first argument, according to the case by Moore, Popham, C. J., and Mr. Justice Gawdy, relying upon the case in Fitzherbert, were clearly of the opinion that the sheriff might break the door of the dwelling-house to execute the process against the goods. Fenner and Yelverton, the other two justices, being of a contrary opinion, no judgment was then given. But a fifth judge, Mr. Justice Williams, being appointed in the King's Bench in the first year of James the first, the case was again argued the next year; and Williams concurring in opinion with Fenner and Yelverton, the decision was made against the sheriff's right, as reported (5 Coke, 91). By this decision, the right to close the outer door of the dwelling-house upon the sheriff when he came with an execution at the suit of a private person, to levy upon goods, was placed upon the same basis as the right to prevent a similar entry when he came with like process to arrest the person of the defendant; and that appears to have been considered the settled law of England ever since. It has also been constantly recognized as the common law of the several States of the Union where the English common law prevails (Curtis v. Hubbard, 1 Hill, 336).

lectors for arresting the plaintiff and confining her in jail until she paid her tax, a question was raised as to the right of the defendants to enter the house of one Scammon, the plaintiff's son-in-law, for the purpose of arresting the plaintiff. It was proved that when the collectors arrived at the dwelling-house of Scammon, in order to arrest the plaintiff, they found the outer door fastened, and were refused admittance by Scammon, but the door was opened by one of the defendants, and thereupon the collectors entered and made the arrest. There was evidence tending to prove that Scammon's object in removing the plaintiff to his house, and making her a member of his family, was to prevent the collection of the tax, and prevent her arrest. It was held that, if such was his object, the collectors, after requesting the door to be opened and a refusal, might lawfully break in to make the arrest, because Scammon had received the plaintiff in bad faith.*

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* In Semayne's Case (5 Co. 91; 1 Smith's L. C. 6th ed. p. 88), the following principles were laid down: "That in all cases when the door is open, the sheriff may enter the house and do execution at the suit of any subject, either of the body or the goods. But that it is not lawful for the sheriff (after request made to open the door, and denial made), at the suit of a common person, to break the defendant's house, if the door be not opened, to execute any process at the suit of any subject. That the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law. For the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the sheriff may break the house." In the same case, it was said that when any house is recovered by any real action, or by ejectment, the sheriff may break the house and deliver the seizin or possession to the demandant or the plaintiff * * * * * *, and after judgment it is not the house in right and judgment of law of the tenant or defendant.

The Supreme Court of Connecticut, in the year 1788, said: "It has never been adjudged in any case in this State, within our knowledge, whether it be lawful or not, for an officer to break open either the outer or inner door of a dwelling-house to arrest a person on an execution for debt, or on any civil process; nor do we know of any instance where it has been done by a sheriff or other officer. We do not see any good or weighty reason for the distinction made in England between the breaking an outer door, or inner door, for that purpose; but that point need not be determined in this case" (Fitch agst. Loveland, Kirby, 380).

A landlord has no right, at common law, to break open the outer door of a building under a warrant of distress for arrears of rent. A declaration alleged that the defendant broke and entered a dwelling-house of the plaintiff, seized divers goods and chattels, carried them away, and converted them to his own use. It appeared that the defendant, who was landlord to the plaintiff from

§ 813. Where a house is occupied in distinct parts by two families, each part is deemed in law a separate dwelling, but not if there be a common entrance.[1] Stedman v. Crane[2] was an action against a deputy sheriff for breaking into the plaintiff's dwelling-house and arresting him. It was proved that the house was occupied by two families—that is, the plaintiff and one Cone, each having distinct apartments and separate outer doors. The defendant entered without breaking into the part of the house occupied by Cone through his outer door, and passed from thence into the plaintiff's apartments by breaking open a door leading into them from the rooms occupied by Cone, after notice and request to be admitted. The judge before whom the cause was tried charged the jury that an entry into Cone's room through his outer door, though peaceable and with the assent of Cone, would not excuse the breaking open of a door leading into the rooms occupied by the plaintiff, which was kept closed; but that if such door was in common use by the two families, either to go out of the house through Cone's outer door, or to pass through the interior of the house, it would not be privileged as an outer door, and the officer being

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whom rent was due to him, had, in order to make a distress, entered on the plaintiff's premises by forcibly breaking in a window, and had seized and sold his goods. It was held that this mode of entry on the premises, being unlawful in itself, rendered the defendant a trespasser *ab initio*; and that the plaintiff was entitled to recover the full value of the goods, and not that value less the sum due for rent (Attack v. Bramwell, 3 B. & S. 520; and see Brown v. Glenn, 15 Jur. 189).

The town officers of the town of A., in which a pauper had his legal settlement, entered the pauper's house in the town of M., where he was in a suffering condition, and removed him, his family and effects, to the town of A. An action of trespass *quare clausum* having been brought against the officers by the pauper, it was held that, as the defendants had no authority in writing from the overseers of the poor of A., as required by the statute, they were not justified as town officers in removing the plaintiff, his family and effects, and that they were liable as trespassers for so doing; but that the gist of the action being the breaking and entering the plaintiff's close, if the plaintiff gave the defendants permission to enter his house, and they entered with his consent, they were entitled to a verdict (Hunnewell v. Hobart, 42 Maine, 565).

A police officer hearing a noise in a public house at one o'clock in the night, entered the house, the door being open. It was held that this was not a trespass (Rex v. Smith, 6 Car. & P. 136).

[1] Hammond's N. P. 149, 152; Whalley v. Williamson, 7 Car. & P. 294; Fallon v. Anderson, Peake, 110.

[2] 11 Metc. 295.

peaceably in the room of Cone adjacent to the plaintiff's room, had a right, after due notice of the object of his entry, and refusal to admit him, to open the plaintiff's room and make the arrest. The Supreme Court held that the foregoing instruction was correct.*

§ 814. An officer who has entered the house of another, in violation of law, cannot be justified in consummating the wrong, by arresting his person or removing the goods, where it is all one continuous act.[1] † In the Year Book,[2] a case is reported as follows: "Catesby came to the bar and showed how a *fieri facias* was directed to the sheriff of Middlesex to cause execution to be made for one J. upon a recovery by the said J. against one B.; and afterwards the said B. put all his goods into a chest closed and locked; and afterwards the sheriff broke the [outer] door of the house and entered into the house, and took the goods [away] with him. And whether the sheriff had done any wrong. Littleton and all his companions held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *fieri facias;* for the *fieri facias* shall not excuse him of the breaking of the house, but of the taking of the goods only." Afterwards, in Semayne's Case,[3] the court, in speaking of the foregoing, say: "By Littleton and all his companions, it was resolved that the sheriff cannot break the defendant's house by force of the *fieri facias*, but he is a trespasser by the breaking; and yet the execution he then doth in the house is good." In Lee v. Gansel,[4] Lord Mansfield referred to the first of the foregoing cases as an ac-

[1] Curtis v. Hubbard, 4 Hill, 437; s. c. 1 Ib. 336; The People v. Hubbard, 24 Wend. 369; State v. Hooker, 17 Vt. 658; Hooker v. Smith, 19 Ib. 151.

[2] 18 Edw. 4, fol. 4, pl. 19. [3] 5 Coke, 93.

[4] Cowp. 1, 6.

* If A. be in possession of part of a house, and B. of the other part, and an officer enter into A.'s part under a writ against B.'s goods, which are not there, A. may maintain an action against the officer for breaking and entering his house, and need not new assign to a justification under the writ against B. (Fallon v. Anderson, *supra*).

† There is nothing to prevent a sheriff from serving an execution in the night as well as in the day time (Williams, Ch. J., in Burton v. Wilkinson, 18 Vt. 186).

tion for breaking the outer door, in which the court decided that the action would lie, but at the same time held that an action would not lie for taking the goods. "I quote," said he, "this case, not to imply that I should perhaps have been of the same opinion myself, in a case of the first impression; but to show that the rule of privilege is taken most rigidly." In Hooper v. Lane,[1] however, the court stated that the alleged decisions on the point in question were not law, remarking that the *dictum* in the Year Book and that in Semayne's Case were both purely extrajudicial. In Curtis v. Hubbard,[2] which was an action for assault and battery, it appeared that the plaintiff, who was sheriff, went to the house of the defendant's brother with an execution, for the purpose of levying on property; that the defendant's brother, being in the door yard, forbade the sheriff entering the house, the door of which was closed and latched; that the sheriff, notwithstanding, opened the door and went in, and was carrying away a clock which he had seized when the defendant grappled with him, and in the struggle that followed the sheriff was thrown down, but that no more force was employed than was required to prevent the sheriff from taking away the clock. The plaintiff was nonsuited, on the ground that as the sheriff entered the house illegally he had no right to make a levy.

But persons who, after an officer has entered illegally, seeing him actually within the house, and being ignorant of the manner in which he entered, innocently and from a sense of duty go to his aid, will not be trespassers.[3]

§ 815. Where the execution of a process has been properly commenced, the officer may afterward break the outer door, if necessary, for the purpose of continuing and completing the execution. If the defendant, after an arrest, escape and take shelter in a house, the officer may break open the house and retake him, whether it belong to the debtor or be

[1] 6 H. L. C. 443.
[2] 1 Hill, 336.
[3] Oystead v. Shed, 13 Mass. 520; s. c. 12 Ib. 505.

the house of a stranger, provided the officer has given notice of the object of his coming, and has demanded and been refused admission.[1] Where a party arrested by a constable on an execution issued by a justice of the peace broke away from the constable and shut himself up in his house, it was held that the constable, in the pursuit to retake the party, had an unquestionable right to break open the outer door of the house after making known his business, demanding admission and being refused; and that if the constable had been previously thrust out of the party's house and the door shut upon him, no such demand was necessary.[2] And the principle is the same in the case of a levy upon goods. If the defendant has afterward shut them up in his dwelling, and the officer cannot gain admittance upon a reasonable demand, he may force the doors for the purpose of regaining legal control over the property. Accordingly, where an officer having levied upon goods in the house of the owner, and partly inventoried them, left them, and upon going back the next day was refused admittance, whereupon he broke open an outer door, it was held that he was justified.[3] A different rule would put the officer in a perilous condition. By the original levy, he makes himself answerable to the creditor for the goods, or for so much of them as will be sufficient to satisfy the debt; and if his control over the property is made to depend on the will of the debtor, it is easy to see that the goods may be wasted or destroyed, and yet the officer be charged with the payment of the debt. When a levy has been duly made, the property is in the custody of the law, and the officer may do whatever is necessary for the purpose of maintaining his legal control over it.

§ 816. If the officer, after he has peaceably entered, and before he can make an arrest, is forcibly ejected, and the outer door fastened against him, he may break open the

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[1] Anon. Lofft, 390.

[2] Glover v. Whittenhall, 6 Hill, 597.

[3] Allen v. Martin, 10 Wend. 300.

outer door in order to effect the arrest.[1] * And when he has once lawfully got inside the house, he may break open the outer door to get out again, if the door is locked and there is no one in the house who will open the door.[2] † Where the window of a house is open, or a pane of glass broken, and the officer puts his hand in, and touches one for whom he has a warrant, he becomes his prisoner, and the officer may break open the door of the house if necessary,[3] or break through the window.[4]

§ 817. After a peaceable entry by an officer at the outer door of a dwelling-house, he may lawfully break open an inner door of the house, either to seize the person or the goods of the owner of the house, or of a lodger therein;[5] and he need not demand to have the inner doors opened to him before he breaks them, in order to take the goods under an execution.[6] And it seems that any resistance to the officer after he has once entered at the open outer door will be unlawful, although the entry may have been obtained by deceit.[7]

§ 818. Where a felony has been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the

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[1] Aga Kurboolie Mahomed v. Reg, 3 Moore P. C. C. 164.

[2] Pugh v. Griffith, 7 Ad. & E. 827.

[3] Anon. 7 Mod. 8; Sandon v. Jervis, E. B. & E. 935; 28 L. J. Exch. 156.

[4] Lloyd v. Sandilands, 8 Taunt. 250.

[5] Lee v. Gansell, 1 Cowp. 1; Lofft, 374.

[6] Hutchinson v. Birch, 4 Taunt. 619. [7] Rex v. Backhouse, Lofft, 61.

* Where the person in possession of goods distrained for rent, having temporarily absented himself, found on going back the door locked against him by the tenant, and broke it open in order to get in, it was held that he was justified in so doing (Bannister v. Hyde, 2 Ellis & E. 627).

In trespass for breaking the outer door and entering the plaintiff's dwelling-house, the defendant may give in evidence, under the general issue, that he had entered by virtue of a warrant of distress for rent, and was turned out of possession, whereupon he committed the trespass complained of (Eagleton v. Gutteridge, 11 Mees. & W. 465; 2 Dowl. N. S. 1053; 12 L. J. N. S. 359).

† Where A., having peaceably entered the premises of B., the latter locked the gate, in order unlawfully to detain A.'s goods. It was held, that A. did not become a trespasser by forcing his way out by breaking the gate (Robson v. Jones, 2 Bailey, 4).

party's own house is no sanctuary for him; doors may, in any of these cases, be forced, notification, demand and refusal having been previously made. In these cases the principles of political justice conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has actually been committed, unless the officer comes armed with a warrant from the magistrate grounded on such suspicion.[1] Where it is the duty of the officer to arrest a party in his own house, and to effect this, if need be, by breaking and entering the house by force, it is his further duty to make search for him there, and although in the event it appears that he was not in the house at the time such arrest was attempted to be made, yet the breaking and entering the house for the purpose of making the arrest will be justified if the officer acted *bona fide*, and under the belief that the party was there, and after proper notice, broke and entered the house, doing no unnecessary violence or damage.[2] Although a private person may justify the breaking and entering another's house and imprisoning his person to prevent him from committing murder,[3] yet, except in a case of urgent necessity like this, the law protects every one in the peaceable possession of his dwelling, and entitles him to recover damages from every wilful and intentional intruder.[4]

§ 819. A barn, or out-house adjoining to and parcel of the house, or within the curtilage, may be broken open to make a levy, a request having first been made for admittance;[5] and a barn in a field may be opened without

[1] Foster's Discourse on Homicide, 319; 1 East P. C. 326; 1 Hale P. C. 459; State v. Smith, 1 N. Hamp. 346.

[2] Barnard v. Bartlett, 10 Cush. 501. [3] Hancock v. Baker, 2 B. & P. 260.

[4] Sears v. Lyons, 2 Stark. 318; Rogers v. Spence, 13 M. & W. 571.

[5] Penton v. Browne, 1 Sid. 186; Douglas v. The State, 6 Yerg. 525.

request.[1] Where an officer who goes to a mill or shop to attach machinery therein is refused admittance, he may break into the building, using no more force than is necessary for that purpose, whether the property he proposes to attach belongs to the owner of the mill or another person.[2] * But in an action against a private person for breaking and entering the out-building of the plaintiff, it is no justification that the defendant was tenant in common with the plaintiff of goods deposited therein, and that the breaking and entering were for the purpose of removing them. In Crocker v. Carson,[3] hay, cut for the plaintiff by the defendant on shares, was placed in the plaintiff's barn, under an agreement that after it was put into the barn it should be divided into three equal parts, of which the defendant was to have one for his services, and that the defendant might keep his part of the hay in the barn until the next year, or until he could sell it.

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[1] Burton v. Wilkinson, 18 Vt. 186; Haggerty v. Wilber, 16 Johns. 287.

[2] Fullam v. Stearns, 30 Vt. 443.

[3] 33 Maine, 436.

* In Maine, it was held that an officer who had a warrant to search for intoxicating liquors might lawfully break open a railway depot where the liquors were deposited, after the customary time for receiving and delivering goods at a depot, if such breaking was necessary for the execution of the warrant, without first asking leave of the person in charge of the depot to enter and search it. In Androscoggin R. R. Co. v. Richards, 41 Maine, 233, in which this was decided, it appeared that, after the depot master had left the depot for the night, and just before sundown, the defendants went to the depot with a cart and oxen, and that, finding the depot fastened, they inserted a bar of iron into a hole in the window pane and removed the hasp of the outer door by which it was fastened, opened the door, went in and removed the liquor, and carried it away. The defendants were acting under a warrant duly issued by a competent magistrate commanding them to search the depot and freight house for the liquor, and to seize the same, and have it to await the order of the court. The judge instructed the jury that, "if the defendants broke and entered the depot after it had been closed and fastened for the night and left by the depot master, without any notice or request to him, or to some person having the care of it, and took the liquors therefrom, that such proceeding was wholly unjustifiable; and that the search warrant under which they professed to act afforded them no protection; and that a search commenced and conducted under such circumstances was unreasonable and illegal." The jury having returned a verdict for the plaintiff, the Supreme Court held the foregoing instructions erroneous, and set the verdict aside. The court relied upon the following circumstances: It was a criminal prosecution; it was not a dwelling-house which was to be searched; the search was to be made forthwith in the daytime; it was not a case where the officer had made the complaint and procured the process by his own oath; and there was no person in the depot, or around it, at the time of its entry by the officer from whom he could have demanded admission.

The barn being locked, the defendant, without the plaintiff's consent, forcibly broke it open and carried away some of the hay. It was contended, in behalf of the defendant, that as there was an implied authority for him to enter the barn and take his part of the hay, the act was but the abuse of a license, and that it could not be a trespass even if he took more than his part. The court, in holding that the plaintiff was entitled to recover, said: "Whether the parties were tenants in common of the hay is immaterial. The barn belonged to the plaintiff, and the hay was in it by the defendant's consent. If the hay was the joint property of the parties, or even if it was owned by the defendant alone, he had no right to break the barn to take it, or any part of it, away without the consent of the plaintiff."

§ 820. With reference to what constitutes the breaking into a house, it may be observed, that if an officer, who holds civil process, lowers a window fastened with pulleys, it is such a breaking as will make him a trespasser.[1] The same has been said as to the mere lifting of the latch, and thus opening the outer door. But the latter, though stated to be law, by Comyns,[2] has been denied.[3] The better opinion seems to be, that where a sheriff lifts the latch of the outer door of a dwelling-house, or opens the outer door, in the way in which it is ordinarily opened by persons going into the house, and enters the house of the execution debtor, in order to arrest him or take his goods, the sheriff will be protected if he has reasonable ground to believe that the execution debtor is there, or that his goods are there; but that if the sheriff enters the house of a stranger, to make the arrest or the seizure, he will be protected only in case he finds the

[1] Curtis v. Hubbard, 1 Hill, 336, per Cowen, J.; citing Penton v. Brown, 1 Keb. 698; Seyman v. Gresham, Cro. Eliz. 908; Bishop v. White, Ib. 759; Ratcliffe v. Burton, 3 Bos. & Pul. 223; Lee v. Gansell, Cowp. 1; Buckenham v. Francis, 11 Moore, 40.

[2] Digest, Execution.

[3] Pollock, C. B., Ryan v. Shilcock, 7 Exch. 72; 21 L. J. Exch. 55.

execution debtor or his goods in the house—unless the house be entered, in hot pursuit, after an escape.[1] *

3. *Causing injury by improper use of one's own land.*

§ 821. The use of land by the owner, is not an absolute right, but qualified and limited by the higher rights of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to the motives of the aggressor. It is not essential to a right of action that the owner should have been driven from his dwelling. It is enough that the enjoyment of life and property has been impaired.[2] We have seen,[3] that although a man may prosecute such business as he chooses upon his

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[1] Sheers v. Brooks, 2 H. Bl. 122; Johnson v. Leigh, 6 Taunt. 246; Morrish v. Murrey, 13 M. & W. 57; but see Curtis v. Hubbard, *supra*.

[2] Fish v. Dodge, 4 Denio, 311. [3] *Ante*, § 11.

* In Allen v. Crofoot, 5 Wend. 506, Crofoot brought an action, in the court below, against Allen, for entering his house in his absence and obtaining copies of papers for the purpose of commencing a suit against him. It was proved that when the defendant went to the house of the plaintiff, he knocked at the door and was bidden to come in; and that he was on terms of intimacy with the plaintiff, and in the habit of going to his house. The defendant's admission was also proved that he would not have obtained the copies if he had not practiced a deception upon the inmates of the house, and that he went there in the plaintiff's absence, knowing that if he had been at home, he could not have obtained copies of the papers. It was held that as the defendant entered the house by permission, his subsequent abuse of the privilege did not make him a trespasser *ab initio*.

A. hired of B. certain rooms in the house of B., at a yearly rent, with the privilege of putting a brass plate, with A.'s name engraved thereon, upon the front door, there to remain so long as A. should continue to occupy the apartments. The rent being in arrear, B. removed the brass plate from the door, and refused to allow A. to have access to the apartments. In trespass, charging that B. broke and entered the apartments of A., and expelled him therefrom, and removed the plate, and seized and converted his goods, B., amongst other pleas, pleaded that A. was not possessed of the brass plate. It was held that the facts warranted the jury in finding that B. was guilty of breaking and entering the apartments; that the removal of the plate was properly treated as a substantial trespass, having been pleaded to as such, and that in the absence of evidence to show that it was affixed to the freehold, it must be assumed to be a chattel only (Lane v. Dixon, 3 C. B. 776). In an action of trespass for breaking and entering the plaintiff's apartment, it appeared that the plaintiff had taken furnished lodgings in the defendant's house, for a term, and that the only entrance to them was through the defendant's street door and lobby. The evidence to show the breaking and entering by the defendant, was that, before the term had expired, the defendant had prevented the plaintiff from entering the house, telling him he should no longer have the apartments. It was held that this was sufficient evidence for the jury to infer a breaking and entering of the apartments by the defendant.

premises, yet that he is not permitted to violate the rights of the adjoining proprietor, even for the purpose of lawful trade.* He may excavate his soil, but he cannot cast the dirt or stones upon the land of his neighbor.[1] It is not lawful for a person to blast rocks on his own land and thereby throw them on the land of his neighbor.[2] † He may not obstruct ancient lights.[3] He cannot lawfully displace a party-wall,[4] or dig in the bed of a stream, on his own side of the center, in such a way as to divert the natural flow of the water;[5] or dig away the earth on his own land, where it is essential to the natural lateral or subjacent support of the

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[1] Hay v. The Cohoes Co. 2 N. Y. 159; s. c. 3 Barb. 42.

[2] Ibid. [3] Pickard v. Collins, 23 Barb. 444.

[4] Eno v. Del Vecchio, 4 Duer, 53; s. c. 6 Ib. 17; *ante*, § 733.

[5] Van Hoesen v. Coventry, 10 Barb. 518; see *ante*, § 757.

* Gas works are to be placed in the class of erections which are not within the ordinary and usual purposes to which real estate is applied; and whenever they create a special injury, they are to be regarded as a private nuisance, for which an action will lie for the special injury, like a swine stye, a lime kiln, a dye house, a tallow chandler, a furnace, a brew house, a smelting house, a smith forge, a livery stable, or a tannery (Carhart v. Auburn Gas Light Co. 22 Barb. 297).

In Cropsey v. Murphy, 1 Hilton, 126, which was an action in the New York Marine Court, for an alleged nuisance by boiling fat, the plaintiff recovered $250 ; and on appeal to the Common Pleas, the latter court said, that although the damages seemed to be excessive, yet the judgment would not be disturbed for that reason.

In Street v. Ingwell, Selw. N. P. 851, an action was brought for keeping dogs so near the plaintiff's dwelling-house, that his family were prevented from sleeping during the night, and were much disturbed the day time. There was a verdict for the defendant. On a motion for a new trial, Lord Kenyon observed that he knew it was very disagreeable to have such neighbors, and that cases of the kind had been made the subject of investigation in the courts. Although he denied the motion, yet he intimated that if the nuisance was continued, a new action might be brought.

† An action was brought by a tenant of a house and lot, for injury to his possession, by the blasting of rocks on the adjoining lot, by which pieces of rock were thrown upon the plaintiff's premises, the blasts extending underneath and forcing out the rock some three or four feet, in the lot of the plaintiff, below the foundation of the house. The walls of the house were cracked, and the windows and skylight broken, and the house was thereby rendered so insecure that the members of the plaintiff's family, or some of them, were compelled to leave their apartments for safety. It was held that so far as, by such acts, the plaintiff was deprived of the use of his house during the interruption, and so far as he was put to expense in removing stones thrown upon the house or lot, or in repairing damages thus occasioned, he was entitled to indemnity (Gourdier v. Cormack, 2 E. D. Smith, 200, 254; referring to Radcliff's Ex. v. Mayor &c. of Brooklyn, 4 Comst. 195; Hay v. The Cohoes Co. 2 Comst. 159; s. p. Hardrop v. Gallagher, 2 E. D. Smith, 523).

land of his neighbor.[1] And in many cases, it would be unlawful to destroy a line tree which might be useful as a natural monument.[2] If one having a hedge on his own land, adjoining another close, cut the thorns, and they fall against his will, on his neighbor's land, from which he removes them as soon as possible, he may be treated as a trespasser. And if he lop a tree, and the boughs fall against his will, on the land of another; or if, in building his house, a piece of timber fall on the house of his neighbor, an action will lie. So, likewise, one cannot justify placing a spout on his house, which throws the water on the land of his neighbor.[3] *

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[1] Farraud v. Marshall, 19 Barb. 380; s. c. 21 Ib. 409; Humphries v. Brogden, 1 Eng. L. & Eq. R. 241; see *ante*, § 735.

[2] Relyea v. Beaver, 34 Barb. 547; aff'd 25 N. Y. 123; see *ante*, § 744.

[3] Lambert v. Bessey, T. Raym. 421; Gardner v. Village of Newburgh, 2 Johns. Ch. R. 162; Radcliff's Exrs. v. Mayor &c. of Brooklyn, 4 Comst. 195.

* We have seen, *ante*, § 16, that a person who draws together a crowd to the annoyance of his neighbors, is liable for an injury resulting therefrom. Where the defendant was accustomed to invite people on to his premises, to shoot pigeons, and idlers collected near the spot trod down the grass of the neighboring meadows, destroyed the fences, and alarmed women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance (Rex v. Moore, 3 B. & Ad. 184; Walker v. Brewster, L. R. 5 Eq. Cas. 25).

Common stages for rope dancers, have been adjudged nuisances at common law; "not only," says Hawkins, "because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons which cannot but be very inconvenient to the neighborhood" (1 Hawk. P. C. ch. 32, § 6). In the next section he distinguishes between places kept for such useless sports, and play houses which were originally instituted for the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly. These, he says, are not nuisances in their own nature, but may only become such by accident; whereas, the others cannot but be nuisances. In Hall's Case, 1 Mod. 76, Hall, a rope dancer, had erected a stage, or was about erecting one, at Charing Cross, which the court of King's Bench pronounced to be a nuisance. The same was held at a very early day of bowling alleys. Hale, Ch. J., mentioned as a precedent, that in the eighth year of Charles the First, Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's Church, and had it. According to the report of Hall's Case, in 2 Keb. 846, there were affidavits that Hall was going on to build his booth. The reporter adds, that after the court were informed of it, they sent for Hall and the workmen by a tipstaff; "and because he would not enter into a recognizance not to build on, they committed him and then he ceast." Ventris (1 Ventr. 169), gives the same account of the matter. He says the complaint was that the booth was being erected, and that Hall intended to show his feats of activity to the annoyance of the complainants, "by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices inveigled from their shops." The court ordered him to stop, to which he replied with great impudence, that he had the king's warrant for it and promise to bear him harmless. After committing him, the court caused a record to be made of the nuisance, as upon their own view, and awarded a writ to the sheriff to prostrate it. In Rex v. Howel, 3 Keb. 465, which was in the 27 Car. 2, the court thought

§ 822. One who demises his property for the purpose of having it used in such a way as must prove offensive to others, may himself be treated as the author of the mischief.[1] An instruction that if the defendant constructed and adapted a barn, so that in its ordinary use, it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, the defendant was responsible for the nuisance caused by his tenants to whom he had let the barn, was held correct. But if the offensiveness arose from an unusual circumstance, the defendant would not be liable, unless he knew, or had reason to believe, when he let the barn, that the use of it in the ordinary mode, would prove a nuisance.[2] *

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an indictment for a nuisance in keeping a cock pit valid at common law; and this on the authority of the bowling alley case which they mentioned, and said the alley was pulled down as a common nuisance.

The by-law of a village provided that it should "not be lawful for any person to keep or maintain any ball alley or apparatus, alley, machine, building or enclosure, constructed or used for the purpose of playing thereon or therewith at the game called or known by the name of nine pins or ten pins, for gain, hire, reward or emolument of any kind, or in any manner whatsoever." An action having been brought to recover the penalty for a violation of the foregoing, it was held that a bowling alley kept for gain or hire was a public nuisance at common law, and judgment in favor of the plaintiff in the court below was affirmed by the Supreme Court (Tanner v. The Trustees of Albion, 5 Hill, 121. The court said: "Establishments of this kind in populous communities, are at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible, day after day; and for this purpose, temptations beyond mere amusement, are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or amusements having no useful end, and notoriously fitted up and continued with a view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation, but because it has become matter of general observation, that when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime. * * * A useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere—a place which, in despite of every care, will be attended by profligates, with evil communication, and at best, with a waste of time and money, followed by the multiplication of paupers and rogues—has always been considered an obvious nuisance."

[1] The King v. Pedly, 1 Adol. & El. 822.

[2] Pickard v. Collins, 23 Barb. 444.

* The New York Revised Statutes preserved the common law remedy by writ of nuisance, subject to certain provisions in the statute. At common law this writ only lay against him who erected the nuisance upon his freehold. It was however early provided by statute, that the writ should lie against him and his alienee. And this provision was preserved in the Revised Statutes. The plaintiff was not to go without remedy because the land was transferred to

4. *Interruption of easement.*

§ 823. An easement is a burden upon the servient, and a right only in the dominant estate. When created and defined by an express grant, it cannot be extended beyond its plain language or clear intent. It cannot arise by way of implication from an express grant, unless there be some circumstances connected with the grant, or the estate granted, which show that the easement claimed is necessary to the enjoyment of the estate granted.[1]

§ 824. At common law, where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.* This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, re-arrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to re-distribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence if instead of a benefit conferred, a burden has been imposed upon the portion sold,

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another, but the party who erected the nuisance and his transferee were both to be named in the writ as defendants (N. Y. Rev. Sts. 5th ed. v. 3, p. 620; Hess v. Buffalo & Niagara Falls R. R. Co. 29 Barb. 391). The writ of nuisance is abolished by the New York Code (§§ 453, 454), and injuries heretofore remediable by it are subjects of action in which there may be judgment for damages or for the removal of the nuisance or both.

[1] Evans v. Dana, 7 R. I. 306.

* "If I purchase from the owner of two adjoining freehold tenements, the fee simple of one of those tenements, and have it conveyed to me, I am not bound to take notice of the manner in which the adjoining tenement is used or enjoyed by the vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenements, in the manner it was used and enjoyed by the vendor at the time of such sale and conveyance" (The Lord Chancellor, Suffield v. Brown, 33 L. J. Ch. 258).

the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract with reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.[1] In Tulk v. Moxhay,[2] a covenant by the grantee of land to use it as a private square, was enforced against a purchaser from the grantee with notice. The Lord Chancellor said the question was not "whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. Where M. had purchased land in a village adjoining a public street, and it was at the same time agreed between him and the vendor, that a triangular piece of ground belonging to the vendor, on the opposite side of the street should never be built upon, but should be deemed public property; and the vendor executed to M. a deed of the land sold, and a bond for the performance of the agreement as to the triangular piece of land, both instruments being duly proved and recorded; and H. afterward purchased of M. the land opposite the triangular piece, after being informed by him of the privilege secured by the bond; it was held that H. was entitled to the benefit of the easement, and that M. could not, without his consent be permitted to make a new arrangement with the holders of the legal estate in the triangular piece of land, by which buildings should be erected thereon.[3] In Tallmadge v. The East River Bank,[4] which was an action to restrain the defendants, who owned a lot in the city of New York, from erecting a building thereon, covering the entire lot, and to compel them to leave a space of eight feet between the building and the line of the street, it was proved that when the plaintiff and others

[1] Lampman v. Milks, 21 N. Y. 505.
[2] 11 Beav. 571.
[3] Hills v. Miller, 3 Paige, 254.
[4] 26 N. Y. 105; s. c. 2 Duer, 614.

bought lots in St. Mark's place, New York, of one Davis, a map or plan of St. Mark's place was exhibited, showing that the houses on both sides of the place, were to be set back eight feet from the street, and that they bought on the assurance of Davis, that the plan should be carried out in building on the place; and that relying upon this assurance, they paid a larger price for the lots than they otherwise would have done. It was held that the sale of the lots with such assurances through verbal, bound Davis in equity and good conscience to use and dispose of all the remaining lots, so that the assurances upon which the plaintiff and others had bought their lots, would be fulfilled; and that the same equity attached to the remaining lots, so that a person afterward purchasing from Davis, any one or more of the remaining lots, with notice of the equity, as between Davis and the prior purchasers, would not stand in a different situation from Davis, but would be bound by that equity.

§ 825. The darkening of another's windows, or depriving him of a prospect by building on one's own land where no right to the light unobstructed or to the prospect has been acquired by grant or prescription, invades no legal right, and hence is not a legal injury.[1] The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do, although it is said no action lies for it. He is, therefore, encroaching, although not strictly and legally trespassing upon the rights of another. He enjoys an easement, therefore, in his neighbor's property which in time may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's

[1] Pickard v. Collins, 23 Barb. 444.

property. In Mahan v. Brown,[1] which was an action for the obstruction of lights in the dwelling-house of the plaintiff, the facts proved were, that the house was built on a lot adjoining a lot of the defendant, in which windows were placed for the admission of light and air; that the defendant, under pretense of preventing his yard from being overlooked by the windows in the plaintiff's house, but, in fact, from mere malice, and with the intent to exclude the light and air from the windows in question, had erected on his own lot a fence forty feet high opposite the recess or opening in the house of the plaintiff, in consequence whereof the light and air had been excluded from the windows, and the plaintiff had sustained great damage in consequence of her apartments, which had been occupied by boarders, being rendered untenantable. The plaintiff, being nonsuited, a motion to set the nonsuit aside was denied by the Supreme Court.

§ 826. If verbal permission be granted to a person by the owner of land to open a window overlooking the land, it will not prevent such owner from building a wall on his own land, and thereby shutting out the light and air from the newly opened window. Where permission, not under seal, was given to a defendant to open a window in his house overlooking the plaintiff's garden, and the plaintiff afterward built a wall on his own ground which blocked up the offending window, and the defendant then entered upon the plaintiff's land and tore the wall down, it was held that he was liable as a trespasser.[2]

§ 827. If the owner of a house and land sell the house without the land, the admission of so much light and air as may be reasonably necessary for the enjoyment of the house is impliedly granted by the vendor across his own adjoining land, unless the privilege be expressly excluded.

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[1] 18 Wend. 261.

[2] Bridges v. Blanchard, 1 Ad. & E. 536; Wood v. Leadbitter, 13 M. & W. 845; Lee v. Stevenson, E. B. & E. 512.

And if he sell the house to one man, and the adjoining land to another, the purchaser of the adjoining land cannot build so as to darken or obstruct the windows of the house, although such adjoining land may have been described as building land, and the intention to build thereon may have been known to the purchaser of the house at the time he purchased it.[1] Where, however, the owner of an ancient house and of the land around the house sold the land without the house, and the purchaser built thereon so as to shut out the light and air from the windows of the house, it was held that the owner had no redress for the injury.[2] Where an unfinished house was sold, it was held that the vendor could not afterward build on his land adjoining so as to shut out the light and air from the spaces left in the unfinished structure for windows, nor close access to the apertures intended for doors. And when two individuals buy two unfinished houses from the same person, and at the time of the purchase the spaces for windows and doors are marked out, they cannot afterward interfere with each other's enjoyment of the windows and doors as impliedly agreed upon at the time of the sale.[3] So, where two lessees of houses derive title from a common lessor, one cannot shut out the light and air from the house occupied by the other.[4] And a landlord, after he has demised a house, cannot obstruct the lights existing at the time of the demise.[5] Nor can a lessee darken or obstruct the windows of his landlord which existed at the time of the demise, whether such windows are ancient or of recent construction.[6] Where a person, having erected on his own land a building which wrongfully darkens the windows of the adjoining proprietors, purchases the house with the darkened windows, and afterward sells the

[1] Palmer v. Fletcher, 1 Lev. 122; Canham v. Fisk, 2 Cr. & J. 128; Swansborough v. Coventry, 9 Bing. 305.

[2] White v. Bass, 7 H. & N. 732; 31 L. J. Exch. 283.

[3] Compton v. Richards, 1 Price, 27; Glave v. Harding, 27 L. J. Exch. 286.

[4] Coutts v. Gorham, 1 M. & M. 396; Jacomb v. Knight, 33 L. J. Ch. 601.

[5] Cox v. Mathews, 1 Ventr. 237, 239; Rosewell v. Pryor, 6 Mod. 116.

[6] Riviere v. Bower, R. & M. 24.

same, his grantee is without remedy. And if one of two houses owned by different persons wrongfully overhangs the other, and they afterward come into one hand, the tort is thenceforth purged by the unity of ownership; so that if the houses again belong to different persons, neither party can complain.[1]

§ 828. Although a person possessed of ancient windows has a right to the full benefit of all the light he can get through the ancient aperture, by any change he can effect in the form and character of the windows,[2] yet he may so alter them as to entitle the owner of the adjoining land to block them up.[3] If they have had blinds attached to them, sloping upward, so as to admit the light but obstruct the view, the right to light cannot be enlarged by the removal of the blinds; and if the blinds are removed they may be blocked up, so far as to exclude the additional light.[4] It has been held that, if a person who has a right to the enjoyment of a window of a certain size enlarges it, the one who is annoyed thereby may, by erecting a screen on his own land, stop up the entire window, and that the only remedy of the owner of the window is to reduce it to its ancient size.[5] But if the owner of land on a stream, who has a prescriptive right to maintain thereon a dam or weir of a certain height, enlarges the same, to the damage of another riparian proprietor, the latter may, after notice, remove the enlarged portion of the erection, but cannot lawfully remove the whole dam. Where, therefore, the plaintiff, owning such a dam or weir, made with a loose board, kept in its place with large stones, fastened the board down with stakes driven into the bed of the stream, and the defendant, who was a riparian proprietor, pulled up both the stakes and the board, it was held that he was liable as a trespasser.[6]

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[1] Roll. Abr. Customs, D, Pl. 7; Battishill v. Reed, 18 C. B. 696; Robins v. Barnes, Hob. 131.

[2] Turner v. Spooner, 1 D. & S. 467; 30 L. J. Ch. 801.

[3] Garritt v. Sharp, 3 Ad. & E. 330.

[4] Cotterell v. Griffiths, 4 Esp. 69. [5] Cawkwell v. Russell, 26 L. J. Exch. 34.

[6] Greenslade v. Halliday, 6 Bing. 379.

§ 829. Where the enjoyment of some natural incident to the possession of land has been interrupted, the owner is entitled to damages, though no perceptible injury has been sustained, whenever the continuance of the wrong would lay the foundation of a legal right. Where, therefore, certain manufacturers erected works on the bank of a stream and defiled the water with soap suds, but no actual damage was proved, it was held that the plaintiff was nevertheless entitled to recover damages, as a continuance of the practice without interruption would eventually establish a right on the part of the defendants to discharge their foul water into the stream.[1] So where the defendant, who owned land on the banks of a stream which fed a spout, the water of which the plaintiff, in common with the other inhabitants of a certain district, had a right by custom to use for domestic purposes, drew off so much of the water as not to leave enough for the inhabitants, it was held that the plaintiff might maintain an action, although he had not himself suffered any personal inconvenience.[2] *

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[1] Wood v. Waud, 3 Exch. 772; Rochdale Canal Co. v. King, 14 Q. B. 138.

[2] Harrop v. Hirst, L. R. 4 Exch. 43.

* In Amoskeag Manf. Co. v. Goodale, 46 N. Hamp. 53, the court said: "After the numerous decisions in this State and elsewhere, we cannot now regard it as an open question whether the defendant would have been entitled to recover nominal damages of the plaintiffs if they, by their dam, wrongfully caused the water of the river to flow back on his land, perceptibly higher than its natural level, but without causing any actual damage to the defendant, for the infringement of right which, by repetition, might ripen into an easement, has been held a sufficient cause of action."

Trespass *quare clausum* will not lie for the interruption of an easement (Smith v. Slocomb, 11 Gray, 280).

In order to maintain an action for the obstruction of the access of light to an ancient window, a trifling curtailment of the light will not be sufficient. There must have been a substantial privation of light such as to render the house comparatively uncomfortable, or to prevent the owner from carrying on his business as beneficially and profitably as he had formerly done (Back v. Stacey, 2 C. & P. 466).

Where a house is occupied by the servant of the owner, and the windows are unlawfully darkened, the owner may bring an action therefor, the occupation of the servant being that of the master (Bertie v. Beaumont, 16 East, 33). And if the house is in the possession of the tenant of the owner, the action should be brought in respect of the injury to the reversion (Cotterill v. Hobby, 4 B. & C. 465).

Where the owner of land obstructs his neighbor's ancient windows, and then rents the land with the obstruction upon it, an action may be maintained both against him and his tenant for the continuance of the obstruction (Rosewell v.

5. *Encroaching on land with fence.*

§ 830. It is scarcely necessary to observe that, excepting in the case of a division fence, no part of the fence can lawfully be placed on another's land. In New York, in an action for driving a fence post on the plaintiff's premises, it appeared that the parties owned adjoining land fronting on a highway, and that the post in question was placed partly on the land of each, where the front fences united. The judge at the circuit instructed the jury that the defendant had the right to put the post there, in part upon the plaintiff's land, "if it was put there for the division fence, or for part of the division fence, or for a division line, but that he did not regard this post as part of a division fence or line between the parties." Judgment having been rendered for the plaintiff, the Supreme Court in affirming it on appeal, held that such a fence was in no sense a division fence within the statute of New York, which provides that "where two or more persons have lands adjoining, each must maintain a just proportion of the division fence between them,"[1]* and that therefore

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Prior, 2 Salk. 460; 12 Mod. 636). And it seems that a clerk, who has superintended the erection of a building by which ancient lights have been darkened, and who alone directed the workmen, may be united as a codefendant with the contractor who appointed him to superintend the progress of the building (Wilson v. Peto, 6 Moore, 47).

In North Carolina, where a person built a house on another's land so near his dwelling as to darken it and otherwise greatly impair its value, it was held, in an action of trespass therefor, that the jury were confined to the actual pecuniary injury (Hays v. Askew, 7 Jones Law, N. C. 272). In this case land had been conveyed by the defendant to the plaintiff, reserving a right of way which had previously existed for a long time. The plaintiff erected a storehouse on the land next to and fronting the way; and the defendant, against the remonstrances of the plaintiff, put up a storehouse on the way, thereby darkening the windows of the storehouse and obstructing access to it. It was held that trespass *quare clausum fregit* was the proper form of action.

[1] Warren v. Sabin, 1 Lans. 79.

* In the above case the court said: "Under this statute it is clear, upon principle and authority, that the owners are bound to erect and maintain a line or division fence, and should make it equally upon the lands of each. The difficulty in the defendant's case seems to be that, on the north side of his lot conveyed to the plaintiff, there was no division fence, and could be none. On the north side their lands did not adjoin. They adjoined only on the westerly line of the plaintiff's and the easterly line of the defendant's land. The northerly side of the plaintiff's land adjoined the public highway. It is not pretended that this post complained of was put there as any part of the fence running north and south, which was and could be the only division fence between the parties—the

the statute had no sort of application to the case. A similar decision was rendered in Connecticut.*

6. *Continuance of obstruction.*

§ 831. Trespass is the proper remedy for wrongfully continuing an obstruction on the plaintiff's land, for the erection of which the plaintiff has already recovered compensation; a recovery, with satisfaction for erecting it, not operating as a purchase of the right to continue the erection.[1] In an action for placing stumps and stakes on the plaintiff's land, the defendant paid into court 40*s*., which the plaintiff took out in satisfaction of that trespass. The plaintiff afterward gave the defendant notice that unless he removed the stumps and

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only fence between adjoining lands. It was claimed to be a part of the defendant's fence running on the north side of his lot. If it were a part of that fence, there was no necessity for putting any part of it on the plaintiff's land. The fence of the defendant on that line should run up to the line on one side, and the plaintiff's fence should run up to the same line from the other direction to meet the defendant's fence."

[1] Holmes v. Wilson, 10 Ad. & E. 503; Thompson v. Gibson, 7 Mees. & W. 456; Esty v. Baker, 48 Maine, 495; Shadwell v. Hutchinson, 4 C. & P. 333.

* In Hubbell v. Peck, 15 Conn. 133, it appeared that the plaintiff and defendant owned adjoining lands fronting on a street, and that the defendant, there being no divisional fence between them, in constructing his fence on the line of the street, placed a post on the dividing line, so that a part of it stood on the plaintiff's land and a part on the defendant's land, which was the wrong complained of. The defendant claimed that the post would form the termination and a part of the divisional line between his land and that of the plaintiff, and that he was justified in so placing it by the statute, which provided that, when adjoining proprietors made a divisional fence, the posts should stand on the dividing line. The court, in holding that the placing of the post in the manner stated was a trespass, said: "If there was a divisional fence between the parties, the post would indeed form a part of it, and so would have been lawfully placed in part on the plaintiff's land. But it is difficult to conceive how there can be a justification for placing it in that manner as being a part of a divisional fence, when no such fence existed or was contemplated; and the law does not allow of its being so placed as a part of any other. If the defendant had been erecting not only a front fence but also a divisional one, he might have justified himself in placing the post as he did, as being a part of the latter; but it is not claimed that such was the case, and the defense is not put on this ground. If the question had arisen on a special plea of justification, it is plain that the defense would fail. The plea must have stated the material fact that the post was part of a fence which the defendant had erected or was erecting on the dividing line; and upon a denial of the averment, the issue must have been found in favor of the plaintiff. A plea that it was part of a fence merely would obviously be bad. This conclusively tests the principle involved in the case. It is one of very considerable practical importance, especially in thickly settled places, where the owners of adjoining lands might choose to erect different kinds of fences in front of them, and much contest, injustice and inconvenience might ensue from the adoption of the principle claimed by the defendant."

stakes, a further action would be brought against him. It was held that the leaving of the stumps and stakes on the land was a new trespass.[1] Where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction of the trespass for such erection, it was held that after notice to the defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.[2]*

§ 832. Although the obstruction be temporary in its nature, and under the circumstances justifiable, yet if the party causing it allow it to continue, he may thereby make himself a trespasser *ab initio*. Accordingly, where a surveyor of highways ordered a person who was employed in working out the highway tax of the adjoining owner, to cut down trees that were within the limits of the highway, and to re-

[1] Bowyer v. Cook, 4 C. B. 236; 4 Dowl. & L. 816; 11 Jur. 383; 16 L. J. 322.

[2] Holmes v. Wilson, *supra*.

* In an action on the case, brought for obstructing an ancient window of the plaintiff's house by keeping and continuing a certain roof before then wrongfully erected adjoining the said house, to the injury of the plaintiff's reversion, a former judgment recovered by the plaintiff against the defendant for the same grievance was pleaded in bar. The plaintiff replied that the grievances were not the same, and issue was joined thereupon. It appeared that, on a former trial between the same parties, of an action for an injury to the plaintiff's reversion in the same premises, by erecting and keeping up the roof, the plaintiff recovered damages, but it was held that the recovery was no bar to the second action (Shadwell v. Hutchinson, 2 B. & Ad. 97).

Where an action was brought and damages recovered for diverting the channel of a brook, by means of obstructions, and afterward damages were recovered in a second action between the same parties, for the continuance of the obstructions from the time the first suit was commenced to the time of the commencement of the second, it was held that, as the plaintiff had only recovered actual damages, in the second action he was not required to set out in his complaint the first recovery, and allege a wrongful continuance of the obstructions (Beckwith v. Griswold, 29 Barb. 291).

Where the complaint stated that the Buffalo & Niagara Falls R. R. Co. erected buildings across the alley of the plaintiff, and that the other defendant, the New York Central R. R. Co., continued and maintained the obstructions, it was held that a cause of action was shown against each defendant separately, but no cause of action against them jointly; that the objection to the misjoinder might be taken by joint demurrer; and that the defendants might move that the plaintiff elect which of the causes of action he would prosecute (Hess v. Buffalo & Niagara Falls R. R. Co. 29 Barb. 391).

move them, and the person so ordered cut down the trees, and caused them to fall on the adjacent land, where they remained, it was held that if the surveyor was in view of the land when the trees were cut down, and knew that they fell on the land, and assented thereto, and did not order their removal, he was liable to the owner of the land in an action of trespass. The court said that the trespass complained of was a continuing trespass until the trees were removed; that it was the duty of the defendant to cause them to be removed immediately; and if he neglected to do this, he must be considered as authorizing the continuance of the trees on the plaintiff's land, and so was a trespasser *ab initio*.[1]

§ 833. Where, however, the defendant has no right to enter on the plaintiff's land, to remove a nuisance which he has placed thereon, payment of the damages by the defendant, and acceptance of them by the plaintiff, in full satisfaction, will bar a second action for the continuance of the nuisance. In Vedder v. Vedder,[2] it appeared that the defendant had a right of action against the plaintiff, for damages done by his cattle; and that, at the same time, the plaintiff had a claim against the defendant, for a trespass on his land, and for placing and leaving upon it the carcasses of dead dogs, so as thereby to corrupt and render unfit for use the water of a stream, to which the plaintiff and his family resorted for domestic purposes. The plaintiff was willing to pay for the damage done by his cattle; but the defendant exacted, as one of the terms of settlement for that injury, that the plaintiff should give him a receipt in full for all demands which the plaintiff had against him. Upon this ground, the parties made their settlement; the plaintiff paid eight dollars, and gave a general receipt to the defendant, stating that he had received one dollar in full of all demands; and the defendant gave a receipt for the eight dollars which the plaintiff paid to him. It was held that the effect of the arrangement was to cancel, not only every right

[1] Elder v. Bemis, 2 Metc. 599.

[2] 1 Denio, 257.

of action, then existing in the plaintiff's favor, against the defendant, but also all right to future damages occasioned by the nuisance. As the defendant could not go upon the plaintiff's land, to remove the nuisance, without becoming a trespasser, and had paid for the trespass he had committed, he had thereby extinguished all remedy against him, as well for the consequential as the immediate injury received. If the nuisance had been placed on the defendant's land, so as thereby to have proved injurious to the plaintiff, an accord and satisfaction, or a release of all demands, would not have barred an action for the continuance of the nuisance after that day. If damages have been recovered for digging a pit or making a trench in another man's land, such recovery will be a bar to a second action for the same cause. But if a man dig a trench or deepen a ditch in his own land, which injuriously diverts water from his neighbor's stream, or diminishes the supply of water to a neighbor's mill, it is a continuing injury.[1]

7. *Wrongful cutting of timber.*

§ 834. Where a person enters on another's land, without permission, and cuts down and carries away timber, the law presumes that the act was wilful;[2] and he will be deemed a trespasser, irrespective of his motive or ignorance.[3] * It has even been held to be no defense that the plaintiff, by mistake, led the defendant to suppose that the timber was on the defendant's land.[4] † And trespass may be maintained, although the statute authorizes damages in an action

[1] Clegg v. Dearden, 12 Q. B. 591.
[2] Watkins v. Gale, 13 Ill. 152.
[3] Luttrell v. Hazen, 3 Sneed, 20.
[4] Pearson v. Inlow, 20 Mo. 322.

* It was held in Massachusetts, under the statute of 1795, ch. 75, § 3, giving threefold damages for cutting down trees, during the pendency of an action to recover possession of the land, that trespass was the most suitable remedy (Pierce v. Spring, 15 Mass. 489).

† To subject a party to the penalty prescribed by the statute (of New Hampshire) for cutting timber, it must appear that the act was done knowingly and wilfully, and not through mistake or accident; in which latter case, the party would be entitled to recover only the value of the injury he had actually sustained (Batchelder v. Kelly, 10 N. Hamp. 436).

of debt.[1] If the plaintiff fails to prove the cutting of his trees, he may still recover for the breach of his close.[2]

§ 835. One who enters on land under a contract to purchase, acquires thereby no right to cut and consume the timber; permission to occupy by no means implying a license to commit waste. On the contrary, one who enters generally under such a contract, has at most only the rights of a tenant at will; and if he cuts timber without license, he is a trespasser.[3] * A provision in a land contract, that

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[1] Montague v. Papin, 1 Mo. 757. [2] Mundell v. Hugh, 2 Gill & Johns. 193.

[3] Jackson v. Clark, 3 Johns. 424; Jackson v. Moncrief, 5 Wend. 26; Suffern v. Townsend, 9 Johns. 35; Cooper v. Stower, Ib. 331; Jackson v. Camp, 1 Cowen, 605; Featherstonhaugh v. Bradshaw, 1 Wend. 134; Jackson v. Walker, 7 Cowen, 637; Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 Ib. 489; Clough v. Hosford, 6 N. Hamp. 231; Wendell v. Johnson, 8 Ib. 220.

* Lyford v. Putnam, 35 N. Hamp. 563, was an action for cutting down and carrying away timber. The defendant justified under one Hardy, with whom the plaintiff entered into an agreement in writing substantially as follows: "The condition of this obligation is such, that whereas the said Lyford hath bargained and sold to said Hardy the farm whereon he has lived the past winter, for which farm the said Hardy is to deliver to said Lyford, at the railroad depot, ninety thousand feet of spruce timber in the round log, one half of which quantity is to be delivered by the first day of October next, and the other half to be delivered the first day of May, 1855; and when the first half is delivered, the said Lyford is to make and deliver to said Hardy, a conveyance of said premises free from all incumbrances; is to take back a mortgage of said premises, to secure the payment of the last half of said lumber, and he is not to cut or sell any spruce timber from said farm without the consent of said Lyford, excepting what is delivered at said depot, until the said farm is fully paid for." Hardy did not fulfill his part of the agreement, but the defendant, with his aid and consent, cut and carried away a large quantity of timber. The court, in holding that the defendant was liable as a trespasser, said: "The supposition that a contract to purchase, with an implied license to enter and cut timber, for the purpose of making payment of the purchase money, authorized the party entering to cut and sell off the lumber generally at his pleasure, would authorize a party, who had contracted to purchase a lot with valuable buildings thereon, under the implied license to occupy and improve the premises in the mean time, to enter and pull down and dispose of the buildings before making payment under his contract. The most that can be implied under the provisions of the obligation in this case, is a permission to the purchaser to enter in the mean time, as tenant at will, and occupy the land in a reasonable manner, as a tenant at will might lawfully do, with an implied authority to cut and haul to the depot therefrom, a sufficient quantity of spruce timber, to fulfill the stipulations of the contract of purchase, but not to commit any act hostile to the interests of the vendor, or amounting to waste. The contract shows that, by withholding the conveyance until one half the purchase money should be paid, and stipulating for a mortgage of the premises to secure the payment of the residue, the plaintiff relied on the premises contracted to be conveyed as security for the purchase money; and it would be most unreasonable to hold that from such a contract, any license was to be implied for Hardy, or the defendant under him, to strip the premises of their timber, and thereby render them comparatively, if not al-

the purchaser shall not cut timber on the land until he has fulfilled the conditions of purchase, will not prevent him from maintaining an action of trespass against a stranger for cutting the timber; such an exception being a stipulation for the security of the vendor, and not intended to reserve the title to him, save only in the contingency of its being necessary for his security.[1]

§ 836. Where the grantor of land remains in possession against the wishes of the grantee and cuts timber, he is liable to an action of trespass.[2] But if the deed reserves the standing timber, it remains the property of the former owner of the land, with the right to so much of the soil as is essential to its support; and the grantor may maintain trespass against any person for cutting and carrying it away.* Accordingly, where the deed excepted pine trees, it was held that the grantor might maintain an action of trespass against the grantee or his assignee for cutting and carrying them away, although done more than twenty years after the conveyance.[3] But when this species of implied interest and possession is not exclusive, but of a mixed character, as where the grant or reservation of growing trees is not general, but partial, in common with others, trespass will not lie by one of the parties in interest against the other.[4] †

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together, worthless. Hardy then having neglected to make any portion of his payments under the contract, and having also, through the defendant, cut and sold timber from the farm, without authority or license, express or implied, so to do, but in violation of any rights he acquired by implication of law, under the contract of sale, this action may well be maintained."

[1] Hunt v. Taylor, 22 Vt. 556.

[2] Spencer v. Weatherly, 1 Jones' Law, N. C. 327; Boults v. Mitchell, 3 Harris, 380; Narehood v. Wilhelm, 69 Penn. St. R. 64.

[3] Goodwin v. Hubbard, 47 Maine, 595.

[4] Clap v. Draper, 4 Mass. 266; Boults v. Mitchell, *supra*.

* The rule is the same in case of a grant of standing timber (Howard v. Lincoln, 13 Maine, 122; Leigh v. Heald, 1 Barn. & Ad. 622).

† The owner of land executed the following agreement: "I hereby agree to let J. H. have all the pine trees fit for mill logs on my land in B., said J. H. to have two years from date to take off said timber." It was held that this was a sale of only so much of the timber as the purchaser might take off in the two years, and that an entry by him after the expiration of the time specified was a trespass (Pease v. Gibson, 6 Maine, 81). Mellen, C. J.: "To admit the construc-

§ 837. Where the owner of land sells the standing timber, and the purchaser of the timber cuts a part of it, he has a sufficient possession to maintain trespass against a stranger who cuts and carries away the remainder. In Goodrich v. Hathaway,[1] one Samuel Hawkins, owning a piece of land, sold to the plaintiff about 20,000 feet of the standing timber, including one large pine tree; and then sold the land to William Hawkins, reserving the timber sold to the plaintiff

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tion given by the defendant's counsel, and consider such a permission as a sale of trees to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation in point of time specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury, and in fact it would amount to an indefinite permission. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth; and before he would have removed the trees standing on the land at the time of receiving such a license or sale, others would grow to a sufficient size to be useful and valuable, and thus the owner of the land would be completely deprived of all use of it" (s. p. Howard v. Lincoln, 13 Maine, 122).

A mistake is sometimes made by not distinguishing between a right to enter on land for a specified purpose under a license or contract, and a right of possession by a lessee to the exclusion of the owner of the fee. The first is not only consistent with the possession of the owner, but does not alter or affect his possession. The latter is a grant of the possession which cannot be resumed without an entry by the owner, either absolute or constructive.

Reed v. Merrifield, 10 Metc. 155, was an action of trespass for going on the plaintiff's land, and cutting and carrying away timber. The plaintiff claimed title to the land through one Chamberlain, the original owner. The defendant proved a conveyance from Chamberlain of all the timber on the land to one Wait, and an assignment of the same from Wait to the defendant—Wait to have five years to get the timber from the land, and to have no right to the wood which might arise from cutting the timber. It was held that there was not a grant of the land, nor of any such interest in it as to give to the lessee any exclusive possession of the land; that the plaintiff was, by force of his deed, in possession of the estate, and there was no necessity of an entry by him to terminate any right on the part of the defendant; that the defendant was not a tenant by sufferance; that he had no interest in the land, and his right of entry to cut and carry away the timber was put an end to by the determination of the lease; that during its continuance, if he had been disturbed in his right of entering and cutting the timber, he might have maintained an action for such injury, because of his separate interest in the timber, and even an estate of inheritance might exist in trees while the fee of the soil is in another; but that here no such estate was created, but simply a right, during five years, to take off the timber growing on the land. The court observed that if the defendant became the absolute owner of the timber, by force of the contract, and might, being the owner, lawfully enter, and cut and carry it away after the period limited in the contract, it would not only deprive the owner of the land of the right to cultivate and enjoy it, but it would amount to an indefinite permission to cut and carry off the timber in so gradual a manner that he might avail himself a second growth before the first was all removed, and thus in fact defeat the owner of his right in the estate during the life of the vendee.

[1] 1 Vt. 485.

as aforesaid. The plaintiff then purchased of William Hawkins the residue of the timber; and the defendant cut and carried away the large pine tree. Previous to this, the plaintiff had entered and cut and carried away a part of the timber. The court below charged the jury that the plaintiff had not sufficient possession to enable him to maintain the action, and they accordingly found for the defendant. The Supreme Court, however, granted a new trial for misdirection. But a verbal contract for the sale of standing timber will not enable the purchaser of the timber to maintain trespass against the owner of the land, or his grantee, for cutting it.* Buck v. Pickwell[1] was an action of trespass for cutting and carrying away trees to which the plaintiff claimed title, by reason of a parol contract of purchase made with one Story, while he was the owner of the premises. The defendant justified the cutting upon the ground that he subsequently acquired a title to the premises, as derived from this same Story. It appeared that some twenty-one or twenty-two years previous to the trial, and while Story was the owner of the premises, he sold the plaintiff, by a parol contract, all the timber on a certain part of the premises, supposed to be about one and a half acres, which the plaintiff paid for, he to act his pleasure as to the time of cutting it. The plaintiff had entered upon the land, and cut and taken off a part of the timber, as he wanted it from time to time. But the timber for which this action was brought was left standing, and was cut and taken away by the defendant. The land had been conveyed to

[1] 27 Vt. 157. And see Carrington v. Roots, 2 M. & W. 248; Yale v. Seely, 15 Vt. 221.

* Standing trees must be regarded as part and parcel of the land in which they are rooted, and from which they draw their support; and upon the death of the ancestor they pass to the heir as a part of the inheritance, and not to the executor or administrator, as is the case with emblements and personal chattels generally; neither can they be levied upon and sold upon an execution as a chattel.

It has been maintained by highly respectable authority, that a sale of standing timber may be made by verbal contract (Bostwick v. Leach, 3 Day, 484; Erskine v. Plummer, 7 Greenlf. 447; Claflin v. Carpenter, 4 Metc. 580).

A sale by B. to C. & D. of the right to cut timber on the land of A., is tantamount to a consent by B. to the acts of C. & D., in entering A.'s close, and removing the timber (Sanborn v. Sturtevant, 17 Minn. 200).

the defendant without any reservation as to the timber. Judgment having been rendered in the County Court, for the plaintiff, for the value of the timber taken by the defendant, it was reversed by the Supreme Court.*

§ 838. If land be conveyed to the grantee in fee, reserving to the grantor an inheritance in the trees and timber not

* In Buck v. Pickwell, *supra*, the Supreme Court said: "The verbal contract, as detailed in the testimony of Story, did not purport to give to the plaintiff the right of the exclusive possession of the land upon which the timber sold was standing. All that it fairly imported was a transfer of the timber as standing, and a right, at a future time, to enter upon the premises and cut and take it away, from time to time, as the plaintiff might want to use it. As far as the plaintiff had cut and taken away the timber, so far it may have vested in him; but as far as it remained uncut, so far the contract remained executory. No actual or constructive possession of the trees uncut was taken, and no possession had been taken of the land. At most, the plaintiff had only exercised the right of entry as to the land itself, which is all the contract purported to give. There is then no good ground to say that this contract was fully executed. It is well settled, that at law a part performance of a verbal contract will not exempt it from the statute of frauds. We think if this action had been against Story, it could not have been maintained, even though he had remained the owner of the premises, and had committed the acts complained of. Much less can it be maintained against the defendant, his grantee through intermediate conveyances, and whose immediate grantor had upon the record a deed without any reservation, and who conveyed to this defendant without any reservation. Though the defendant, when he purchased the premises, might have recognized and treated the plaintiff's right to the timber as valid, under the contract with Story, yet that cannot make that pass by parol which the statute of frauds requires shall only be passed by writing."

It would seem to follow, that a contract for the sale of standing trees, with a right, at a future time, to enter upon land to remove them, concerned an interest in land. It was so held in Putney v. Day, 6 N. H. 430; Green v. Armstrong, 1 Denio, 550; Warren v. Leland, 2 Barb. 613; and that as long as they are annexed to the land, and are not actually nor in contemplation of law severed therefrom, they cannot be sold by verbal contract. In Scorell v. Boxall *et al.* 1 Younge & Jervis, 395, it was determined that the sale of growing underwood, to be cut by the purchaser, was a contract for an interest in land, and must be in writing. It did not appear at what time the vendee was to cut the underwood, or what state it was in as to its growth at the time of the contract, or whether the price was dependent upon the quantity produced. In Teall v. Auty, 2 Brod. & Bing. 99, it was held that a sale of growing trees for hop poles was a contract for an interest in land, and must be in writing; and the same has been held in several cases as to a contract for the sale of growing grass which stands upon the same ground as a contract for the sale of growing trees. In neither case would the subject-matter of the sale be emblements, and go to the executor or administrator as a chattel, or be sold on execution as a chattel (Buck v. Pickwell, 27 Vt. 157, per Bennett, J., citing Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 M. & W. 248; Rodwell v. Phillips, 9 M. & W. 501; Jones v. Flint, 10 Adolph. & Ellis, 753). The case of Smith v. Surman, 9 Barn. & Cres. 561, was peculiar. Standing timber was sold for so much a foot after the owner had commenced cutting, and had actually cut two trees; and by the contract the vendor was to cut and deliver the rest. This was held not to be a contract for an interest in land. The timber was to be made a chattel by the seller, and the construction given to the contract was that the vendee purchased the trees after they should have been severed from the freehold.

only then growing, but which may thereafter be growing on the land, the grantor and his heirs are entitled to all the trees and timber standing and growing thereon forever, with the right to cut and carry them away. And the purchaser from the grantor has the same right with an exclusive interest in the soil so far as may be necessary for the support and nourishment of the trees, which right would entitle him to maintain an action of trespass for breaking the close as well as for cutting down and carrying away the trees.[1] *

§ 839. Although a person's title to land be sufficient to enable him to recover its possession, yet if another has been for a long time in the actual adverse possession of the premises the owner cannot maintain an action of trespass for cutting the timber. Whether in such case the title to the land vests in the owner a general property in the wood after it has been severed from the freehold, and draws with it such a constructive possession as entitles him to sustain the action, may be questionable. †

§ 840. Where land is mortgaged, any person cutting and carrying away timber therefrom without the permission of the mortgagee, is a trespasser, and acquires no property in it. The property in the timber will still remain in the mortgagee, who may pursue and recover it, or its value, of any one who may become possessed of it, or who may undertake to convert it to his own use. Persons cutting and hauling the timber are liable to an action *quare clausum*, &c., and may

[1] Wilson v. Mackreth, 3 Burr. 1824; Clap v. Draper, 4 Mass. 266; Robinson v. Gee, 4 Ired. 186.

* The vendor of timber standing on another's land, which is afterward cut and removed by the vendee, is a trespasser (Dreyer v. Ming, 28 Mo. 434).

An action of trespass *quare clausum* may be maintained in behalf of the United States against a person for cutting and carrying away timber from the government lands (Cotton v. The U. S. 11 How. U. S. 229).

† There are obviously serious difficulties in sustaining such an action, for if the title to real estate will give a general property and a constructive possession to whatever is severed from the land while it is in the adverse possession of another, then in an action of trover or trespass *de bonis* against the actual possessor, the only question may arise in whom the title to the land really is (see 1 Smith's Leading Cases, 410; Mather v. Trinity Church, 3 Serg. & R. 509; Pratt v. Battels, 28 Vt. 685).

be declared against after having taken it away in trespass *de bonis asportatis*, or trover; as may also any person concerned in aiding them in their tortious acts.[1] Where the mortgagor in possession cuts timber growing upon the land, the mortgagee cannot claim the timber or reduce it into his possession, or treat the mortgagor as a trespasser if, under the circumstances of the case, an assent to the act of the mortgagor may be fairly presumed. But if such assent is not shown, or fairly to be deduced from the facts of the case, a cutting of timber amounts to waste, which may be restrained. The mortgagor is also liable at the suit of the mortgagee (unless there be a usage and general understanding to the contrary with respect to the felling of trees and clearing of wild lands), and the mortgagee, before any lawful rights of third persons intervene, may take possession of the timber.[2] *

§ 841. The plaintiff must in general prove that he owned the land on which the trees were cut. But where, without introducing any paper title, he proved by two witnesses that

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[1] Smith v. Goodwin, 2 Greenlf. 173; Frothingham v. McKusic, 24 Maine, 403.

[2] 2 Story's Eq. 286; Bussey v. Page, 2 Shepl. 132; Smith v. Moore, 11 N. Hamp. 55; *ante*, §§ 774, 775; Stowell v. Pike, 2 Maine, 387.

* Trees and shrubs planted in a nursery for the purpose of temporary cultivation and growth until they shall become sufficiently mature to be fit for market, then to be taken up and sold, pass by a mortgage of the premises on which they are so planted, so that the mortgagor or his assignees cannot remove them as personal chattels. In Maples v. Millon, 31 Conn. 598, the court remarked that "trees and shrubs are generally as much a part of the realty as the soil itself, whether growing upon it naturally or planted and cultivated by the hand of man. It is, therefore, incumbent upon the party claiming that they are personal chattels which do not pass with the transfer of the land, to show that such was not the intention of the parties. How is this attempted to be done in this case? We have nothing but the simple circumstance that Millon, the mortgagor, was a nursery gardener, and that the trees and shrubs in question were his stock in trade. This, as we have intimated, might be important if the question arose between landlord and tenant, but its importance here we do not perceive. He owned the land on which he planted the trees. By placing them there for cultivation and growth they became *prima facie* parcel of the land itself. If he had sold and conveyed the land instead of mortgaging it, they would have passed to his vendee, unless specially excepted out of the conveyance. This would be so even if it be admitted that they partake to some extent of the nature of emblements, since it is a general rule that where an estate is determined by the act of the tenant, the emblements shall go to the owner of the soil. If this is so between vendor and purchaser, then the only question is whether the same rule applies between the mortgagor and mortgagee; and we are satisfied that it does."

the land on which the trespass was committed belonged to him, and no objection was made to the testimony at the time, it was held that the defendant had waived the right to require the court to instruct the jury that the title to the land was not sufficiently proved.[1] If the action be brought by a landlord for cutting down trees on land in the possession of his tenant, proof of the payment of rent by the tenant to the plaintiff is *prima facie* evidence that the plaintiff is the reversioner and the trees his property.[2] *

§ 842. Trees which have been cut down, do not pass to the purchaser of the land; neither has he constructive possession of the wood as bailee or agent of the owner, or any special property therein, so as to enable him to maintain trespass against a party who unlawfully removes it. Where therefore A. without permission, cut down trees on government land, and converted them into wood, and the land was afterward sold by the government to B., who told A. he must not remove the wood, which however A. did, in an action of trespass brought by B. against him therefor, it was held that B. could not recover for the taking of the wood, but only nominal damages for breaking and entering his close.[3] †

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[1] Clay v. Boyer, 5 Gilman, 506.

[2] Jayne v. Price, 5 Taunt. 326; Daintry v. Brocklehurst, 3 Exch. 209.

[3] Brock v. Smith, 14 Ark. 431.

* In Illinois, in an action under the statute "to prevent trespassing by cutting timber," the plaintiff must prove that the defendant cut the trees either by himself or his agent. It is not enough to show that the trees were cut and appropriated by persons employed by him to cut timber on his own land (Cushing v. Dill, 2 Scam. 460; Gale's Stat. 679).

The award of arbitrators settling the boundary of land will justify the party in whose favor the award is made in cutting timber on the land (Sellick v. Adams, 15 Johns. 197).

† Where timber has been severed by a trespasser, the owner may claim it as part of his freehold while yet on the land (Altemose v. Hufsmith, 45 Penn. St. R. 121). If a lessee for years cuts down trees and lets them lie, and afterward carries them away, so that the taking and removal be not one continued act, an action of trespass will lie against the lessee. The interest which the lessee had in the trees is determined by the wrongful act of cutting them down; and the general property which the lessor had before, subject to the rights of the lessee has now become absolute. The trees have become mere personal chattels, and the lessor is the general owner, and entitled to immediate possession. As therefore, the lessor has the right both of property and possession in the trees,

8. *Interrupting enjoyment of church pew.*

§ 843. In the United States, for the violation of the right of possession to a pew, the owner, as already intimated,[1] is entitled to an action of trespass. Jackson v. Rounseville,[2] was an action for occupying the plaintiff's pews by introducing strangers therein on the fourth of July, and for removing certain fixtures which the plaintiff had placed thereon. It appeared that on third of July the plaintiff fastened up his pews with boards, and put thereon a written notice forbidding any person meddling with his pews, and that the following morning the defendants removed the boards. The meeting-house in question, and the land on which it stood, were held under a deed of trust, the general tenor of which was, that the premises should be held and improved for the use of a Baptist meeting-house for public worship only. The prudential committee of the society consisted of three persons, two of whom gave the defendants permission to use the meeting-house for the fourth of July celebration, and the defendants acted under the direction of that committee in removing the boards from the pews. The judge before whom the cause was tried, instructed the jury that the society had a right to grant the use of the house for the celebration of the anniversary of the declaration of independence; but that on such occasions the pew holder had a right to the exclusive use of his pews, and might lock or otherwise fasten them, or in any way prohibit people from entering them, and that if any person knowing such prohibition entered, he would be guilty of a trespass. But that the pew holder would have no right to place such objects in his pews as would be offensive to those who occupied the rest of the house, and if he did so, then those entitled to the use of the house, would have a right to remove the offensive or injurious

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he may sue whenever they are carried away and appropriated by another (Vin. Abr. Trees, A, Pl. 7, and Tit. Trespass, 5, Pl. 10; 1 Chit. Pl. 206; Tobey v. Webster, 3 Johns. 468; Phillips v. Covert, 7 Ib. 1; Holmes v. Seely, 19 Wend. 507; Schermerhorn v. Buell, 4 Denio, 422; Elliott v. Smith, 2 N. Hamp. 430).

[1] *Ante*, § 745.

[2] 5 Metc. 127.

objects, without doing any damage to the pews. That the plaintiff had a right to fasten up his pews with boards, provided they were so placed as not interfere with the rights of others, and that to enter and remove them, would be a trespass. The jury having found a verdict for the plaintiff, the Supreme Court refused to disturb it.*

§ 844. When, by reason of altering or enlarging a church for convenience, the pew of an individual is destroyed, he is entitled to indemnity.† But it is otherwise where an entire

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* The Supreme Court said: "Whether in legal right, in parishes and religious societies constituted in the usual way, the society has authority, by their committee or otherwise, to lend the use of their meeting-house, and whether in such case, the use of the house extends to the use of the pews, to the exclusion of the owners for such an occasion, is a question which we think is not raised in the present case. It has been the practice in various parts of the commonwealth, and especially in the city of Boston, for religious societies to lend the use of their houses to the government, for the annual election sermon, and to the various societies and philanthropic associations to hold meetings for various purposes; and upon such occasions, it has been usual for the body or association to whom the house is lent to control the use of the pews, without regard to the particular owners. Perhaps loans of the use of houses of worship may be resolved into a mere practice of courtesy on the part of religious societies, and of voluntary acquiescence, amounting to an implied license on the part of pew owners, not affecting the legal rights of either. And perhaps it is more for the harmony and well-being of society, that the practice should stand on considerations of liberality and courtesy, than to discuss the question of strict law, at least until a case occurs which requires it. In the present case, there was conflicting evidence, both as to the authority of the committee, and as to the point whether, if they had that authority, they had duly exercised it, and as to the proceedings on the part of those to whom it was given. The evidence was left to the jury, under instructions from the court, in point of law sufficiently favorable to the defendants, and we can perceive no legal ground upon which they can claim to set aside the verdict for any misdirection in matter of law."

† O'Hear v. De Goesbriand *et al.* 33 Vt. 593, was an action of trespass *quare clausum*, for the destruction by the defendants of a pew in a Roman Catholic church in Highgate, which the plaintiff claimed to have owned. At the trial of the cause, in the county court, it was proved that the building of the church was commenced in 1849, and completed in 1851, upon the land of the Messrs. Keyes; that, from 1851 to the period of the alleged trespass, which was in 1856, the plaintiff was in the exclusive use and occupancy of the pew whenever the church was open for public worship; that, in 1853, the title and estate of the Messrs. Keyes in the land on which the church was erected was conveyed to the Right Rev. John B. Fitzpatrick, who, at that time, was bishop of the Roman Catholic diocese of Boston, of which the State of Vermont formed a part; that, in the same year, the territory within the limits of Vermont was erected into a new diocese, of which the defendant De Goesbriand was duly appointed and installed as bishop. It was not questioned that bishop De Goesbriand succeeded to, and was invested with all the rights connected with the church which belonged to Bishop Fitzpatrick; and it was admitted that the other two defendants, who assisted in tearing up and removing the pew, acted under his directions. It was proved, on the trial, that the original agreement among the subscribers was that they should buy the land and build the church, and that

demolition becomes necessary, in order to rebuild the old house, which has so far decayed as to become unfit for use.[1] Church officers cannot, however, lawfully deprive a person of a sitting in a pew which he has enjoyed for a long time, without notifying him of their intention, and affording him an opportunity to object.[2] When a church edifice, being so far decayed as to be unfit for use as a place of public worship, is demolished, and the materials worked into a new house, or sold and the proceeds employed in rebuilding, no individual pewholder can claim his share of the materials or the proceeds, for the reason that he did not own them, but only the right to use the pew for the purposes of public worship. His right is absolute while the house remains, but no longer. It may be asked, what remedy have a minority

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the pews should be divided among the subscribers, so that each might own his pew in severalty, and that this agreement was practically carried out and acted upon; that there was a severance and division of the pews, agreed to at the time it was made, by all of the subscribers, or made according to the original agreement, and subsequently acquiesced in by all the subscribers; so that thereafter, by common consent of the subscribers, the plaintiff, who was one of their number, was recognized and agreed by all of them to have the right to the exclusive occupancy and ownership of the pew in question, and that the plaintiff, from that time forward, up to the time of the trespass complained of, occupied the pew, claiming such right. It was urged, on the part of the defendants, that the object and design of the parties to the original undertaking to build the church, as expressed in their subscriptions, was to erect a Roman Catholic church, and that the admission of the right of a layman to own and hold a pew therein would prevent its being a Roman Catholic church, even though recognized in the subscription or agreement; and that any agreement for the division of the pews among the subscribers, to be owned in severalty, whether contained in the original subscription or agreement or not, was to be rejected and disregarded, as being repugnant to the obvious design and intent of the parties in reference to their proposed undertaking; that the original subscription for the building of the church was a contract in writing, that the church to be built by the funds to be raised should be a Roman Catholic church, and that no parol testimony could be received to show that, at the time the subscription papers were signed, there was a parol agreement made by the parties thereto, that the several subscribers (they being laymen) should own the pews in the church; because it would be repugnant to the written contract, inasmuch as the building to be erected could not be a Roman Catholic church if laymen were permitted to own pews in it. It was held that the agreement or intention of the original subscribers to the undertaking was to be carried into effect whenever properly ascertained; and that the question whether the rules of the canon law, in relation to the property in the pews were adopted or recognized by them when they entered into the original agreement or contract for the building of the church, was one of fact, and not of law. And the jury having found for the plaintiff, the Supreme Court refused to disturb the verdict.

[1] Gay v. Baker, 17 Mass. 435; Wentworth v. First Parish in Canton, 3 Pick. 344.

[2] Horsfall v. Holland, 6 Jur. N. S. 278.

of pewholders, if the majority determine to demolish the building, and thus destroy the pews. The answer is, none, if the act is necessary. The property of all is dealt with in the same way, and the advantages are enjoyed in common. But if there should be a wanton or malicious abuse of power, by which the minority were oppressed, the law would afford a remedy to the extent of the injury sustained.[1] Howard v. The First Parish in North Bridgewater[2] was an action by a pewholder for depriving him of his pew by tearing down the parish meeting-house. Worth, J., who presided at the trial, charged the jury, that "although, taking into consideration the age, decay, and inconvenience of the house, they might be of opinion that the taking it down and erecting a new one was expedient and commendable, yet that the parish had no right to take it down because it was inconvenient, decayed, and out of repair, unless it had become unsuitable for the purposes for which it was erected, without making an adequate compensation to the pewholders; and that, if they were satisfied that the house was, and, by moderate repairs, would have continued to be for a considerable time, a convenient and suitable place of public worship for the parish and pewholders, and that the pew as such, and for the use and purposes for which it was intended, was valuable property to the plaintiff, they ought to find a verdict for the plaintiff for such sum as the pew was worth; otherwise they ought to find for the defendants." The jury having found for the plaintiff, the Supreme Court, in directing judgment to be entered on it, said: "We have looked at all the cases, and notwithstanding there may be some loose expressions in them of a contrary tendency, we consider the law to be that where the meeting-house is so old and ruinous that the jury will say it is necessary to take it down, there shall be no compensation to the pewholder; and that, although the parish have a right to take down a

[1] Wentworth v. First Parish in Canton, *supra*, per Parker, Ch. J.; *ante*, § 746.

[2] 7 Pick. 138.

meeting-house which may be in good condition, in order to build one in better taste or of larger dimensions, yet in such case there must be compensation.*

* In Massachusetts this right is recognized, and the mode of executing it established by statute. By the fifth section of the statute of 1817, ch. 189, it is provided that whenever the proprietors shall deem it necessary, for the purpose of repairing, altering, enlarging, or rebuilding any meeting-house, to take down any pews therein, it shall be lawful for them so to do, such pews being first appraised; and that the pews newly built shall be sold, and the moneys arising from the sale be applied for the payment of the pews taken down.

Daniel v. Wood, 1 Pick. 102, was an action of trespass *quare clausum fregit*, for destroying the plaintiff's pew, which he proved was built pursuant to a vote of the town, and that he had been in possession of it until the destruction of the meeting-house pursuant to a vote of the parish. The plaintiff having been nonsuited in the court below, the Supreme Court, per Parker, C. J., in refusing to set the nonsuit aside, said: "It does not appear in the case whether the proceedings required by this statute (of 1817, ch. 189) were had, or whether any indemnity has been given to the plaintiff; but still the defendants could not be trespassers in executing a vote of the parish, for, before the statute, the parish or society had a right to take down and rebuild the meeting-house. And if the plaintiff has suffered in his property by the destruction of the old meeting-house, and the erection of a new one, he can have his action on the case, in which he will recover his reasonable damages; or perhaps he may hold a property in the new pews corresponding with his property in the old ones, by submitting to his share of the expense" (approved in Wentworth v. First Parish in Canton, 3 Pick. 344).

Where a parish is incorporated into a town, it does not necessarily lose its parochial corporate character, but may still proceed to hold parish meetings, elect parish officers, and keep records distinct from those of the town. These principles were discussed and settled in Dillingham v. Snow, 3 Mass. 276, and afterwards revised and confirmed, in a case between the same parties, in 5 Mass. 547. In those cases it appeared that the North Parish in Harwich was incorporated into a town by the name of Brewster, and, having continued to act as a parish, it was contended that it ceased to exist in that capacity upon its incorporation into a town; but it was decided that the parish still continued to exist. It was also settled as law that the inhabitants of a town are not necessarily and of course members of a parish included within it; but that those who are exempted on account of their religious scruples and opinions, though members of the town, are not members of the parish comprehended by the same boundaries.

Inhabitants of Milford v. Godfrey *et als.* 1 Pick. 91, was an action of trespass *quare clausum fregit*, for tearing down a meeting-house and removing the materials, to which the defendants pleaded the general issue. It was proved that a precinct existed as a corporation in the territory afterwards comprised in the town, from the year 1741 to the year 1780, when the precinct was incorporated into a town. All the parochial affairs of the precinct were then transacted in town meeting. The money for the minister's salary and for repairing the meeting-house was raised by a vote of the town, and assessed and collected by town officers, and paid into the town treasury. The care of the meeting-house was, from time to time, committed to a person chosen by the inhabitants of the town. The town sold a part of the ground floor for the purpose of making pews, and it authorized certain persons to saw the house asunder in order to enlarge it and make more pews. The house was also used by the town for public purposes on election days, and it was called the town's meeting-house. The plaintiffs contended that the property in the land and building originally in the precinct came to the town, and that, by force of the incorporation of the town, the precinct became extinct; or if it did not, that the various acts of ownership above stated gave such an exclusive possession to the town that they had a right to maintain

9. *Removing dead bodies.*

§ 845. A dead body is not the subject of property, but after burial becomes a part of the ground to which it has been committed. By the common law, though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes, nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried. The person indeed who has the freehold of the soil may bring an action of trespass against such as dig and disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony, for the property in it remains in the executor or whoever was at the charge of the funeral.[1] Although, in an action against the superintendent of a cemetery for wrongfully removing from the plaintiff's lot the body of his deceased child and burying it elsewhere; the gist of the action is the breaking and entering the plaintiff's close, yet the circumstances which accompany and give character to the trespass may be shown either in aggravation or mitigation. At the trial of such an action in the Superior Court of Massachusetts, the judge instructed the jury that, if it appeared that the defendant had acted in

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the present action. The defandants, on the other hand, insisted that the property was not in the town, but in the parish, which was organized under a warrant from a justice of the peace in 1815, they being authorized by said parish to do the act complained of as a trespass; and, also, that the possession of the house was in the said parish at the time the alleged trespass was committed. It was proved that the persons claiming to be the parish had the sole occupation and control of the house for the purposes for which it was erected, and that the key of the same was in the custody of their servant, from the year 1815 to the time the action was brought. A verdict having been taken at the trial in the court below, for the plaintiffs, subject to the opinion of the Supreme Court, the latter, in directing judgment of nonsuit to be entered, said: "We consider all the acts of the town in relation to the meeting-house, as done in their parochial capacity, and therefore giving them no right in their municipal character. The parish never lost possession of the meeting-house, never forfeited the property; and the town, as such, never acquired any. The use of the house for public municipal purposes could give no right of property; nor was it anything like an exclusive possession while the society had the use of it every Sabbath for the purposes for which it was built. We are, therefore, after maturely considering the case, all of opinion that the verdict should be set aside."

[1] Corven's Case, 12 Co. 105; Hayne's Case, Ib. 113; 2 Bl. Com. 429; The King v. Lynn, 2 Term R. 733.

the removal of the body of the child either with a willful disregard of the plaintiff's rights, or under a mistake arising from gross carelessness and want of ordinary attention or diligence in making proper inquiry, they would have a right, in assessing damages, to consider the injury to the plaintiff's feelings, and would not be restricted to the mere pecuniary loss or damage to his property. A verdict having been found for the plaintiff for $837 50, the Supreme Court refused to disturb it.[1] *

10. *Removal or injury of tombstones.*

§ 846. One who takes up tombstones in a churchyard or defaces the inscriptions is liable in damages, property in tombstones remaining in the person who erected them.[2] After the decease of the latter, the action belongs to the heirs of him to whose memory the stones were erected, although they may have been severed from the freehold.[3] A husband, who has defrayed the funeral expenses of his deceased wife, has a paramount right to place a monument at her grave, and for that purpose to remove one which has been placed there by another relative. In Durell v. Hayward[4] the husband had caused his deceased wife to be buried at his own expense. The mother of his wife having placed

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[1] Meagher v. Driscoll, 99 Mass. 281.

[2] Spooner v. Brewster, 3 Bing. 136; Frances v. Ley, Cro. Jac. 367; and see Ashby v. Harris, 3 C. P. 523.

[3] Sabin v. Harkness, 4 N. Hamp. 415; Pym v. Gorwyn, Moore, 878; Corven's Case, 12 Co. 105.

[4] 9 Gray, 248.

* In this case the Supreme Court said: "He who is guilty of a willful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of willful mischief, often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness" (citing Bracegirdle v. Orford, 2 M. & S. 77; Merest v. Harvey, 5 Taunt. 442; Brewer v. Dew, 11 M. & W. 625).

a stone at his wife's grave, without his knowledge or consent, he removed it for the purpose of substituting another stone, and it was for such removal that the action was brought. At the trial in the Common Pleas, the judge ruled that "the plaintiff had a right to erect the stone in memory of her daughter as she did; that the defendant, if there was anything upon the stone disagreeable to his feelings, could not remove the stone and carry it away without first giving notice to the plaintiff; and that the subsequent tender of the stone to the plaintiff was of no avail in the matter of damages." The jury having found a verdict for the plaintiff, the Supreme Court, in setting it aside, said: "The plaintiff had no right to erect a stone at the grave of the defendant's wife, without his knowledge or consent. The indisputable and paramount right as well as duty of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial, in accordance with the well known and long established usage of the community. The defendant had, therefore, a right to remove the stone which the plaintiff had placed over the grave of his wife, in order to put in its stead the one procured by himself; and having taken it down without injury, and holding it in his possession ready to be delivered up to the plaintiff on her demand therefor, he has done no act for which an action of trespass will lie."

11. *Forcibly passing turnpike gate.*

§ 847. To constitute the forcible passage of a gate, within a statute imposing a penalty upon any person who shall forcibly or fraudulently pass any gate on any turnpike or plank-road, without having paid the legal toll, the passage must be effected by actual force, as opening the gate, taking hold of and keeping it open, or some other similar act, or at least offering some violence to overcome, remove or prevent the obstacle of the gate to the passage. In Monterey &c. Plank-

road Co. v. Faulkner,[1] the only evidence in relation to force was that the defendant, with a pair of horses, passed through the gate, and was requested by a person in charge to pay the toll; that the defendant offered a bank bill in payment, and refused to pay in any other way. It was held that this fell far short of what was required to maintain the action. In another case, in the same court, the evidence showed that the defendant passed through the gate on the plaintiff's plank-road, and on being requested to pay toll declined, saying that he ought not to pay toll as the road was bad, but would do so if the superintendent of the road said he must; that subsequently he again passed through, and was told that the superintendent said he must pay toll, to which he made no reply, but passed on without paying toll. It was held that there was not a forcible or fraudulent passing of the gate, within the meaning of the statute, and that therefore the plaintiff was not entitled to recover.[2] *

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[1] 21 Barb. 212.

[2] Bridgewater & Utica Plank-road Co. v. Robins, 22 Barb. 662.

* In the above case, judgment having been rendered for the plaintiff in the court below, the Supreme Court, in reversing it, said: "While in the construction of penal as of other statutes, the intention of the legislature must govern, that intention is to be collected from the words employed; and the words must receive an interpretation according to their plain and natural sense—the sense in which they are ordinarily used. The question before us is, whether there was any evidence to be submitted to and passed upon by the jury, of 'a forcible or fraudulent passing,' of the gate of the plaintiff, within the statute imposing the penalty. The terms 'forcible and fraudulent' must be held to have been used in their ordinary sense. Actual force or actual fraud, as distinguished from constructive force or fraud, was intended. Every passage without the consent of the toll gatherer, and without the payment of the legal toll, would be in one sense forcible, as being done against his will, and fraudulent, as an act in fraud of the rights of the company. But it cannot be presumed that these common and well understood words were used in this somewhat refined and very unusual sense. The words were designed to specify the particular wrongful passing, without the payment of toll, which should subject an individual to the penalty. Upon any other construction the words were useless, as qualifying the sentence and limiting the penalty to a particular class of offenders. The act of the defendant was rather a nonfeasance than a malfeasance. It consisted in an omission to pay the toll. Indeed, he was not forbidden to pass the gate, and no effort was made, even by words, to prevent his passing until he should pay the toll; and a mere nonfeasance cannot be considered as forcible."

The same point was decided in The Columbia Turnpike v. Woodworth, 2 Caines, 97, in which it was held that a similar clause in the act incorporating the company had in contemplation only forcible and violent passings, and that simply riding through the gate, without paying toll, did not subject the party to the penalty.

§ 848. A turnpike or plank-road company is, in judgment of law, the injured party when its gates are forcibly or fraudulently passed to evade the payment of toll, notwithstanding any arrangement that may exist between the company and a third person as to the disposition of, or interest in, the tolls. In Monterey &c. Plank-road Co. v. Chamberlain,[1] the court, at the trial, decided that the plaintiffs could not recover the penalty, because having leased a portion of their road to one Voak, and having no interest in the tolls or proceeds thereof, they were not injured by the wrongful acts of the defendant; that the only injury sustained by any one by the acts complained of was occasioned by the omission to pay toll, and consisted of the loss of such tolls; that that was no injury to the plaintiff, but was the loss of Voak, who alone was entitled to the tolls. The Supreme Court construed the statute as giving a right of action for the penalty to a turnpike or plank-road company only where such company had suffered actual injury by the commission of the prohibited act; and as the only injury in the present case, by forcibly passing the gate, was the loss of toll to which Voak was entitled, and in which the plaintiffs had no interest, it was adjudged that they had sustained no injury, and consequently had no right of action. The judgment was, however, reversed by the Court of Appeals.*

12. *Obstructing private way.*

§ 849. If the owner of land allows a person to use a path across it, and a dangerous obstruction is placed in the path, which causes injury to the licensee, he is entitled to an action for damages, whether the obstruction be caused by the owner

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[1] 32 N. Y. 659.

* A turnpike gate cannot be lawfully erected upon an existing turnpike, without an act of the legislature. In an action of trespass for cutting down a turnpike gate, it appeared that a statute authorized a turnpike company to erect a gate on their road, near the dwelling-house of J. H., and that the gate was not erected there, but in a different place. It was held that the gate was a public nuisance, and that the defendant had a right to abate it (Wales v. Stetson, 2 Mass. 143).

of the land over which the way exists or by a stranger, and whether the way be claimed by prescription or grant, or be enjoyed only under a parol license or permission which has not been revoked.[1] Where a grant of land reserved a right of way through a certain avenue, and the grantor afterward built a house in said avenue, it was held that the proper remedy of the grantee was an action of trespass.[2] When an open way is not expressly granted, the owner of the land will be at liberty to use convenient gates or bars where they are required for the proper use and protection of his fields, unless the nature and objects of the way granted are such as to indicate a way not to be subject to gates and bars. This comes naturally from the doctrine that the owner of the land shall be permitted, in the absence of express stipulations or necessary implications to the contrary, to make all the use of the land he can consistently with the enjoyment by the grantee of a reasonably convenient way.[3] In a recent case in Massachusetts,[4] it was held that the owner of land subject to a right of way cannot lawfully erect a gate at the entrance of the way, or narrow the passage, unless there be proof of a contrary usage. "This rule," say the court, is "necessary to the security of both parties: to the grantee, to insure him a way of known width and dimension, the sufficiency of which he may judge of before he closes his contract for the purchase; and to the grantor, to secure himself against the claim of the grantee to an indefinite right to pass over his premises."[5]* Bakeman v.

[1] Corby v. Hill, 4 C. B. N. S. 556; 27 L. J. C. P. 218. See *ante*, § 712.

[2] Hays v. Askew, 7 Jones Law R. N. C. 272.

[3] Warren v. Bunnell, 11 Vt. 600; Whitingham v. Bowen, 22 Ib. 317; Loveland v. Town of Berlin, 27 Ib. 713; Wolcott v. Whitcomb, 40 Vt. 40; Garland v. Furber, 47 N. Hamp. 301.

[4] Welch v. Wilcox, 101 Mass. 162.

[5] See Salisbury v. Andrews, 19 Pick. 250; O'Linda v. Lothrop, 21 Pick. 292; Underwood v. Carney, 1 Cush. 285, 292.

* Where the owner of land places a gate across a private footway so as not absolutely to obstruct the use of the way by the grantee, an action will not lie therefor. But it is otherwise in the case of the grant of a way for horses and carriages, and the use of the way by the grantee free from gates (James v. Hayward, W. Jones, 221; Cro. Car. 184).

In Washburn on Easements, it is laid down that where one grants the right

Talbot[1] was an action brought to remove certain fences from a private way, claimed by the plaintiff, over lands of the defendant, and for an injunction. The easement was a right of passage, without defining the manner of its enjoyment, with or without bars or gates, over the agricultural lands of the defendant. The plaintiff claimed that the lands of the defendant should be thrown open, without fences or protection, or that he should be required to erect a fence upon both sides of the way throughout its entire length, leaving the entrance open at the western end. The court, in affirming the judgment below, which was for the defendant, remarked that the first of the foregoing propositions "would, in effect, deprive the defendant of the use of his lands for cultivation; while the second would entail upon him an amount of expense in the making and maintaining of the fences quite as damaging in its consequences.*

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of a private footway across his land, he may shut the *termini* of the same, by gates which the grantee must open and close when using the same, unless an open way is expressly granted. In support of this is Maxwell v. M'Atee, 9 B. Mon. 20, in which it was held that the grant of a way without any reservation of a right to maintain gates did not necessarily imply a negation of the owner's right to do so; and this position is sustained in Bean v. Coleman, 44 N. H. 539. The foregoing are also cited and approved in Garland v. Furber, *supra*.

[1] 31 N. Y. 366.

* Emerson v. Wiley, 10 Pick. 310, was an action of trespass *quare clausum fregit*, to which the defendant pleaded a private way by prescription, and that he was the owner of the adjoining close, and, as appurtenant to it, he had a right to pass over the plaintiff's land. The plaintiff derived his title to the premises in question from the parish. They were a part of the common which was appropriated "for the use of the old parish for highways, a training field, a burying place, and the more convenient coming at the pond with flax and creatures, and also to accommodate the neighbors that live bordering on said lands for their more convenient coming at and improving their own lands and buildings; all the aforesaid lands to remain unfenced as they then (in 1741) were, and to the use of the old parish and neighborhood aforesaid forever; never to be disposed of for any other use whatsoever, without the consent of every freeholder in the parish." The parish had undertaken to dispose of the land to the plaintiff, and the land of the defendant was deprived of the privilege of bounding and fronting upon the common; and it was not proved that every freeholder consented to the sale to the plaintiff. Such consent was not to be presumed to have been given by the owner of the defendant's lot, because it would have greatly lessened its value. In the original grant by the parish, of the land now claimed by the defendant, it was bounded upon the common. It was held that the parish could not, nor could the plaintiff claiming under the parish, legally inclose the land which the inhabitants had appropriated, as before stated, without the consent of the owners of the lands abutting thereon (citing Parker v. Smith, 17 Mass. 413).

In an action for obstructing a right of way, a general denial does not raise a

13. *Interfering with ferry or market.*

§ 850. As the owner of a ferry is bound to keep proper boats, boatmen and all other things essential to the preservation of it in an efficient state for the use of the public, he may maintain an action against any one who carries in the line of the ferry, or makes a landing place near it so as to be substantially the same landing. It is sufficient in such case to prove that he was in possession of the ferry at the time the cause of action accrued.[1] So, likewise, if one comes near the boundary of a market and avails himself of the throng of persons coming and going, to get customers, and sells without the boundary of the market, so as to avoid the payment of the toll, an action will lie against him by the owner of the market.[2] But it must be proved that the act was willful and intentional.[3]

14. *Defiling stream.*

§ 851. A person is bound so to use a stream running across his land, as not to pollute or poison it by admixture with unwholesome substances. This is upon the principle that all who are entitled to the benefit of the water of a stream have a right to receive it pure and uncontaminated. Like the air, it is in a certain sense common property. Accordingly, where a person is allowed to take water from adjoining land through a pipe or water-course, he may maintain an action for damages if the water is defiled by a wrongdoer. The plaintiff in such a case relies upon no title to the water as a riparian proprietor; but merely alleges that he was lawfully in the enjoyment and use of water flowing through his premises in a pure and unpolluted state, and

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question of title (Hastings v. Glenn, 1 E. D. Smith, 402). In such action the plaintiff is entitled to more than nominal damages (Smiles v. Hastings, 24 Barb. 44).

[1] Letton v. Goodden, L. R. 2 Eq. Ca. 123; Newton v. Cubbitt, 12 C. B. N. S. 32; 31 L. J. C. P. 246.

[2] Bridgland v. Shapter, 5 M. & W. 375.

[3] Brecon v. Edwards, 31 L. J. Exch. 368.

that the defendant fouled it.[1] And if the owner of land higher up the stream defiles it and renders it unfit for use, the owner lower down the stream may maintain an action for the injury without proof of damage; for such pollution, if allowed to continue, might become a right.[2] So likewise, the vendor of land on the banks of a stream cannot, in derogation of his own grant, continue to foul the water in front of the land sold.[3]

§ 852. A frequent claim for damages arises from injury to mills by the throwing of tan bark and other refuse into the stream above. In an early case in New York, it was decided that when persons have equal rights to erect mill dams on a river, the rubbish of which comes from a newly erected upper mill to an older lower mill, though it be an inconvenience to the lower mill, causing some considerable damage thereto, it will not lay the foundation for an action unless the person above has made an unreasonable use of his privilege, and it be very clear that the party had no right to use it in that way.[4] But in Thomas v. Brackney,[5] which was an action for injury to the plaintiff's mill, caused by the defendant, who owned a tannery on the stream above, throwing bark into the stream which floated down, it appearing that damage had thereby been caused to the plaintiff's grist mill, it was held that he was entitled to recover.

§ 853. With regard to the party plaintiff, it may be observed that any person interested in the use and enjoyment of the water of a stream, is entitled to maintain an action for any special injury he may sustain from the corruption of the water by any other person, directly or indirectly. This rule is essential to a proper regard for the public welfare, to the preservation of the public health, and to the due and complete enjoyment of private rights.[6] In an action for

[1] Laing v. Whaley, 3 H. & N. 685; s. c. 2 Ib. 476.
[2] Murgatroyd v. Robinson, 7 Ell. & Bl. 391; 26 L. J. Q. B. 233.
[3] Crossley v. Lightowler, L. R. 3 Eq. Cas. 279.
[4] Palmer v. Mulligan, 3 Caines, 307. [5] 17 Barb. 654.
[6] Carhart v. Auburn Gas Light Co. 22 Barb. 297.

injury resulting to the plaintiff from the wrongful acts of the defendant, in throwing tan bark and other materials into the stream upon which the plaintiff had a mill, the plaintiff alleged that he was the owner and in lawful possession of the premises. The evidence showed that he had an agreement for the purchase of the property, and had taken and held possession, by virtue of this and another agreement, for some time prior to the commencement of the suit; that payments were made to his grantor, on his contract, and that the property was conveyed to him by deed about the time of the trial. The plaintiff was virtually the owner of the premises. He was in possession, exercising acts of ownership, and was entitled to a conveyance upon making the payments required. The damages claimed, were sustained by him. The grantor had sustained no loss. At the trial at the circuit, the plaintiff was allowed for injuries to his interest while in the actual occupation and possession of the premises; and upon appeal taken to the general term of the Supreme Court, the judgment was affirmed. The court remarked that it was unnecessary to inquire whether the plaintiff, as the holder of an executory contract, was entitled to recover for an injury to the freehold. It was sufficient that he had made out a case upon which to go to the jury, and had sustained injury, as the actual occupant and possessor.[1]

15. *Diversion of water beneath the surface.*

§ 854. The rule that a man has the right to the free and absolute use of his property, so long as he does not directly invade that of his neighbor, or consequentially injure his perceptible and clearly defined rights, is applicable to the interruption of the subsurface supplies of a stream by the owner of the soil.[2] It has been justly said that "to award compensation for, or prevent the infliction of such injuries, would seriously

[1] Honsee v. Hammond, 39 Barb. 89.

[2] Acton v. Blundell, 12 Mees. & W. 324; Radcliff's Exrs. v. The Mayor of Brooklyn, 4 Comst. 195.

arrest the march of improvement, and often so seriously impair the use of property as to render it of little or no value. The distinction between reasonable and unreasonable damages, in cases of this description, is not very definite or clear. In some particulars the rule has been solemnly settled by uniform decisions, while in others, and generally such as are very near the dividing line, the determinations have been conflicting, and in many there have been none at all. The distinction turns generally, although not universally, upon the question whether the damages are direct or consequential. In the latter case, and especially where they result remotely from the exciting cause, they are not generally recoverable. In the interruption of a surface current, the injury from a diminution of the water would seem to be palpable, and so far direct that it would originate a valid cause of action. There too, the owners have knowingly permitted the waters to flow in their natural course, for the benefit of all those whose banks they pass, from time immemorial. They have acquired their title, with a full knowledge of what is visible, and (presumptively) of the rights which result from it. But it is different when the principal stream is partially supplied by underground currents. The owners of the surface soil are not generally aware of their existence, and cannot be supposed to have voluntarily acquiesced in any appropriation of them. When they purchase, they are ignorant of any obstacle to the free use of their property; and to arrest some valuable improvement, such as digging a well or cellar, draining the land, taking valuable stones from a quarry, or leveling the ground for building or agricultural purposes, because it would cause some consequential, unforseen, and possibly irremediable damage to another would seem to be unreasonable and unjust." [1]

§ 855. It follows from what has been stated in the last preceding section, that if a person, without any intention to injure an adjacent owner, and while making use of his own land to

[1] Strong, J., in Ellis v. Duncan, 21 Barb. 230.

any suitable and lawful purpose, cuts off, diverts, or destroys the use of an underground spring or current of water which has no known and defined course, but has been accustomed to penetrate and flow into the land of his neighbor, he is not thereby liable to any action for the diversion or stoppage of such water.[1] * Therefore, the owner of land may construct a well thereon, although by so doing he cuts off the supply of water to the springs and wells in the vicinity. The only remedy of the adjoining proprietor in such case is to get back the water by sinking a deeper well on his own land.[2] So likewise, if a person in digging coal from his soil, causes the well of a neighbor to become dry, he is not liable to an action therefor.[3] In a recent case in New York, which was an action brought to restrain the defendant from digging on his own land, and thereby diverting water from the land of the plaintiff, the question was, whether the defendant had the right to dig in his land to obtain water for domestic and culinary purposes at his house, and to supply his horses and horned cattle at his barn, when by so doing he materially injured two springs of water that issued from adjoining land owned by the plaintiff, which springs had issued out of the plaintiff's land from time immemorial, there being no surface flow of water above either of the springs or to either of them from the defendant's land, or from either of them to the defendant's land. The special term having decided in the affirmative and dismissed the complaint, the judgment was affirmed on appeal to the general term.[4] † It would seem

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[1] Washburn on Easements, 2 ed. 411.

[2] Chasemore v. Richards, 7 H. L. C. 349; 26 L. J. Exch. 393.

[3] Acton v. Blundell, *supra*.

[4] Trustees &c. of the Village of Delhi v. Youmans, 50 Barb. 316, Mason, J., dissenting.

* Where a well is dug on one's own land so near the land of his neighbor as to render the support of clay or stone in his neighbor's land necessary to retain the water in the well, unless there be a prescriptive right to the use of the water, the owner of the adjacent land may dig away such clay or stone which is his own property, and let out the water (Acton v. Blundell, *supra*; Reg. v. Metrop. Board, 32 L. J. Q. B. 110.)

† In the above case, Balcom, J., in support of the judgment cited the following: Ellis v. Duncan, 21 Barb. 230; Acton v. Blundell, 12 Mees. & Wels.

that the use of the water of a well is not restricted to the reasonable wants of the occupier of the land in which the well is situated. Where a person sunk a well seventy-four feet deep in his own land, adjoining the source of a river, which supplied water to several mills, and pumped water from this well for a neighboring town, at the rate of half a million of gallons a day and upwards, and so diminished the volume of water in the river, that the mill owners could not work their mills full time, it was held that the land owner had not exceeded his natural rights, and that the mill owners were without remedy.[1] But as the riparian proprietors of a natural stream, which had been drained by the sinking of

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824; Greenleaf v. Francis, 18 Pick. 117; Chasemore v. Richards, 2 Hurlst. & Norm. 168; 5 Id. 982; Smith v. Kenrick, 7 Man. Gr. & S. 514; Chatfield v. Wilson, 28 Vt. 49; Roath v. Driscoll, 20 Conn. 533; Goodale v. Tuttle, 29 N. Y. R. 459; Frazier v. Brown, 12 Ohio, 294; but see Balston v. Bensted, 1 Camp. 463, and Dexter v. The Providence Aqueduct Co. 1 Story, 387, *contra*. In closing an elaborate opinion he said: "If the defendant were liable for digging in his land for water, for domestic or agricultural purposes, near the line of the plaintiff's lands, out of which their springs issue, because such digging materially lessened or prevented the flow of water from such springs, then he and all others would be liable for digging for a like proper purpose in their lands, though a half mile from the plaintiff's springs, provided such digging would prevent the water issuing from such springs. Such a rule would create more vexation than it would do good, and it might become intolerable. The weight of authority is opposed to such a rule." In the same case, Boardman, J., laid down the following principles as "too well settled to admit of controversy:" 1. The law controlling the rights to subterranean waters is very different from that affecting the rights to surface streams. In the former case, the water belongs to the soil, is part of it, is owned and possessed as the earth is, and may be used, removed and controlled to the same extent by the owner. 2. An exception to this rule of law exists in the case of subterranean streams that have a known and well defined channel, constituting a regular and constant flow of water. Such streams are subject to the same law with surface streams, and subject only to the like interruptions and interference. 3. A further exception exists in case of an injury done by cutting off such waters with malice. No person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself. 4. The defendant could not prevent the plaintiff from using the waters that ran from the springs; consequently no grant could be presumed from his silence or acquiescence. 5. If the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from the defendant's land to such spring, then the defendant would be liable. (See the numerous cases cited by Boardman, J., in support of the foregoing propositions, 50 Barb. 319, 320, 321.)

The ruling of Lord Ellenborough in Balston v. Bensted, *supra*, was cited by Chancellor Walworth in support of his *dictum* in Smith v. Adams, 6 Paige, 435, to the effect that the owner of land out of which a spring of water issues, may restrain the owner of adjoining land from digging in his own land so as to intercept the underground stream that supplies the spring with water.

[1] Chasemore v. Richards, 7 H. L. C. 349; 26 L. J. Exch. 401.

wells and shafts and pumping away the water, would have no means of counteracting the mischief, the soundness of the foregoing decision may be deemed questionable.*.

16. *Interfering with fishery.*

§ 856. The rule that possession is sufficient to maintain an action of trespass, applies to an incorporeal hereditament. If therefore a rival fisherman lays hold of the nets of a first comer, and violently disturbs the water, drives away the fish, and prevents the latter by force and violence from pursuing his calling, an action will lie therefor.[1] Where an action was brought by several persons for entering upon their fishery in the Connecticut river, interrupting them in the enjoyment of their right, and taking and carrying away fish, and it appeared that some of the plaintiffs had an absolute title to the fishery, while others were in possession under a parol agreement, it was held that they were properly joined.[2] A declaration stated that the defendant had been summoned to answer the plaintiff in an action of trespass, and charged that the defendant *vi et armis* broke and entered a fishery, to wit the sole and exclusive fishery of the plaintiff in a certain part of the river, then flowing and

[1] Young v. Hichens, 6 Q. B. 606. [2] Russell v. Stocking, 8 Conn. 236.

* Where the course of a subterranean stream is well known, as in the case of many which sink underground, pursue for a short space a subterranean course, and then emerge again, the owner of the soil under which the stream flows, can maintain an action for the diversion of it, if it takes place under such circumstances as would enable him to recover if the stream were wholly above ground (Wheatley v. Baugh, 25 Penn. St. R. 528).

A person who brings upon his land, collects, and keeps there anything likely to do mischief, if it should escape, is *prima facie* liable for all the damage which is the natural consequence of its escape (Fletcher v. Rylands, 1 Exch. 265). Where therefore the owner of a mine on a higher level, pumped into it water from a lower level (in order to work a lower seam), so that more water flowed into the adjoining mine, which was on a lower level, than would have resulted from the natural running of the water from the higher to the lower level, it was held that the owner of the higher mine was liable to an action (Baird v. Williamson, 33 L. J. C. P. 101). The foregoing rule is not however applicable to injury resulting from the legitimate use of one's own land. Accordingly, where the owner of a coal field in digging his coal left large hollows which filled with water, and when the adjoining land owner proceeded to work his coal, the subterranean water from the hollows ran into his works and flooded them, it was held that he could not maintain an action for the damage (Smith v. Kenrick, 7 C. B. 565).

being over the soil of one P. F. and then fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of the plaintiff, being in the said fishery chased and disturbed, against the peace, &c. It was held by the Exchequer Chamber, affirming the judgment of the court of Queen's Bench, first, that trespass lay for breaking and entering a several fishery, though no fish were taken, secondly, that the plaintiff was not bound to state any further title, although the declaration stated the several fishery to be in *alieno solo*, as there was no averment upon the record to show that the defendant claimed title or authority under the owner of the soil. Thirdly (reversing the judgment of the court below), that after verdict, the words "sole and exclusive fishery," were equivalent to "several fishery," as under such description, the plaintiff must have proved the incorporeal right usually described as a several fishery.[1] *

17. *Interfering with oyster bed.*

§ 857. Oysters planted by an individual in a bed clearly marked out and defined in the tide waters of a bay or arm of the sea which is a common fishery to all the inhabitants of the State where the bay or arm of the sea is situated, and where there are no oysters growing spontaneously at the time, are the property of the person who plants them; and the taking them by another is a trespass, for which an action lies. It is indispensable to the existence of the right of property in oysters thus planted that the bed shall not interfere with the exercise of the common right of fishing. For if the oysters are mingled with, and undistinguishable from others of natural growth in the public waters, the interest of the

[1] Holford v. Bailey, 13 Jur. 278; 18 L. J. Q. B. 109.

* Plaintiff while fishing had nearly encompassed the fish with a net, when the defendant by rowing his boat to the opening, disturbed the fish and prevented their capture. Issues being joined in trespass, first on the plaintiff's possession of the fish, secondly on the fish being the plaintiff's, it was held that he was not entitled to recover, no special custom of the fishery having been proved (Young v. Hichens, 6 Q. B. 606).

person planting them will be subservient to the public use.* Decker v. Fisher[1] was an action of trespass for taking and carrying away the plaintiffs' oysters from their oyster beds. It appeared that the plaintiffs, who were partners, had for several years previous to 1844 planted oysters in a part of Princes Bay, which they had designated by stakes, and had subsequently dredged them for market, until they were interrupted by the defendants. In February, 1844, the oysters which had been previously planted by the

[1] 4 Barb. 592.

* Fleet v. Hegeman, 14 Wend. 42, was an action of trespass for taking out of an oyster bed and carrying away a quantity of oysters which the plaintiff had gathered when small, some two years previous, and planted in the bay in a space of four or five square rods, inclosed with stakes, at the distance of about fifteen rods from the shore. A judgment having been rendered for the defendant in the justice's court, where the trial was had, and affirmed in the Common Pleas, the Supreme Court, in reversing it, said: "That a qualified property in the oysters was acquired by the plaintiff is admitted. But it is contended that the planting them in the bay where a common right of taking them existed was an abandonment of them to the public use. If so, it must be by force of law, for the case fully discloses that no such intent in point of fact existed. On the contrary, they were deposited there by the owner to improve, or rather give value to them, and with reference to an ulterior use. As to all inanimate things, an absolute property in possession may be acquired in them—such as goods, plate, money; and if the article in question could be considered as falling within that description, there could be no doubt the defense taken would be untenable, unless there was an abandonment in fact. Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them no good reason is perceived why it should not be governed by the rules of law applicable to inanimate things. But it is contended they fall within the rules of law applicable to animals denominated *ferœ naturæ*, the same as deer in the forest, pigeons in the air, or fish in public waters or the ocean. A qualified property is acquired in these by reclaiming and taming them, or by so confining them within the immediate power of the owner as to prevent their escape and the use of their natural liberty. The right of the plaintiff to the oysters is within the reason of these principles. They have been reclaimed, and are as entirely within his possession and control as his swans or other water fowl that may float habitually in the bay. They were distinctly designated according to usage; and besides, the defendants had actual information of the ownership, and they can set up no greater right to take them because found in their native element than tame pigeons in the air or a domesticated deer upon the mountain. If the bed interfered with the exercise of the common right of fishing, or if the oysters were undistinguished among others belonging to the public waters, the interest of the owners in them would undoubtedly be subservient to the enjoyment of the public use. But the exercise of that right in this case was a mere pretense. No oysters of the natural growth of the bay, fit for use, had been found there for years. The bed interfered with no other sort of fishing for either profit or pleasure. The case presents a deliberate and wanton violation of property acquired by the industry and care of another, under the pretext of exercising a right in common which the defendants knew to be fruitless. We certainly would have regretted if the law had given countenance to such depredations, and we are rejoiced to find they are as gross a violation of law as they are of the first principles of justice."

plaintiffs were mostly removed, and the defendants attempted to show that some time during that month they deposited oysters on the same ground, but the fact was left in doubt. It was proved that the plaintiffs had filled the ground with oysters in April, 1844, and that the defendants threw one load on the same ground in May, 1844. In the summer of 1844 the defendant took five or six boat loads containing twenty bushels each of oysters from the ground in question, and carried them away; and it was clearly to be inferred from all the testimony that these were the oysters which had been deposited there by the plaintiffs in April, with the exception perhaps of a small quantity which had been intentionally mingled with them by the defendants. It was held, upon the foregoing facts, that the plaintiff was entitled to recover.*

Lowndes v. Dickerson[1] was an action of trespass for taking and carrying away a quantity of oysters from the bottom of Long Island Sound, where the plaintiff had planted them. The taking of the oysters was admitted, but the right of property in the plaintiff, and his right to maintain the action, were denied. It appeared that the plaintiff commenced planting oysters several years previous, and that he had continued to plant them every year since in water five feet deep in-shore at ordinary tides, and from five to six fathoms deep on the outer edge of the bed. Before planting he examined the bottom with a dredge. The bed was 500 or 600 yards long by 300 yards wide. He took up some scollops, but found no oysters. Before making the ex-

[1] 34 Barb. 586.

* In Decker v. Fisher, *supra*, the Supreme Court said: "It is not against the common privilege to say, that while any one may fully exercise it, that does not give him the right to take property which another has reclaimed from its native wild state and confined within his immediate power so as to prevent its escape. If oysters had previously existed in their native state on this ground, the plaintiff could not have deprived others of the right to take them by depositing others in the same place. But if there had been none there before, the privilege had been created by the plaintiffs, and had never belonged to the public. The defendants could not impair the plaintiffs' title to the oysters by depositing a few others in the same place, knowing that the plaintiffs had at the time similar property there, and with an intent so to mingle the two together that neither could be identified, and thus enable them to appropriate the property of others to their own use."

amination the boundaries of the ground were marked with stakes inside and buoys on the outside. The stakes remained until the ice in winter carried them away, and in the spring they were replaced. The buoys were visible at high tide, and the stakes at low tide. The in-shore line was about 110 yards from the shore. Within two years before the trial the plaintiff had planted about 7,000 bushels of oysters in the bed. When the defendant took the oysters he knew that they had been put there by the plaintiff, and that the plaintiff claimed to own them. Testimony was offered by the defendant, and received without objection, to show that oysters of natural growth existed in the immediate neighborhood of the plaintiff's stakes, and were found within the lines of his stakes before he marked out his bed. The judge charged the jury that if there was a bed of oysters growing naturally in the place where the plaintiff planted his oysters, and he mingled his oysters with the natural produce of the waters, he did not thereby acquire an exclusive title to the mingled mass or its increase; and that if oysters were found before the planting by the plaintiff, around and immediately adjoining the bed of the plaintiff the jury might take that circumstance into consideration in determining the question whether oysters of natural growth existed on the place planted by the plaintiff at the time. The general term of the Supreme Court, after hearing argument on exceptions taken at the trial by the defendant, directed judgment to be entered for the plaintiff on the verdict.*

* In New Jersey a person who plants oysters on the bed of a navigable river below low-water mark, though adjacent to his own shore, cannot maintain trespass against a person taking them away (Arnold v. Mundy, 1 Halst. 1). The construction of a public grant should be most favorable to the public. Therefore, where there was some ambiguity in an act which gave the right to stake out oyster beds, it was held that the privilege did not extend below low water mark, although such limitation destroyed the value of the grant (Townsend v. Brown, 4 Zabr. 80).

Where land covered by an arm of the sea at high water is conveyed, the grantee may maintain an action of trespass *quare clausum* for taking oysters from the rocks within the grant (M'Kenzie v. Hulet, 2 Tayl. 181).

Where oysters are deposited in a navigable river in such a way as to obstruct the navigation by lessening the depth of the water, a ship master is not for that reason justified in running his vessel upon the oyster beds if he had room to pass without going upon the beds (Mayor of Colchester v. Brooke, 7 Q. B. 339).

CHAPTER IV.

TRESPASS CONCERNING ANIMALS.

1. General liability of owner of animals.
2. Duty to fence against cattle.
3. Driving from land animals wrongfully thereon.
4. Seizure of animals trespassing.
5. Pursuing domestic animals with dogs.
6. Willful killing of domestic animals.
7. Rightful killing of domestic animals.

1. *General liability of owner of animals.*

§ 858. The common law holds a man answerable, not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land; and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit*, though he had no notice, in fact, of such propensity. And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the inclosure under such circumstances.[1] * The property in the

[1] 3 Blk. Com. 211; Bac. Abr. Tit. Trespass, G; Browne on Actions at Law, 369; Rust v. Low, 6 Mass. 94; The Tonawanda R. R. Co. v. Munger, 5 Denio, 255; s. c. 4 N. Y. 349; Van Leuven v. Lyke, 1 N. Y. 515; McBride v. Lynd, 55 Ill. 411.

* In Vermont, notwithstanding the statutes in relation to fences, the common law rule prevails, requiring the owners of cattle to take care of them (Keenan v. Cavanaugh, 44 Vt. 268). The liability is the same in Indiana, in the absence of an order of the board of county commissioners (Mich. Southern R. R. Co. v. Fisher, 27 Ind. 96). In Missouri and Mississippi, the common law liability does not prevail (Gorman v. Pacific R. R. Co. 26 Mo. 441; Vicksburg & Jackson R. R. Co. v. Patton, 31 Miss. 156). In Massachusetts, where the parties are not adjoin-

animal raises the duty on the part of the owner to guard against its mischievous propensities, and failing in this, it holds him answerable for its injurious acts, without regard to the degree of care bestowed in controlling it.[1] So far as the books show, this has been the uniform practice and understanding of the law in all times; and it is therefore too late to inquire whether the remedy by an action of trespass is founded upon the strictest logical propriety where the cause of the damage is the negligence, and not the willful act of the owner of the mischievous beast.[2]* There are exceptions to the general rule, growing out of a necessity almost irresistible in particular exigencies. As where cattle, driven along a highway, stray from it in sight of the person in charge of them, and pass, against his will, on to uninclosed land adjoining the highway, he making pursuit to bring them back. For, in such case, the owner ought not to be chargeable for this involuntary trespass on the land, nor for the herbage the cattle may crop *raptim et sparsim*, as they go along.[3]

§ 859. Where cattle are in the custody of an agister, he is to be deemed, for the purposes of the action, their owner,

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ing owners, the common law rule prevails that each is bound to keep his cattle upon his own land at his peril. Where, therefore, the mule of A. escaped from his field through an insufficient fence, which B. was bound to repair, into B.'s field, from that into the field of C., and thence into the field of D., through D.'s insufficient fence, and injured D.'s mare so that she died, it was held that A. was liable to D. for the injury, although he did not know that the mule was vicious (Lyons v. Merrick, 105 Mass. 71). In Kansas, where both parties choose to do otherwise than maintain a partition fence under the statute, the common law governs, and each must take care of his cattle, or be liable for all injuries they may commit by roaming (Baker v. Robbins, 9 Kansas, 303; Wells v. Beal, Ib. 597).

[1] Rossell v. Cotton, 31 Penn. St. R. 525. [2] Noyes v. Colby, 10 Fost. 143.

[3] Com. Dig. Trespass, D; 1 Arch. N. P. 358; 1 Cowen, 87, note; Stackpole v. Healy, 16 Mass. 35; The Tonawanda R. R. Co. v. Munger, *supra*.

* In Noyes v. Colby, *supra*, which was an action for a trespass committed by the defendant's cow, it appeared that the cow was turned out of the pasture without the knowledge or assent of the defendant, and without any authority, and driven in the direction of the plaintiff's close, and being left, strayed upon it and committed the act complained of. The court, in holding that the defendant was liable, said: "When Heath abandoned the cow, she was about twelve rods from the lands of the plaintiff. From that period, she was no longer under the control of Heath, but was again in the legal possession of the defendant, and under his general custody and control; and like other owners, having the care and custody of their beasts at the time, he is answerable in trespass for her act in straying upon the close in question and grazing there."

and liable for damage done by them.[1] * There is respectable authority in support of the position that in such case the owner of the cattle is also responsible.[2] This, it is claimed in Massachusetts, was the rule at common law, and recognized as such by the early English text-writers.[3] † On the other hand, in Pennsylvania, it has been held that such a rule is not sustained by either reason or authority.[4] ‡

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[1] Barnum v. Vandusen, 16 Conn. 200. [2] Knox v. Tucker, 48 Maine, 373.

[3] Sheridan v. Bean, 8 Metc. 284, referring to 2 Roll. Abr. 546; Com. Dig. Trespass, C, 1; Vin. Abr. 20, Trespass, B.

[4] Rossell v. Cotton, 31 Penn. St. R. 525.

* An agister is one who takes the cattle of another on his own ground to be fed for a consideration to be paid by the owner. An agister does not insure the safety of the cattle, but is liable for ordinary neglect. For instance, if he leave his gates open or fences down, and in consequence of such neglect the cattle stray away and are lost or stolen, he will be responsible for the loss (Bass v. Pierce, 16 Barb. 595; 1 Bouv. L. Dict. tit. Agistment; Story on Bailm. § 443).

† In Sheridan v. Bean, *supra*, a question arose as to whether the statute had modified or altered the common-law rule as to liability for damage done by agisted cattle. The language of the Rev. Sts. of Mass. ch. 113, § 4, is as follows: When any person is injured in his land by sheep, swine, horses, asses, mules, goats, or neat cattle, he may recover his damages in an action of trespass against the owners of the beasts, or by distraining the beasts doing the damage and proceeding therewith as hereinafter directed; provided, that if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom in consequence of the neglect of the person who has suffered the damage to maintain his part of the division fence, the owner of the beasts shall not be liable for such damage. It was insisted that the action could not be maintained, either at common law or upon the statute, against the owner of the horses under such circumstances, but only against the agister. It was urged that to constitute a trespass, there must be an invasion of the property or person of another, by one who is an actor without right, either willfully or negligently; and that, in the present case, the act of sending horses to be agisted was lawful, and that during the time they were agisted they were under the control and in the custody of the agister, and not of the defendant. The court said: "We are of opinion that the word 'owner,' in this section, is used in a popular sense, and is intended to apply to the person in whom is the general property of the animals enumerated, and embraces those also who are in possession under a special title or by virtue of any lien. While there is an apparent hardship in subjecting a person to the action of trespass where the cause arises from the neglect of another, yet we cannot overlook the necessity of the checks which are required to guard against this species of trespass, which is not only so easily committed, but is so difficult to prevent. Nor does the hardship appear so great when we consider that the owner has his remedy against the person whom he employs, and if he does not obtain satisfaction for his loss, it is rather he who employed a negligent person that should suffer than the man who is injured by such neglect."

‡ "The reason of liability," said the court, in Rossell v. Cotton, *supra*, "in such cases arises out of the legal requirements to take the necessary care and control of them so as to prevent injury, which implies not only the duty but the right of control. The law must not be so administered as to destroy the relation altogether. And would not this follow, if I must answer in trespass, if my horse, being hired or loaned, break into the field of another while in the custody

§ 860. A person who keeps a domestic animal which has, to his knowledge, a vicious propensity, is liable, in damages, for injury committed by it in the indulgence of its evil dis-

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of the hirer or borrower; or my agisted cattle commit a trespass while under the control of the agister? While in his custody and in his inclosures, how can I control them? I could not enter upon his premises to do so, without myself becoming a trespasser; and for omitting to do so, the principle contended for would make me a trespasser for injuries done by them. It is not the ownership of the trespassing creature, but the possession and use, that causes the liability. If this were not so, there would of necessity be an end to borrowing and hiring. The relation is of the same character with that of agistment; they are all bailments. The bailee in all such cases has the legal custody for the purpose of the bailment —has the power of control and management, for its full accomplishment—does not act therein by the command of the owner, but is the qualified or special owner himself. He stands in the place of the owner for the purposes specified—has acquired the temporary ownership for this very purpose. Being thus the temporary owner, it is not denied that the trespasses of the cattle are his trespasses. Upon what principle can they be the trespasses of another, although he be the owner? Not upon the principle of control, for that he has parted with."

In the same case, the older authorities were reviewed and commented upon by the court, as follows: "It is said, in 1 Esp. N. P. 387, title Trespass, that 'he who has the care, custody or possession of the cattle which do the damage is liable to this action,' and adds, 'as if agisted cattle break into another's land, the agister is liable to the damages. So if the hogs of A. were put into the yard of B., and they break into C.'s land, an action lies against B., even though A.'s servant watches them, and so the owner had a special possession' (Dawtry v. Huggins, Clayton, 33, Trials per Pais, 201). In 2 Roll. Abr. 546, it is laid down in one case, that if the beasts of A., agisted by B., trespass on the close of C., it is in the election of C. to bring trespass against A. or B. This is cited in Bac. Abr. 498 (Bouv. ed.), and is succeeded by a reference to the case in Clayton, as follows: 'But it is laid down in another case, that an action in such case lies only against the agister of the beast' (Bateman's Case, Clayton, 33). This is an error on the part of the author. Bateman's Case is not reported in Clayton; it is referred to in the case of Dawtry v. Huggins. The principle, however, is correctly stated. But in Saund. on Pl. & Ev. Bateman's Case, Clayton, 33, is cited for authority, that either A. or B., the owner or agister, may be sued in trespass. This is also an error, both as to the principle and name of the case. Dawtry v. Huggins is the case reported in Clayton, 33, and is as follows: 'It was ruled upon an evidence, if A. hath the custody of the goods of B., as here it was, hoggs put into the defendant's yard; if these do a trespasse to the land of C. adjoining, A. shall be punished in trespasse, and this, though the owner's servant did wait upon them; and here it was proved the servant of A. did also wait on them and serve them, therefore they were in his speciall possession; and the like matter was relied on in the case of *Stephen Bateman of Wakefield* for agist cattle, if they doe commit trespasse, the owner of the soil where, &c., shall answer for that trespasse' (York Assizes, 1651). This case is accurately cited in 1 Esp. N. P. *supra*. Neither Dawtry v. Huggins nor Bateman's Case supports the doctrine that either the owner or agister of cattle may, at the election of the injured party, be sued for the trespass of the agisted cattle. They are authority to the contrary. The case in Roll. Abr. 546, refers to the Year Book, 7 Henry IV, which does not sustain it."

In Wales v. Ford, 8 Halst. 267, trespass was brought against the owner of a stud horse for injury done by biting and kicking the plaintiff's mare and horse. At the time of the injury, the horse was in the possession of a third person, who had him in the vicinity in service. Per Cur.: "The action is misconceived. If any action can be sustained at all, it must be in form of trespass on the case."

position. An action may accordingly be maintained against the owner of a dog, who, knowing its habit of chasing game, suffers it to run at large, whereby it enters a person's woods and kills pheasants which are being reared there under domestic hens.[1] In Coggswell v. Baldwin [2] it was held that the owner of a cow, accustomed to hook—the vicious propensity being known to the owner—was liable for damages done by her, although it was done in the highway against the land of the owner, and while going to her usual watering place. In that case, the owner of the cow, knowing her disposition, had caused buttons to be put on her horns as a safeguard. But the cow hooked the plaintiff's horse, in the road, so that he died of the wound, and the plaintiff had a verdict. In Koney v. Ward,[3] which was an action to recover damages for injuries sustained by the bite of a horse, it was proved that the defendant knew that his horse had the habit of biting, and that to guard against it, he usually kept him muzzled; but that when the plaintiff was injured, the horse was standing on the sidewalk unmuzzled. A judgment having been rendered in the court below, in favor of the plaintiff for $50 damages, it was affirmed on appeal. In an action for injury by the bite of the defendant's dog, it need not be proved that the dog had bitten another person before it bit the plaintiff. It it sufficient if the defendant knew that it had shown a savage disposition by attempting to bite;[4] and evidence that the owner knew that the dog was vicious and accustomed to bite, is admissible in aggravation of damages, although the statute does not make the liability depend upon such knowledge.[5]

§ 861. But the owner of a domestic animal is not in general liable for a violent injury committed by it, unless it be shown that he had notice of its vicious propensities.[6] In

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[1] Read v. Edwards, 17 C. B. N. S. 245.
[2] 15 Vt. 404.
[3] 2 Daly, 295; 36 How. Pr. R. 255.
[4] Worth v. Gilling, Law R. 2 C. P. 1.
[5] Swift v. Applebone, 23 Mich. 252.
[6] Dickson v. McCoy, 39 N. Y. 400; Logue v. Link, 4 E. D. Smith, 63.

Fairchild v. Bentley,[1] which was an action for an injury to the plaintiff, caused by the defendant's dog attacking and biting him, it appeared that on the day of the occurrence, the dog followed the sleigh in which Bentley rode, when he got out and drove the dog back, and Bentley saw no more of the dog until after the accident; that the team was driven into the yard of a tavern where the horses were tied; that the horses being fastened near the wagon of the plaintiff's father, the plaintiff found them gnawing it, whereupon he took hold of the horses' heads to back them away, when the dog jumped up and bit the plaintiff. There was evidence tending to show that the dog had been teased and irritated by boys; but there was no proof that he had ever bitten any body before this, or that he was savage or dangerous. A verdict having been found for the plaintiff, a new trial was granted on the ground that the judge erred at the trial, in laying out of view the question whether the defendant knew of the habits of his dog at the time the plaintiff was bitten.[2] Where a horse, rightfully on a public highway, kicks a child in the road, the owner of the horse will not be liable unless it can be shown that the horse is of a vicious disposition and accustomed to kick, and that the owner knew it when he allowed the horse to stray into the highway.[3] In Lyke v. Van Leuven[4] it appeared that the plaintiff and defendant being the owners of adjoining land, the plaintiff's cow with a calf newly brought forth, were attacked and killed by the defendant's swine; but it was not charged, nor was there any proof that the defendant knew of the vicious propensities of the swine. At the trial before a justice of the peace, a verdict and judgment were rendered for the plaintiff, which the Common Pleas affirmed on certiorari. The judgment was, however, reversed by the Supreme Court.*

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[1] 30 Barb. 147.

[2] Mason, J. dissenting; see Stiles v. Cardiff Steam Nav. Co. 33 L. J. Q. B. 310.

[3] Cox v. Burbridge, 13 C. B. N. S. 430; 32 L. J. C. P. 89.

[4] 4 Denio, 127; s. c. 1 N. Y. 515; see Tift v. Tift, 4 Denio, 175.

* In this case the court said: "The defendants were undoubtedly liable for

§ 862. An exception to the rule under consideration has been allowed in the case of a domestic animal naturally prone to mischief, such as a bull.[1] And in New Jersey, where cattle broke another's close and killed his cow, it was held that the owner was liable without proof that he knew they were unruly.[2] * There is also an exception to the rule when the injury is the fault of the owner of the animal. In Lee v. Riley,[3] it was proved that the defendant's mare broke in the night out of the field in which she was pasturing, through a gate which the defendant was bound to keep in repair, and passing into the adjoining field belonging to the plaintiff, by a kick broke the leg of the latter's horse rendering it necessary to kill him. It was held that the defendant was liable whether the mare was a vicious animal, and he knew it or not.

§ 863. Where the injury results from a ferocious propensity, which is the natural effect and sure accompaniment of the savage nature of the animal, the existence of such qualities is equivalent to proof of express notice of them. As the propensity of wild beasts to do mischief is well known, and is inherent and not to be eradicated by any

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the trespass of the swine in the plaintiff's close, although not for this unnatural injury done by them. But the trespass on the land was not complained of in this case; and as to the cow and calf, it makes no difference that they were destroyed on the plaintiff's land where the swine were trespassing." This is not like the case of Beckwith v. Shordike, 4 Burr. 2092, where the action was trespass for breaking the plaintiff's close, with guns and dogs, and killing his deer; and where the defendant was held liable for a deer killed by one of his dogs, although it did not appear that he had any knowledge of the propensity of the animal to do such an injury. But the decision was placed on the express ground that the defendant was himself a trespasser with his dog in the plaintiff's close, at the time the damage was done; so that the jury were authorized to find, as they had done, that the act of the dog was the voluntary trespass of the master. If this declaration had alleged the *scienter* of the defendants, it might very well be urged that they had waived the objection now made, that the *scienter* was not proved on the trial. But as the plaintiff had not stated any such ground of liability in his declaration, the defendant cannot be deemed to have waived the objection, by not making it specifically before the justice" (aff'd 1 N. Y. 515).

[1] Dolph v. Ferris, 7 Watts & Serg. 367.

[2] Angus v. Radin, 2 South. 815. [3] 18 C. B. N. S. 722.

* An action cannot be maintained against the owner of bees for accidental injury done by them; bees not being deemed in law dangerous animals (Earl v. Van Alstine, 8 Barb. 630).

effort at domestication, nor restrained except by perfect confinement or extraordinary skill and watchfulness, the owner or keeper of such dangerous creatures is required to exercise such a decree of care in regard to them, as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit.[1]

§ 864. The principle that the owner of a domestic animal not naturally inclined to commit mischief, is not liable for an injury committed by it, unless he has notice that such animal is accustomed to commit depredation, has no application to the case of cattle communicating disease to another person's cattle while trespassing. Accordingly where it appeared that the defendant's sheep, while trespassing upon the plaintiff's land, communicated to the plaintiff's sheep a disease of which numbers of them died, and no sufficient justification was shown for the trespass, it was held that the plaintiff was entitled to damages for the loss of his sheep as well as for the breach of his close, without proof of knowledge by the defendant that the sheep were diseased, and without proof of malice or misconduct on the part of the defendant; but that the plaintiff might prove, for the purpose of enhancing the damages, that the defendant at the time of the trespass knew that his sheep were diseased, and that he was guilty of neglect and misconduct in relation to the custody of them, although there was no averment in the declaration of any such knowledge, neglect, or misconduct.[2] Since, however, every one has the absolute right to use his own property as he pleases, up to the point where the particular use becomes a nuisance, without being answerable for the consequences, provided he exercise proper care and skill to prevent any unnecessary injury to others, the owner of diseased cattle may lawfully keep them on his

[1] McManus v. Finan, 4 Iowa, 283; Leame v. Bray, 3 East, 593; Canefox v. Crenshaw, 24 Mo. 199; Scribner v. Kelley, 38 Barb. 14.

[2] Barnum v. Van Dusen, 16 Conn. 200; Smith v. Jaques, 6 Ib. 530.

own land, although they endanger the cattle of the adjoining proprietor.[1] *

§ 865. At common law, where a dog worries or kills another's sheep, the owner of the dog is not liable, for the reason that it is said not to be in accordance with the ordinary instinct of the animal. But it is otherwise if the dog has previously worried sheep with the knowledge of the owner.[2] And in New York, the statute making the owner of a dog liable for the value of sheep or lambs killed or wounded by dogs, has been held not to apply where the damage results from the sheep being chased and worried. In the latter case, the rule of the common law applies, and prior knowledge or notice of such or similar mischief must be proved.[3] †

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[1] Fisher v. Clark, 41 Barb. 329; Pickard v. Collins, 23 Ib. 444; Anderson v. Buckton, 1 Str. 192; Cooke v. Waring, 32 L. J. Exch. 262.

[2] Jenkins v. Turner, 1 Ld. Raym. 109; Card v. Case, 5 C. B. 622.

[3] Auchmuty v. Ham, 1 Denio, 495; Osincup v. Nichols, 49 Barb. 145.

* In Fisher v. Clark, *supra*, the gravamen of the complaint was, that the defendant knowing that the plaintiff had a flock of sheep running in his lot, turned his own sheep having the scab, a contagious disease, into an adjoining field on his own farm. The General Term of the Supreme Court, in holding that the plaintiff was not entitled to recover, said: "It could be no violation of the plaintiff's rights for the defendant to occupy his own land in his own way, unless he created a nuisance thereon. Pasturing sheep having an infectious disease, was not a nuisance. It was, and could be, no injury to the plaintiff, unless he suffered his sheep to take the contagion by permitting them to come in contact with the defendant's sheep. Each party had a right to use his own field to pasture his sheep. If the defendant's sheep had infectious disease, infectious only to sheep, he had the same right to have the same in his own field, as the plaintiff had to permit his sheep to run in the adjoining field, exposed to take such disease. A person, sick with a contagious disease, is not obliged to abandon his own house to prevent the spread of such disease. A house occupied by persons having an infectious disease, is not a nuisance. It is not pretended that the disease of the defendant's sheep was a nuisance. They did not render the enjoyment of life or property uncomfortable, or endanger the health of the neighborhood."

"A man must be governed, even as against trespassers, by the nature and object of the article which is kept upon his premises. A man's gravel pit is fallen into by trespassing cattle, his corn eaten, or his sap drunk, whereby the cattle are killed. The unruly bull gores the intruder; or his trusty watch dog, properly and honestly kept for protection, worries the unreasonable trespasser. Such consequences cannot be absolutely avoided. Yet so long as he keeps on the side of humanity, there is little danger that a jury of his neighbors will not place a correct construction upon his acts. With them, it must be, in nice cases, to mark the boundaries of his conduct" (Cowen, J., in Loomis v. Terry, 17 Wend. 496).

† An exception to the rule of the common law requiring knowledge or notice of the mischievous habits of a dog, in case of injuries by killing or wounding

§ 866. If a dog becomes mischievous, his owner is bound to restrain him on the first notice, and is liable for any mischief he may thereafter do.[1] * Knowledge by the owner that the dog has bitten other persons, will make him responsible for the injury, in however high estimation the character of the dog for mildness may have been held among the neighbors.[2] Such a dog, although in the presence of his master, is to be regarded as at large, within the common import of that

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sheep, has been made in New York by statute (2 N. Y. Rev. Sts. 5th ed. p. 975, § 9), which provides that "The owner or possessor of any dog that shall kill or wound any sheep or lamb, shall be liable for the value of such sheep or lamb to the owner thereof, without proving notice to the owner or possessor of such dog, or knowledge by him, that his dog was mischievous or disposed to kill sheep." The fifteenth section of the same statute declares that any person may kill any dog which he shall see chasing, worrying or wounding any sheep, unless the same shall be done by the direction or permission of the owner of the sheep or his servant. By other provisions, the owner is required to kill such dog in a certain time, under a certain penalty (§§ 16, 17, 18, 19). The twentieth section (pp. 976, 977) declares that "Every person in possession of any dog, or who shall suffer any dog to remain about his house for the space of twenty days previous to the assessment of a tax, or previous to any injury, chasing or worrying of sheep, or any such attack made by a dog, shall be deemed the owner of such dog for all the purposes of this title." An action under the foregoing statute may be brought without application to the fence viewers to inquire into the matter (Fish v. Skut, 21 Barb. 333).

In Pennsylvania, under a statute which provided that persons owning dogs who did not shut them up at night or keep them chained should be liable for whatever damages they committed in the destruction of sheep, it was held that such damages might be recovered in an action of trespass. "The person who will not house or chain his dog becomes consenting to the mischief which he commits, and takes upon himself the risk of saying: Go at large; if you destroy sheep, I will pay for them. It is not like the doing some act, innocent in itself, from which the person could not reasonably infer that injury or damages would follow, and which, when they did happen, were rather the result of accident or misadventure than design" (Paff v. Slack, 7 Penn. St. R. 254, per Coulter, J.)

In an action to recover damages for the defendant's dog killing and wounding the plaintiff's sheep, some of the witnesses testified that the defendant's dog had a "very coarse voice;" that they could identify him by his bark; that they heard the barking of a dog in the lot where the sheep were the night they were wounded and killed, and it appeared to be the bark of the defendant's dog, but they did not see the dog. It was held that, whether the witnesses satisfactorily identified the defendant's dog as one of the two that were among the sheep, was a question for the jury to determine (Wilbur v. Hubbard, 35 Barb. 303).

[1] Pickering v. Orange, 1 Scam. 338–492; Charlwood v. Greig, 8 C. & K. 46.

[2] Buckley v. Leonard, 4 Denio, 500; Adams v. Hall, 2 Vt. 9.

* The statute of Connecticut (Rev. Sts. tit. 1, § 282) providing that "whenever any dog shall do any damage, either to the body or property of any person, the owner or keeper, &c. shall pay such damage, to be recovered in an action of trespass," imposes an obligation on the owner or keeper of every dog to pay for any and all damage it may do of its own volition, and when the owner does not set him on, and become thereby liable to be sued as for a personal trespass (Woolf v. Chalker, 31 Conn. 121).

term, when he is so far free from restraint as to be capable of committing mischief.[1] In Smith v. Pelah,[2] the chief justice ruled that the master was liable for all damage done by a dog which had once bitten a man, even though it was caused by a person treading on the dog's toes, "for it was owing to his not hanging the dog in the first instance;" and it is added, "the safety of the king's subjects ought not afterward to be endangered." Mr. Starkie[3] classes such a dog as a common nuisance. The language of Tindall, Ch. J., in Sarch v. Blackburn,[4] is similar; and Best, Ch. J., in Blackman v. Simmons,[5] lays it down as clear law, that one who keeps such a dangerous animal, knowing its habits, is clearly guilty of "an aggravated species of manslaughter, if nothing more," if the animal should afterward kill any one. It is not material to the maintenance of the action whether the defendant is the owner of the dog or has charge of him, or simply allows him to resort to his premises. The person whose premises the dog frequents, as soon as he is informed of his mischievous character, is bound to send him away or cause him to be killed.[6] *

§ 867. In England a person may lawfully keep a ferocious dog for the protection of his premises, and may turn it loose at night, provided the barking of the dog does not disturb his neighbors. Accordingly, where the defendant, for the protection of his premises, kept a savage dog, which was confined during the day and let loose at night, and the defendant's foreman went into the yard after dark, knowing

[1] May v. Burdett, 9 Q. B. 112; Cox v. Burbridge, 13 C. B. N. S. 440; Leame v. Bray, 3 East, 595; Brown v. Carpenter, 26 Vt. 638.

[2] 2 Strange, 1264.

[3] Ev. vol. 2, p. 735.

[4] 4 Car. & P. 297.

[5] 3 Car. & P. 138.

[6] McKone v. Wood, 5 Car. & P. 1.

* In an action to recover damages for injuries sustained by the plaintiff's child from the bite of the defendant's dog, admissions of the defendant's wife as to the occurrence, and the character of the dog, were proved by the plaintiff, under objection. The admissions, which were as to the mode of the injury and the character of the dog, were held improper, the admissions of a wife not being evidence against her husband. Even if she were his agent, her admissions, after the agency was over, of what had taken place could not have been received in evidence (Logue v. Link, 4 E. D. Smith, 63).

that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he could not maintain an action therefor.[1] But a man will not be justified in placing a ferocious dog in the way of access to his house with such a length of chain that a person innocently going there for a lawful purpose in the daytime, may be bitten by it.[2] And a notice to beware of the dog, put up by his owner, will not exempt the owner of the dog from liability to a person injured, if the latter was lawfully on the premises, and was, in point of fact, ignorant of the notice.[3]

§ 868. In the United States a man may not employ dangerous instruments for the protection of his property against trespassers; but only such as the same degree of force, if otherwise used, would justify. The keeping of a ferocious dog for such a purpose, has been held unlawful, upon the same principle that setting spring guns, or concealed spears, or placing poisonous food, is unlawful. In Connecticut, in an action of trespass for injury of the plaintiff by the dog of the defendant, it was proved that the dog was ferocious, accustomed to bite, and dangerous. It was held that the defendant had no right to keep such a dog for any purpose, unless in an inclosure or building in the night season, and cautiously as a protection against criminal wrong-doers, nor then, perhaps, if his size and ferocity were such as to endanger life, as a protection against anything but a felony by violence or surprise.[4] In a case in New York in which the defendant was sued for keeping dogs accustomed to bite mankind, which attacked and bit the plaintiff's son and servant while hunting in the defendant's woods, the defense was, that the person injured was a trespasser, and brought the evil upon himself. It was held that, though he was trespassing, he did not thereby forfeit all protection against vicious dogs, and that the defendant should only have used such force as

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[1] Brock v. Copeland, 1 Esp. 203; *ante*, § 166.

[2] Sarch v. Blackburn, 4 C. & P. 300; Curtis v. Mills, 5 Ib. 489.

[3] Sarch v. Blackburn, *supra*.

[4] Woolf v. Chalker, 31 Conn. 121.

he found necessary to remove the intruder.[1] And in the same State, in an action by husband and wife for injuries received by the wife from a dog belonging to the defendant, the answer, after specifically denying all the allegations in the complaint, including the averment that the defendant owned the dog, admitted that the wife was bitten by the dog in the yard where he was kept, and then alleged that the person bitten had no right in the yard in question. It was held that it was no excuse that the plaintiff went into a yard which did not belong to her, and was there bitten; that the defendant was equally liable if he kept a dog on his own premises, and suffered him to be loose, as if the dog were at the time in the highway; and that though the place and other circumstances might be referred to on the question of damages, yet that no issue could arise upon it.[2]

§ 869. Although a dog cannot, by entering alone on the land of another and doing mischief, subject his owner to an action of trespass *quare clausum*, as cattle and other animals which are naturally inclined to roam and fowls that prey upon crops may do; yet, if the owner of the dog trespass, and while on the land his dog, unbidden and against his will, does mischief, an action will lie for the injury.[3] In Beckwith v. Shordike,[4] the action was trespass for entering the plaintiff's close with guns and dogs and killing his deer. The evidence showed that the defendants entered with guns and dogs into a close of the plaintiff adjoining his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held sufficient evidence to prove that the defendants were trespassers, and they were held liable for the injury done by their dog, although it was not shown that they had any knowledge or notice of the propensity of the dog to do such or similar injury.

§ 870. Where dogs fight, and one of them is killed, the owner of the dog that is killed cannot have satisfaction for

[1] Loomis v. Terry, 17 Wend. 496.
[2] Woolf v. Chalker, *supra*.
[3] Pierret v. Moller, 3 E. D. Smith, 574.
[4] 4 Burr. 2092.

his loss from the owner of the victorious dog.[1] But if a peaceable dog be attacked and killed by another dog that is unrestrained and vicious, the owner of the latter will be liable, although it occurred on his own premises. In an action to recover damages for a dog which was killed by another dog belonging to the defendant, it appeared that the plaintiff's dog was a small one, and a pet or sporting animal, and that it followed him to the defendant's house one afternoon, where it was attacked and bitten so badly by the defendant's dog that it died. The defendant's dog was much larger and stronger than the plaintiff's, and it had previously attacked and bitten other dogs without being told to do so, to the knowledge of the defendant. It was not tied or secured in any manner to prevent its doing mischief. It did not transpire what business the defendant had with the plaintiff at the time his dog was bitten. It was held that the plaintiff was entitled to recover.[2]*

§ 871. Where the animals of several persons, not jointly owned by them, do mischief together, each owner is only liable for the mischief done by his own animal.[3]† This rule

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[1] Wiley v. Slater, 22 Barb. 506. [2] Wheeler v. Brant, 23 Barb. 324.

[3] Russell v. Tomlinson, 2 Conn. 206; Buddington v. Shearer, 20 Pick. 477; Auchmuty v. Ham, 1 Denio, 495; Brady v. Ball, 14 Ind. 317.

* In this case the court said: "The defendant's counsel contends that the plaintiff was guilty of such imprudence in allowing his dog to follow him to the defendant's house, that he was not entitled to recover. And the case of Brock v. Copeland, 1 Esp. R. 203, is relied upon, as well as others, to sustain this position. This position is untenable. It is not claimed that the plaintiff went to the defendant's house for any unlawful or improper purpose, or at any improper time, and the plaintiff did not by simply going there forfeit his harmless dog because he permitted it to follow him. The defendant had no right to kill the plaintiff's dog because it came to his house, so long as it did no mischief, even though the plaintiff committed a technical trespass by there walking upon the defendant's premises. Nor had the defendant any right to cause the death of the plaintiff's dog by the attack of an unrestrained vicious animal, although it was upon his own premises. The defendant's dog was a nuisance. And so are all vicious dogs, and their owners must either kill them or confine them as soon as they have notice of their dangerous habits, or answer in damages for their injuries."

† In Partenheimer v. Van Order, 20 Barb. 479, it was proved that the defendant's cow, with nineteen others, was found in the plaintiff's garden, and that the whole damage done by all of the cows was twenty dollars. A judgment for the plaintiff for twenty dollars with costs having been rendered by a justice of the peace and affirmed by the county court, it was reversed by the Supreme Court. The latter court said: "The law is well settled that the defendant is

presents no difficulty when it can be proved what damage was done by one animal and what by the other. Where a large and small dog, belonging to different persons, in company destroyed sheep, worth $19, and in an action against the owner of the larger dog a verdict was found against him for $12 damages, it was held that the jury had the right to say that the smaller dog did not do as much of the damage as the larger one, and that, therefore, it could not be shown that the jury erred in their finding.[1] On failure to show the exact damage done by each, the owners might be liable for an equal share, if it should appear that the animals were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one than by the other.* In Pennsylvania, the owners of dogs

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only liable for the damages done by his own cow, and not liable for the damages done by the cows of others jointly with his own. In cases like the present, the law fixes a distinct and definite rule of damages. It gives to the party injured his direct pecuniary loss, and no more. In this case, the jury either mistook the rule of damages or else they intentionally disregarded it. In either case, they have violated a settled principle of law. It will not do to say that, as it was not proved that the other cows did any of the damage, the judgment therefore should be affirmed. The only evidence in the case to show that the defendant's cow did this damage consists in the proof that his cow was in the garden with the others, and that the damage was done by these cows. It seems to me that we should infer that the cattle did equal damage, in the absence of any proof as to how much was done by each. The law cannot certainly be so unreasonable as to presume that one cow did it all."

In Buddington v. Shearer, *supra*, which was an action of trespass for injury done by a dog to the plaintiff's sheep, it was proved in the court below that the mischief complained of was done by a dog belonging to one M. together with the defendant's dog, and on this evidence the judge charged the jury that the owner of each dog was liable for all the damage that both dogs did while together. The Supreme Court, in granting a new trial on account of this instruction, said: "The law was laid down differently in Russell v. Tomlinson *et al.* 2 Conn. R. 206, which was founded on a similar statute of the State of Connecticut; and we are of opinion that that case was rightly decided, for the reasons there stated. That action was brought against two owners of dogs who owned the dogs severally. And the court held that a joint action could not be maintained against them, although the mischief were done by the dogs jointly, but that each owner was liable only for the mischief done by his own dog. This decision seems to be conformable to the principles of justice, and according to the true construction of the statute by which the owner of any dog is made liable for the damage done by his own dog and not by the dog of another."

[1] Wilbur v. Hubbard, 35 Barb. 303.

* In Adams v. Hall, 2 Vt. 9, the plaintiff declared against the defendants jointly, for that two dogs of the defendants worried and killed the sheep of the plaintiff. The action was founded upon the following statute: "If any sheep

which have at the same time been engaged in killing sheep are jointly liable.[1]

2. *Duty to fence against cattle.*

§ 872. Where land next to a highway is not fenced, and cattle stray thereon from the highway, the owner of the land cannot immediately treat the owner of the cattle as a trespasser, but must either drive the cattle out, or allow the person in charge of them a reasonable time to do so; unless the cattle were unlawfully on the highway, in which case their intrusion would constitute a trespass for which their owner would be responsible.[2]

§ 873. At common law, the occupier of land was not obliged to maintain fences. But he was bound at his peril to take care of his cattle. "For every man's land is, in the eye of the law inclosed, and set apart from another's, either by a visible and material fence, or by an ideal invisible boundary; and in either case, every entry or breach carries with it some damage, for which compensation can be obtained by action."[3] If cattle escaped, they might be taken

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shall be worried, wounded, or killed by any dog or dogs within this State, the owner or keeper of such dog or dogs shall pay to the owner or owners of such sheep so worried, wounded or killed, just damages, to be recovered by action of trespass, founded on this statute, together with costs, before any court proper to try the same." The Supreme Court, in affirming judgment of nonsuit, which was entered in the court below, said: "An action of trespass is here brought, not for damage which the defendants did by setting their dogs to worry the plaintiff's sheep, but for the worrying and killing by the dogs, without any blame on the part of the defendants. The action is brought upon the statute, and would not lie at common law; nor can it be sustained, unless the defendants are brought within the provisions of the statute. They are charged with being owners of these dogs. And the charge is well enough, for they might be joint owners. But the charge is not maintained by showing each to be the separate owner of one dog. Nor is this a case in which one might be charged and the other not. There is no rule of law to fasten the liability upon either in preference to the other. They both stand alike in every respect. Either, sued separately, might be liable, for the charge that he was owner of the dogs would be true as to one at least, and that would render him liable for the injury. But the charge that both were owners of the dogs was not proved by the plaintiff's testimony, allowing it all to be true" (referring to Russell v. Tomlinson *et al. supra*, as fully in point).

[1] Kerr v. O'Connor, 63 Penn. St. R. 341.

[2] 2 Roll. Abr. 565, Pl. 7.

[3] 3 Blk. Com. 209; Rust v. Low, 6 Mass. 90; Wells v. Howell, 19 Johns. 385; Thayer v. Arnold, 4 Metc. 589; Brady v. Ball, 14 Ind. 317; Moore v. Levert, 24 Ala. 310.

on whatever land they were found damage feasant; or the owner was liable to an action of trespass by the party injured. Where there was no prescription, but the tenant had made an agreement to fence, he could not be compelled to fence, and the party injured by the breach of the agreement had no remedy except by an action on the agreement. In case of a prescription to fence, he could be made to fence by the tenant of the adjoining close, who might also recover damages.

§ 874. The rule is well settled, that where there is no obligation to maintain a division fence, the owner of beasts must take care that they do not trespass on the land of the adjoining proprietor. This rule, derived not only from the common law, but from the general statutes prescribing the duty of erecting fences, has equal application to the owners of land adjoining public highways; and applies with perhaps still greater propriety and force, to land taken and used for railway purposes. Where the horse of A. entered the uninclosed field of B., and destroyed the grass, and it did not appear that there was any regulation of the town as to fences, or as to cattle running at large, it was held that A. was liable for the damage in an action of trespass.[1] A verdict for the plaintiff was sustained, where it appeared that he and the defendant owned adjoining farms; that no legal assignment for a division fence had ever been made; but that the former owner of the plaintiff's farm had agreed with the defendant in constructing what they considered their respective parts of a division fence; that after the plaintiff bought, he claimed to own the whole fence, and three or four years previous to the alleged trespass, took away a large part of the fence which the defendant had built; and that the defendant having put his cattle into his own field, they passed on to the plaintiff's land, across the line where the fence had been removed.[2] * Where A. leased eight acres of a large

[1] Wells v. Howell, 19 Johns. 385. [2] Sturtevant v. Merrill, 33 Maine, 62.

* In this case, the court, in directing judgment to be entered on the verdict,

field to B., the whole being inclosed without any division fence, and A. turned his cattle upon the part of the field which he occupied, and they went on to the eight acres and destroyed B.'s crops, it was held that A. was liable to an action of trespass for the injury, and that B. was not obliged to erect a division fence, nor to allege in his declaration that A. was bound to do so.[1] *

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said: "In the case at bar, there being no division, the parties were in the enjoyment of no rights under the statute, in their occupation. There is no evidence of any agreement or understanding that the lands were intended to be occupied in common. The beasts passed into the plaintiff's land at a place where there was no fence upon the line between his land and that of the defendant; and the plaintiff is entitled to recover unless some ground beside the provision of the statute will protect the defendant. But the party excepting insists that the removal of the fence by the plaintiff precludes him from recovering damages. If the plaintiff had driven the cattle of the defendant on to his land, or had they passed there by his procurement, at the time they were found there, he could not prevail. But such is not the state of facts. There is no evidence that the removal of the fence was for the purpose of allowing the cattle of the defendant to pass into the plaintiff's land three or four years afterwards. The unlawful removal of the fence, was the ground of an action in favor of the party injured at the time. And it may be true, that, had it not been for the removal of the fence by the plaintiff, it would have remained sufficient against cattle till the acts complained of; and under such a state of things, the defendant's cattle may have escaped into the plaintiff's land in consequence of the removal. But the effect is too remote from the cause. The taking away of the fence is to be treated as any other trespass of the plaintiff upon the land from which the cattle passed, such as cutting down trees, or tearing up the soil, at the time; and could not justify any act or neglect, long subsequent, of the other party, with which it had no direct connection. As long as there was no division of the fence, the plaintiff had a right to take away the part belonging to him, if it could be done without a trespass upon other's lands; and he would then be entitled to maintain an action of trespass, if the cattle of the contiguous proprietor should pass upon his close without permission. And if he removed the fence of the latter unlawfully, it would have the same effect upon the rights of both, so far as their occupation of the lands was concerned. A license to permit the defendant's cattle to pass on the lands of the plaintiff, while he might wish to rebuild the fence after the removal, can be inferred from no facts in the case. There is nothing showing that such was the plaintiff's intention; but, on the other hand, there was evidence that the fence was removed because he claimed it as his own property. When so many years elapsed subsequent to the time when the fence was removed, the jury could not have presumed legitimately that the plaintiff designed thereby to allow the defendant to suffer his cattle to pass over the line" (citing Lord v. Wormwood, 29 Maine, 282).

[1] Henly v. Neal, 2 Humph. 551.

* In Wilder v. Wilder, 38 Vt. 678, which was an action of trespass *quare clausum fregit*, it appeared that the plaintiff, one Hubbard, and the defendant, each owned a lot of land lying near together; Hubbard's lot lying between the lots of the plaintiff and the defendant, and adjoining the one on the one side, and the other upon the other side. The principal part of all these lots was uncleared and unoccupied, and constituted no part of the farm properly so called, of either of the owners. They were back lots. Each had a clearing upon his lot which he occupied; and the several clearings were situated with respect to each other, just as the lots were, Hubbard's clearing lying between and separat-

§ 875. If two persons own adjoining closes, with an undivided partition fence, which both are equally bound to repair, each must keep his cattle on his own land at his peril.[1] * In Alabama, under a statute which provided that division fences should be deemed joint property, it was held that one of the owners could not maintain trespass against the other for an injury resulting from the insufficiency of the fence, even though they had entered into an agreement, one to keep up one-half of the fence and the other the other half.[2] In such case, if the fence needs repairing, and one of the proprietors will not help repair it, the other may cause

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ing the clearings of the plaintiff and the defendant. Each owned uncleared and wild unoccupied land lying west of their respective clearings, and extending across their entire lots. There was an old, but not a legal fence on the line between the plaintiff's and Hubbard's clearings; and the same on the line between Hubbard's and the defendant's clearings. The defendant had a fence, but not a legal one, west of his clearing, but not on or near his west line. Neither Hubbard nor the plaintiff had any fence west of their clearings. The fence between Hubbard and the plaintiff, and that between Hubbard and the defendant, though not legal, was satisfactory to the adjoining owners. The plaintiff and Hubbard occupied their clearings as meadow land. The defendant occupied his as sheep pasture. The defendant's sheep escaped from his pasture, sometimes over the fence west of his clearing, and sometimes over the fence between him and Hubbard, into Hubbard's meadow, and thence into the plaintiff's meadow, where they did the damage complained of; and the question was whether the defendant was liable. It was claimed, on the part of the defendant, that he was not liable, because the plaintiff did not have a legal fence inclosing the meadow where the damage was done. At the time the injuries complained of were committed, the statutes of 1853 and of 1857, relative to the building and repairing of fences, were in force. The 4th section of the act of 1853 provided that wherever the lands of two or more individuals were so situated that either might not be compelled to fence on the dividing line, &c., each owner or keeper should be liable for all damages done on the occupied lands of others, by reason of any animal straying from his lands, &c. It will be observed that this section did not make the liability depend upon the fact that the place where the damage was done was or was not inclosed by a legal fence, but only that it should be occupied land. The court, per Pierpont, Ch. J., in holding that the action was well brought, said: "It is insisted by the defendant, that this form of action cannot be maintained upon the facts of the case. We think otherwise. The action is brought to recover for a trespass committed by the defendant's animals on the land of the plaintiff, and is not based, in any respect, upon the insufficiency of the defendant's fences. The result and liability would be the same as if the defendant's fence had been a legal one, and the sheep had escaped and commited the trespass."

[1] Rust v. Low, 6 Mass. 90. [2] Walker v. Watrous, 8 Ala. 493.

* If there existed a joint obligation to make the fence, no legal effect would flow from it. For then each party would be bound equally to make every part; and if the fence was defective, each party would be chargeable with the deficiency; and upon the escape of cattle from either close to the other, through a defect in any part of the fence, the owner of the cattle could not allege the escape to be from the deficiency of the other's fence.

it to be done, and recover from the other his share of the expense.[1] It is the occupier of a close who is bound to keep the fences in repair, and not the owner.* And the occupier of land, if there be no fences, is bound by the same principle to take care of the cattle he puts there.[2]

§ 876. The liability of the owner of cattle for trespasses committed by them is not varied by the fact that it is impossible to erect a fence. Bissel v. Southworth[3] was an action of trespass in which it was alleged that the defendant's cattle got into the plaintiff's inclosure, ate up his corn, grass, &c. The lands of the plaintiff and defendant were divided by a small river, called the Nachauge. The plaintiff plowed and mowed his side, and the defendant pastured on his. The river was no fence, and it was impracticable to maintain a fence on the dividing line between them, and very difficult keeping a fence on the banks of the river. The defendant turned his cattle into the pasture, and they went across the river into the plaintiff's land, and ate his corn and grass. The jury, upon being returned to a second consideration, gave a verdict for the plaintiff, which the court approved. The court, in giving their reasons to the jury, "agreed that where a river, which is not navigable, divides between two adjoining proprietors, their lands meet in the middle of the river; and when lands are so situated that a division fence cannot be maintained in the dividing line, it is a case not provided for in the statute, and must be governed by the principles of reason and justice; and he that keeps cattle must so keep them as to prevent their injuring the property of others. The improvement of lands

[1] Ibid.

[2] Tewksbury v. Bucklin, 7 N. Hamp. 518; Cheetham v. Hampson, 4 D. & E. 318; The Queen v. Bucknall, 2 Ld. Raym. 804; Rider v. Smith, 3 D. & E. 766.

[3] 1 Root, 269.

* Where a person's land is in the possession of a trespasser, or of one claiming in himself, or a third person, the owner is not liable for the erection or repairs of a partition fence. But it is otherwise if he consent as owner to the erection of the fence, and it is made by the adjoining proprietor, upon the consent thus given (Moore v. Levert, 24 Ala. 310).

by plowing and mowing is of great public utility, and is, therefore, to be encouraged and protected; and the defendant's turning his cattle on his own land, knowing of the situation, was a trespass upon the plaintiff."

§ 877. It has been remarked that statutes imposing the duty on adjoining proprietors of land to erect and maintain fences, is a simple recognition of the rule at common law, which requires the owner of cattle to take care of them; that the object of fencing is not to keep the cattle of others off their premises, but to keep their own at home; that the owner of a close is not bound to guard against the intrusion of cattle or animals belonging to others; but that each must prevent his own animals from entering upon the close of the other.[1] The foregoing observation is not, however, strictly correct; for if it is the duty of my neighbor to repair the division fence, and he does not do it, and in consequence thereof my beasts get on to his land, this is a good defense to an action of trespass brought by him; and I may, in such case, lawfully go after my beasts, and bring them back.[2]

§ 878. In many of the States there are statutes requiring land owners to fence their property; and whenever this duty is required, there can be no recovery for damage done by stray cattle if the duty has been neglected. This is the case in Pennsylvania.[3]* And in Illinois, North Carolina, Iowa and Cali-

[1] Clark v. Adams, 18 Vt. 425; Knight v. Abert, 6 Barr, 472; Page v. Hollingsworth, 7 Ind. 317.

[2] Roll. Abr. Trespass, 565, pl. 3.

[3] Gregg v. Gregg, 55 Penn. St. R. 227, and cases cited.

* In Pennsylvania, an owner of cattle is not liable to an action for their browsing on his neighbor's uninclosed woodland. But it follows, not that because such browsing is excusable as a trespass, it is matter of right. It is an immunity, not a privilege; or, at most, a license revocable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim *de minimis*, or perhaps because it is better that all waste lands should be treated as common, without stint. It certainly saves vexatious litigation. The particular loss from it is inappreciable, even as a subject of nominal damages, and would probably be held so, even in England, where waste land is altogether worthless. In Knight v. Abert, *supra*, it was held that, although no action lay in Pennsylvania for trespass by cattle pasturing on uninclosed woodland, yet that not being a matter of right, the owner

fornia, in order to maintain trespass for an injury done by cattle, the owner of the land must prove that it was protected by a sufficient fence.[1]* In Delaware, it seems to have been doubted whether the owner of cattle turned upon the public roads was liable for all trespasses upon private property, or only for such as were committed on land inclosed by a lawful fence.[2]

§ 879. In New York, the owner of land is not obliged to inclose it, but may, if he choose, let it lie open. If, however, he afterward inclose it, he is required to refund to the owner of the adjoining land a just proportion of the value at that time of any division fence that shall have been made by such adjoining owner, or build his proportion of the division fence.[3] It is provided by statute in that State, that if any person liable to contribute to the erection or reparation of a division fence, neglects or refuses to make and maintain his proportion of such fence, or permits it to be out of repair, he cannot maintain any action for damages incurred, but is liable to pay damages to the party injured.[4] Where a person granted to another a right of way over his land, and covenanted to place a gate at the terminus, and the grantee covenanted to make all the necessary repairs to the gate, and the grantor,

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of land was not liable for an injury sustained by such cattle falling into a hole dug by him within the bounds of his land and left uninclosed.

In Ohio, although there is no statute which requires a person to fence or inclose his land, yet if the owner leave it open, he takes the risk of the entry thereon of animals running at large (Kerwhacker v. Cleveland, Columbus & Cincinnati R. R. Co. 3 Ohio, N. S. 172).

In Iowa, in trespass for injury done by cattle running at large, the plaintiff, in order to recover damages, must show that his fence was sufficient to turn ordinary stock (Heath v. Coltenback, 5 Iowa, 490). But in that State, where an ox grazing on a common entered an uninclosed field, and died in consequence of eating corn therein, it was held that, as the owner of the corn was not obliged to fence his field as against the public, and the right to pasture cattle upon commons was permissive merely, he was not liable (Herold v. Meyers, 20 Iowa, 378).

[1] Misner v. Lighthall, 13 Ill. 609; Headen v. Rust, 39 Ib. 186; Jones v. Witherspoon, 7 Jones Law, N. C. 555; Wagner v. Bissell, 3 Clarke, Iowa R. 396; Heath v. Coltenback, 5 Ib. 490; Comerford v. Dupuy, 17 Cal. 308.

[2] Haines v. Wise, 4 Harring. 248.

[3] N. Y. Rev. Sts. 5th ed. vol. 1, p. 833. [4] Ibid.

* But in Illinois, towns have authority so to restore the common law liability for cattle running at large, that land holders may maintain trespass for such damage, although their land is not sufficiently fenced (Westgate v. Carr, 43 Ill. 450).

having erected the gate, some person unknown carried it away, it was held that the grantee was bound to replace it; that the grantor was entitled to damages against the grantee occasioned by cattle coming on to his land in consequence of the removal of the gate; that a recovery therefor would not bar another action on the same covenant for damages accruing after the commencement of the first suit; and that the measure of damages would be the actual injury sustained by the grantor in consequence of the removal of the gate, and not the cost of a new one.[1]*

§ 880. In Connecticut, the law makes it the duty of every man to inclose his lands by a sufficient fence; or, at least, to do all that is required of him toward fencing his land, before he can maintain an action for a trespass thereon by cattle, except in the few cases specified in the statute. Where, therefore, in an action of trespass for damage done to the plaintiff's close by the defendant's cattle, it was conceded

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[1] Beach v. Crain, 2 N. Y. 86; 2 Barb. 120.

* In New York, under the statute in relation to division fences, unless one of the owners chooses to let his land lie open, each party is bound to make and maintain a just proportion of the division fence, and the party who is in default has no remedy for a trespass by the cattle of the adjoining land owner. When the party who suffers by the trespass is not in fault in relation to the division fence, the statute has to some extent given him a new remedy, by calling in the fence viewers to appraise his damages. By the Revised Statutes, the party who permitted his portion of the fence to be out of repair was liable to pay the party injured "all such damages as shall accrue thereby;" and it came very near being decided, that this not only made him liable for the trespass of his own cattle, but for all the consequences which might result to his neighbor's cattle through his neglect to repair. The members of the court for the correction of errors were equally divided in opinion upon the question (Clark v. Brown, 18 Wend. 213). This case led to the act of 1838, which restricts the remedy of the injured party to such damages as shall accrue to his lands, crops, fruit trees, shrubbery and fixtures connected with the land (Stafford v. Ingersol, 3 Hill, 38).

A deed which excepts "grass, herbage and pasturage," creates an easement in the grantor to enter and depasture the lands. Where, in such case, the grantee had the right to plow and plant such arable parts of the land as he chose, and to take timber for fencing, but was required to leave the lands he might till unenclosed from October to April, it was held the grantee's duty to fence, and that, in default thereof, he could not distrain the grantor's cattle damage *feasant* (Rose v. Bunn, 21 N. Y. R. 275).

In New York, where cattle are lawfully feeding on a common, the owner of crops is bound to fence against them (Holladay v. Marsh, 3 Wend. 142). In New Jersey, the owner of land on a highway is not obliged to build a fence along such highway (Chambers v. Mathews, 3 Harr. 368). In Wisconsin, it has been held that, if swine pasturing on the highway break into a field, the owner of the swine is liable therefor (Harrison v. Brown, 5 Wis. 27).

that the injury complained of resulted from the want of a sufficient fence between the adjoining lands of the plaintiff and defendant; that it was the duty of each of the owners of these lands to make and maintain one half of the divisional fence, and that the plaintiff had never made his part, it was held that the plaintiff was not entitled to recover.[1] But the owners of land are not obliged to fence against unruly animals of any kind. Therefore, where in an action for trespass committed by sheep, the defendant claimed that the plaintiff's fence was insufficient, and that the sheep entered the plaintiff's close through such insufficient fence, and that the plaintiff was bound to keep the fence in repair, it was held that proof that the sheep were unruly, and would not be restrained by an ordinary fence, was a complete answer to the attempted justification.[2]

§ 881. In Maine and Massachusetts, the neglect which is made a bar of recovery in an action of trespass *quare clausum*, for the breaking and entering of cattle, can arise only from a division of the fence, either by fence viewers acting under the statute, or by a valid and binding agreement between the parties owning adjoining lots, or by prescription. The division must be such as imposes the obligation upon the party injured to build and maintain wholly, upon a certain well defined portion of the line, a legal fence. The general rule being that every man must, at his peril, keep his cattle on his own land, and that he cannot be permitted to show that his neighbor had no fence, or an insufficient one, the only defense he can set up is, that his neighbor has neglected to maintain the portion of the dividing fence which has been assigned to him in one of the ways before stated. If no division, such as the statute recognizes, has been made, the omission is not to be treated as the fault of one party more than that of the other.* And if no fence is built thereon, it

[1] Studwell v. Ritch, 14 Conn. 292.

[2] Barnum v. Van Dusen, 16 Conn. 200. See Sts. of Conn. relating to pounds.

* In Massachusetts, by the statute of 1785, ch. 52, legal sufficient fences between adjoining occupied closes may be made and kept in repair through the whole year, at the will of either tenant, but at the equal expense of the two ten-

may be because the parties have agreed to occupy and improve their several lands adjoining each other in common,

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ants, each tenaant being liable to the charge of making half the fence. What shall be deemed a sufficient fence is defined by the statute; and if the tenants do not agree on the divison of the fence, or if either neglects sufficiently to make or maintain his part, a remedy is expressly provided. Each town is to choose annually two or more fence viewers, to be sworn to the faithful discharge of the duties of the office. Any two of these officers are authorized, at the request of either tenant, to divide the fence, or the line on which the fence is to be made, and to assign to each tenant his part, which he and the succeeding tenants are to make and maintain; and also, at the request of either tenant, to decide whether the fence of the other is sufficient or not. If either tenant, after such division and assignment, duly made in writing, and recorded in the town clerk's office, shall neglect to make or maintain his share so assigned, the other tenant may do it, and may recover at law, against the negligent tenant, double the expense as ascertained by the fence viewers, with twelve per cent. interest, if, on notice and request, it be not paid. The legal obligation of the tenants of adjoining lands to make and maintain partition fences where no written agreement has been made, in Massachusetts, rests on the foregoing statute. But in this are not included adjoining lands which are not both occupied by the respective owners, nor lands inclosed in a general field or common pasture, nor a close adjoining a highway. It has been held that an assignment pursuant to the foregoing statute imposes the same duty that would result from a prescription; and that in pleading it is sufficient to allege that the tenant is obliged by law to make and repair, and to give the assignment in evidence. The manifest object of the statute was to establish the rights and obligations of tenants of adjoining occupied closes respecting the making and maintaing partition fences; and the rights of persons not having any interest in either of the adjoining closes remain unaffected by the statute, and are to be defined and protected by the common law (Rust v. Low, 6 Mass. 90).

When there has been no assignment, but only a written agreement, executed by the tenants of the adjoining closes, it may be a question whether such agreement shall have the force of an assignment; and if not, whether the tenant whose cattle have escaped can plead such agreement in bar of an action of trespass, or must have his remedy by an action on the agreement. But there appears to be no good reason, after an actual division by such agreement, if the cattle of one tenant escape into the close of the other tenant, through the defect of the fence which the other had agreed to make and repair, why the owner of the cattle might not aver that the party complaining had bound himself by his agreement to make and maintain the fence, and that the cattle escaped through his default. For if he agreed to make and repair the fence, he ought by law to fulfill his agreement (Ibid.)

Rust v. Low, *supra*, was an action of replevin for cattle taken *damage feasant* in the close of one Trask. It appeared that the plaintiff's close bounded three separate closes on the north; that Riggs' close was next adjoining Trask's close on the west; and that Low's close adjoined Riggs' close. The partition fence between the plaintiff's close and the *locus in quo*, and also between the plaintiff's close and Low's close, had never been divided. The plaintiff put his cattle into his own close, from which they broke into Low's close, and went thence into Riggs' close, and from there into the *locus in quo*, there being no partition fences between the latter closes. Parsons, C. J., in delivering the opinion of the court, said: "We conceive it immaterial whether the cattle escaped into Low's close through his default or not. The cattle thence escaped into Riggs' close through want of any fence. And it does not appear that Low and Riggs were obliged to make a partition fence. If the cattle were rightfully on Low's close, he was bound, at his peril, to prevent their escape into Riggs' close; and when they did escape, a trespass was committed. Trask had not fenced her close against Riggs, and the cattle were by wrong on Riggs' close,

or because they intend to hold according to their rights at common law. The latter may be the legal presumption, in the absence of all evidence upon the question. If a fence is built and maintained upon the line between the occupants of contiguous lands, without a valid division according to law, partly by one, and partly by the other, no statute rights or responsibilities will result therefrom.[1] * The obligation to make and maintain a partition fence, is equally operative upon both adjacent owners. Each party is equally bound to move in the matter; and until such division, there can be no deficiency or neglect alleged as to the fence of either party separately and individually. If either therefore, puts cattle on his own land, and they enter upon the land of the adjacent proprietor, there being no partition of the fence separating the lots, he will be liable to an action of trespass therefor. Upon general principles, it is no more the duty of the individual who has a field adjacent to that which his neighbor proposes to depasture with his cattle to take the incipient steps to cause a partition of the fences between their adjacent lands, than of him who

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the owner of the cattle having no interest in that close, or any right to put his cattle there. And Trask was not obliged to fence against any cattle that had escaped from Low's close to Riggs' close. When the cattle escaped into her close from Riggs', it was a trespass, and her bailiff might lawfully distrain them *damage feasant*. If, in fact, the cattle had escaped from the plaintiff's close into Low's, through defect of Low's fence, yet the plaintiff must fail in his replevin against the defendants, and may have his remedy against Low."

[1] Knox v. Tucker, 48 Maine, 373; Sturtevant v. Morrill, 33 Ib. 62; Webber v. Closson, 35 Ib. 26; Sts. of Maine, ch. 30, § 6.

* Knox v. Tucker, *supra*, was an action of trespass for the breaking and entering of the defendant's cattle into the plaintiff's close; the defense being that the cattle were lawfully on the adjoining close, and that they escaped therefrom, in consequence of the neglect of the plaintiff to maintain his part of the partition fence. No statute assignment by fence viewers was produced, nor any written agreement between the owners in relation to a division, and there was not sufficient proof of any parol agreement. There was the declaration of one party, that a division had been agreed upon, but no evidence that the other party assented. It appeared that about thirty years previous, the occupants of the adjoining lots built a fence in separate portions extending 82 rods to a brook, but that this was not the whole extent of the dividing line; that this fence stood more than twenty years, when the plaintiff 's part was rebuilt not on the same line, but ranging from the line on to the plaintiff 's lot. There had been a dispute about the fence for the last five years, and the plaintiff had removed part of it. The plaintiff was nonsuited, the court remarking that it was safe to presume that there was some original grant or agreement between the parties by which a legal division of the fence was established.

owns the cattle and intends to use his land for depasturing them. Both parties are entitled to the privileges given by the statute, authorizing proceedings for dividing their fences, and assigning to each his proper portion thereof; and if either wishes to avail himself of its provisions for his protection, he must move in the matter, if his neighbor does not. By taking the proper steps, and causing a partition to be made of the fences, and duly maintaining and keeping in repair the part assigned to him, he can easily avoid all liability to an action, if his cattle escape into the adjacent lot through defect of the fence assigned to the owner of such lot. If he neglects to procure a division of the fence, it is not for him to complain that the owner of the adjacent lot has been alike inactive in the matter; but the result must be, that both parties must be presumed to elect to occupy and improve their lands under the rules of the common law, and subject to the common law responsibilties."[1]*

§ 882. Where two persons own lands adjoining, and there is a division fence between them, one portion of which one of the parties is bound to repair, and the other portion the other party is bound in like manner to keep in repair, and the cattle of one of them escape from his field through

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[1] Thayer v. Arnold, 4 Metc. 589.

* In Thayer v. Arnold, *supra*, an argument against the application of the common law rule in Massachusetts was derived from the following provision of the statute of 1788, ch. 65, § 3: "Any person injured in his tillage, mowing, or other lands under improvement, that are inclosed with a legal and sufficient fence, may have and maintain an action of trespass *quare clausum fregit* against the owner of the cattle for his damages." It was claimed that the statute had made the having and maintaining of a sufficient partition fence, a condition precedent to the right of maintaining an action of trespass for cattle escaping from an adjacent lot. It was replied that § 4 of ch. 113 of the Rev. Sts. had materially changed the provision on this subject. In the latter, the words "being inclosed with a legal and sufficient fence" are omitted, and the following introduced: "Provided that if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom in consequence of the neglect of the person who has suffered the damage to maintain his part of the division fence, the owner of the beasts shall not be liable." The court remarked that this restriction upon the right to maintain the action, as found in the statute, was clearly applicable only to cases where there had been a division of the fence, and that it could not with propriety be said, that any particular part of the fence was to be kept in repair by one rather than the other, until a division had taken place.

the division fence into the field of the other, by reason of the defect or insufficiency of that portion of the division fence which the latter is bound to keep in repair, he has no remedy.[1] But in order to excuse the trespass of the cattle of one of two adjoining proprietors of land, the owner of the cattle is bound to show not only that the division fence which the plaintiff ought to maintain was out of repair, but also that the cattle passed on to his land over such defective or ruinous fence. The plaintiff's neglect is of no moment, unless the beasts came on to his land in consequence of the ruinous condition of that part of the fence which he is bound to keep in repair; and this is an essential fact in the defense.[2]* In Hine v. Munson,[3] the following instruction of

[1] Cowles v. Balzer, 47 Barb. 562.

[2] 3 Chit. Pl. 7th Am. ed. 1103–1196, and notes; Deyo v. Stewart, 4 Denio, 101; White v. Scott, 4 Barb. 56; Crane v. Ellis, 31 Iowa, 510.

[3] 32 Conn. 219.

* In Deyo v. Stewart, *supra*, it was argued that the act of New York of 1838 had made a radical change in the common law; so that one who was himself in default as to a partition fence, which he was bound to repair, could have no redress for a trespass on his land by the cattle of an adjoining proprietor, although they escaped and came upon the land of the plaintiff over that part of the division fence which such adjoining owner was himself bound to repair. It was held, however, that the statute admitted of no such construction. The first part of the section (1 N. Y. Rev. Sts. 5th ed. p. 833, § 37) is as follows: "If any person liable to contribute to the erection or reparation of a division fence, shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, he shall not be allowed to have and maintain any action for damages incurred." The court said: "The word *incurred* means brought on; and by this statute the party in default is to have no action for damages brought on himself in some manner. What is that manner? Plainly the clause means such damages as are brought upon the party by his own negligence; and it cannot be extended to damages sustained in any other way whatever. So far, the statute is in affirmance of what was previously a well settled rule of law, and was not intended to make any change in it. But the subsequent part of the section had another, and a very different object in view, which was to declare what damages a party so in default should be liable to pay; a point upon which the court of errors immediately preceding the time when this act was passed, had been equally divided (Clark v. Brown, 18 Wend. 213). It was to settle the law upon this point, and not to make any alteration in other respects, that the statute was passed (Stafford v. Ingersol, 3 Hill, 38). In prescribing the measure of damages against a party so in default, the legislature adverted to and affirmed a well settled rule of law in regard to a recovery of damages by such defaulting party; but they did not intend to change the law in this respect, as is plain from the use of the word *incurred*. On this point there had been no doubt about the rule of law and of justice too, and no one desired to change it. But on the other question there was great doubt and uncertainty, which the statute very properly removed."

Through defect of fences, which it was the defendant's duty to repair, his mare strayed in the night time from his close into an adjoining field, and so into

the court below was held correct: That "if the jury should find that the cattle broke and entered through the plaintiff's insufficient fence, their verdict must be for the defendant, although they should also find that the defendant's portion of the fence was not a sufficient and lawful fence, and should not find that the cattle were unruly." The judge referred to Swift's Digest,[1] where it is said: "If the beasts of the adjoining proprietor enter upon my land by the insufficiency of his fence, then they are liable to be impounded in the same manner as if they broke through my sufficient fence." And in an early case in New York,[2] which was an action for damage done by the defendant's hogs in the plaintiff's corn, it having been proved that the hogs entered the corn field through that part of the interior fence which the plaintiff below was bound to keep in repair, but which he suffered to decay, so as to be utterly insufficient, it was held that as the loss of which the plaintiff complained was occasioned by his own negligence, he had suffered *damnum absque injuria*, and could not recover. But where in an action for damage done to grain by sheep, the evidence showed that the sheep got over that part of the fence which for several years had been kept up by the defendant as his part of the division fence; it was held that this was *prima facie* sufficient to make him liable. What the situation of the fence was, or whether there were any rules or regulations of the town on the subject, did not appear. If there was anything to excuse the trespass, the defendant should have shown it.[3] *

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a field of the plaintiffs in which was a horse. The result was, that the plaintiffs' horse received a kick from the defendant's mare, which broke his leg, and he was necessarily killed. It was held that the defendant was liable for his mare's trespass, and that the damage was not too remote (Lee v. Riley, 18 J. Scott, N. S. 722).

In an action of trespass for damage done to crops by the defendant's cattle, he is not liable for injuries cused by the cattle of other persons which entered through the break in the fence made by his own, unless happening under his control (Durham v. Goodwin, 54 Ill. 469).

[1] Vol. 2, p. 90.

[2] Shepherd v. Hees, 12 Johns. 433.

[3] Colden v. Eldred, 15 Johns. 220.

* In Page v. Olcott, 13 N. Hamp. 399, which was an action of trespass *quare clausum fregit*, it appeared that the defendant's land adjoined that of the plaintiff; that a division of the fence between the lands of the parties had been duly made

§ 883. When one land owner is bound to maintain and repair a fence for the benefit of the adjoining land owner, and cattle from the land of the latter trespass upon the land of

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and recorded; and that the sheep of the defendant escaped from his inclosure into the plaintiff's pasture lands through the insufficiency of that portion of the fence which the plaintiff was bound to repair, and thence into the *locus in quo*. The court, in holding that the plaintiff could not maintain the action, said: "We cannot regard the defendant as at all in fault in the matter of the escape of the sheep, or of the injury and loss sustained by the plaintiff. The defendant placed his sheep in his own close, where he had an unquestionable right to place them, and against which the plaintiff, by law and in duty, was bound to keep a good and sufficient fence. That duty, however, was not performed, and by reason of its non-performance, the plaintiff suffered damage in her property. The consequences of the neglect cannot be visited upon the party no wise in fault. And it cannot alter the case, as was contended by the counsel for the plaintiff, that the *locus in quo* was surrounded by a good and sufficient fence which the plaintiff was not bound to keep in repair as against the defendant. The sheep having escaped from the pasture of the defendant through the default of the plaintiff, as between the parties, the damage resulting therefrom must be considered as resulting from the same default. The defendant was deficient in no duty, and was in no default. The plaintiff's negligence must be regarded as occasioning the damage sustained. It is a fair presumption which the law will make that if the plaintiff had performed her duty properly in repairing her part of the division fence, the sheep would not have escaped from the pasture of the defendant, and the damage complained of would not have been sustained. And it is clear, that while under the circumstances of the case, the plaintiff is in law to be regarded as having contributed to the result of which complaint is made, she can have no action for the damage sustained against the defendant, who has not occasioned it by positive wrongful acts or by any negligence whatsoever."

In Rust v. Low, 6 Mass. 90, Parsons, Ch. J., cites a case thus: "The case of 36 H. 6 is not reported in the Year Books, but there is a short statement of it in Fitz. Abr. Bar. 168. It is thus: "Note, that it was adjudged by the court, if my beasts go into the close of another which is adjoining to my close, for the defect of the close of the other, that I shall not be punished because I do not retake them and put them again into my close, until reparation be made of the other close, because they would go again. That I have given the true translation (says he) appears from Jenk. 4, Cent. Ca. 5. The rule as there laid down is, if A. has *green acre* adjoining to his own close *white acre*, which adjoins to B.'s close *black acre*, which A. ought to fence against; if B.'s cattle go from his *black acre* to A.'s *white acre*, and thence to A.'s *green acre*, this is no trespass, because A. did not fence his *white acre* against B.'s black acre." In the case cited, it was in effect decided to be through the default of A. in neglecting to fence his close white acre, adjoining black acre, the close of B. That the cattle of B. escaped from his close black acre and committed the injury complained of in A.'s green acre; while it was held that B. was without fault in putting his cattle into his close, and could not be made responsible for the consequences of the negligence of A.

The rule of law stated in the citation from the 4 Cent. Ca., and which seems to be the same reported in Fitz. Abr. Bar. 168, is a just rule. It would be wholly unreasonable to require one to keep his cattle upon his own land, or to hold him responsible for damage done by reason of their escaping into an adjoining close through defect of a fence which it was the duty of the owner of the adjoining close to keep in repair. Such a doctrine would hold one person responsible for the wrong of another, and give that other advantage from his own default, which would be in conflict with the clearest principles of law and reason.

the person who ought to have kept up the fence, it is no defense that the fences were out of repair, if the beasts were trespassers in the place from whence they came. If it be a close, the owner of the cattle must show an interest or a right to put them there. If it be a way, he must show that he was lawfully using the way.[1] *

§ 884. Where one of two adjoining owners of land gives notice, pursuant to the statute, that he intends to let his land

[1] Dovaston v. Payne, 2 H. Bl. 527; Rust v. Low, 6 Mass. 90; Lord v. Wormwood, 29 Maine, 282; Chapin v. The Sullivan R. R. 39 N. Hamp. 53; Corwin v. The New York & Erie R. R. Co. 13 N. Y. 42.

* At common law, the tenant of any close is only obliged to fence against cattle that are rightfully on the adjoining land. And accordingly, where defect of inclosure is pleaded, the party pleading it claims some right or interest in the adjoining close whence the escape was made, or justifies under those who have such right or interest.

In Lord v. Wormwood, *supra*, the cattle of the defendants passed from the highway across a tract of woodland owned by one Wells, and not fenced, thence across a salt marsh, not fenced, belonging to one Doyle, to the close of the plaintiff. The cattle, by a vote of the town, were allowed to run at large in the highway, from which they passed on to the land of Wells. It was held that, as the defendants had neither shown that their cattle were lawfully on the adjoining lands, nor any neglect of the plaintiff to maintain his part of the fence, the plaintiff was entitled to recover. The court said: "It is not shown that the defendants had any interest in the close of Doyle, or any authority from him to put their cattle on it. If the plaintiff were bound to fence against Doyle's cattle, it would not be inferred that he was also bound to fence against those of a stranger. Cattle are lawfully on an adjoining close when they have a right to be there by the consent of the owner or of one having an interest in it. The defendants had no right to require that their cattle should remain on Doyle's land. To exercise such right they must have had a title in the close or justified under some one who had. And the same remark will apply to the close of Wells. For, if Doyle were bound to fence against the cattle of Wells, so that he could maintain no action against the latter for the escape of his cattle on to Doyle's close, that obligation would not extend to the cattle of others having no interest in the close. So, also, if Wells were required to fence against cattle running in the highway, and they should break into his inclosure, although he could maintain no action for the damage done, yet he could remove them, and guard against their ingress. The owner of the cattle could not claim to have them remain upon the close, because he has no interest in it. They are not rightfully or lawfully on it, and cannot be so, unless by authority of the person owning the close, who may be deprived of redress for any injury which they have done; but no rights accrue to their owner against the tenant of an adjoining close. The cattle of the defendants were not then lawfully on the land of Doyle or Wells. Nor does it appear that the cattle escaped on to the plaintiff's land in consequence of his neglect to maintain his part of the partition fence. This provision was intended to apply to those cases where there had been a division of the fence between owners of adjoining lands. And until a division takes place, there cannot be said to be any neglect. There had been no partition of the fence between the plaintiff and Doyle, nor between Doyle and Wells. But the plaintiff could only be held liable for his own neglect in maintaining his portion of the fence between his close and that of Doyle, after it had been ascertained by a division between them. No division having been made, no neglect could arise."

lie open, and removes his part of the division fence, and his cattle enter on the land of his neighbor, he is liable to an action of trespass at the suit of his neighbor, notwithstanding the fence was removed in accordance with the statute; the parties in such case being remitted to the situation they would have been in at common law.[1] *

[1] Holladay v. Marsh, 3 Wend. 142.

* But it is not enough to show that, by the removal of a fence by the defendant, cattle damaged the plaintiff's crop, without proving when, where and by whom the fence was built, or some agreement as to it, or that the defendant's cattle trespassed on the plaintiff's close (Richardson v. Milburn, 11 Md. 340).

In Holladay v. Marsh, *supra*, the parties owned adjoining land, between which there was a division fence running north and south. By agreement, the plaintiff was to maintain the south half of the fence, and the defendant the north half. The defendant, having given the notice required by the statute, removed his part of the division fence, and through the opening thereby made the defendant's cattle entered on the land of the plaintiff, and destroyed his crops. It appeared that the lands of the parties were bounded on a highway, and that other cattle besides the defendant's entered upon the plaintiff's land. A verdict having been found for the plaintiff at the circuit, the Supreme Court, in refusing a new trial, said: "Had the statute never been passed, the defendant must have kept his cattle in his own premises, in the absence of all agreement or prescription about fences. The plaintiff, without any fence, could bring trespass for the injury he has sustained. Had the fence remained under the statute regulation, it being the fence of the defendant, and had the same injury been inflicted, the plaintiff would have sustained trespass. Is the defendant, by throwing up his land to common feeding, or to lie open, in a better, or the plaintiff in a worse situation than at common law? Into what is the defendant's field converted by removing the partition fence? Is it a common highway? Or does it become the common lands of the town? Or does it remain the property of the defendant, for any trespass upon which he may maintain an action? If it became common lands, the defendant's cattle were wrongfully there, without a by-law of the town permitting cattle to run at large. So, too, if it became a highway. And if the character of the field was not altered, the utmost effect of the defendant's withdrawing his fence under the statute would be to remit the parties to their common law rights and duties."

In Holladay v. Marsh, *supra*, there was another view of the case, which was sufficient to sustain the verdict. It was: That the defendant not only took away his fence, with the declared intention to injure the plaintiff, but, lest his cattle should not destroy the plaintiff's crops voluntarily, his wife and son drove them from the highway into the field near the plaintiff's crops; and when they were actually committing the work of destruction, the defendant himself not only did not turn them out, but, by threats, prevented others from driving them out of the plaintiff's field.

In an action for the trespass of defendant's cattle, by breaking and entering the plaintiff's close, eating and destroying the grass, and trampling upon and injuring the soil of a certain meadow, it appeared that the line fence between the farms of the parties was one which they had both been in the habit of removing late in the fall to prevent its being carried away by the spring floods, and replacing again in the spring after the high water was over; that the plaintiff, before the commission of the injuries, removed his portion of the fence first, and gave the defendant notice to take out his cattle; that, a few days afterward, the defendant removed his portion of the line fence also, but did not take his cattle out of his field. It was held that the plaintiff was entitled to recover (Van Slyck v. Snell, 6 Lans. 299).

When a person chooses to let his land "lie open to a public common," to

§ 885. There may be a valid prescription by which the owner of land may become bound to maintain perpetually the whole of the division fence between him and the adjoining proprietor. When such a prescription is established, it fastens itself upon the land charged with the burden, and in favor of the tenements benefited by it. It is the usual case of a servitude in lands which has been adopted from the civil law. If one of two proprietors, maintains, for a period of time sufficient to establish a prescription, a fence for the benefit in whole or in part of the adjoining proprietor, the law will presume a grant or covenant by which he became legally obliged to do so. It is the fact that the party having the original right has acquiesced in doing, or suffering that which he could have prevented, if he had chosen to do so, that the law lays hold of, to establish a presumption against him.[1] Where the respective proprietors, owning the whole of two large farms along the entire line of the original division fence, had for sixty years or more, maintained each a particular portion of the division fence, and their children, while still occupying the whole of the respective farms, had continued so to maintain the fence, it was held that there was no such legal presumption of a grant, or deed as would, when the farms on each side of the old fence were divided and held by various owners, prevent the new owners from being bound by the general provisions of the statutes relative to fences, between proprietors of adjoining lands. So long as the parties to the prescription, or those holding under them, owned the same quantity of land along the fence, the pre-

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avoid maintaining a just proportion of the division fence between such land and that owned by another person adjoining, he must do what amounts to a license to the people of the town to go upon it, and allow their cattle to feed upon it without being trespassers, until he revokes such license and builds or pays the expense of building his just proportion of such division fence (Perkins v. Perkins, 44 Barb. 134, per Balcom, J.)

In Wisconsin, one who sows his land with a crop after the fence has been taken down cannot maintain an action for injury to the crop by cattle (Hassa v. Junger, 15 Wisc. 598).

[1] Starb v. Rookesby, 1 Salk. 335; Binney v. The Proprietors, &c. in Hull, 5 Pick. 503; Hills v. Miller, 3 Paige, 254; Child v. Chappell, 5 Seld. 246; Adams v. Van Alstyne, 25 N. Y. 232; s. c. 35 Barb. 9.

scription would continue. At most, it would bind only those who owned the land as it was when the prescription arose. It was not of the nature of a covenant, running with the land through all time, but temporary, governing only the immediate owners and the land as it was then owned.[1]

§ 886. Where no statute exists, and no obligation is imposed by covenant or prescription, a railroad company is not bound to fence its property.* Since, at common law, a person is required to keep his cattle upon his own land, and if he suffers them to escape and go upon the land of another, he is a trespasser, a person, by that law, would be a trespasser if his cattle escaped from his own inclosure, and went upon a railroad. It has been justly observed that the owners of adjoining farms are as much bound to keep all cattle off of the railway track, as they are to keep them off of each other's farms.[2] These principles can scarcely be deemed, in this country, of doubtful existence or application.[3] Where sheep were wrongfully on the land of a railroad company, and thence strayed upon the railroad and were killed, it was held that the owner of the sheep could not recover their value.[4]† So, likewise, where the plaintiff's ox was wrong-

[1] Adams v. Van Alstyne, *supra;* Hogeboom, J. dissenting.

[2] Vandegrift v. Redeker, 2 Am. L. J. 116; 1 Law Reg. 104, note.

[3] Hurd v. Rutland & Burlington R. R. Co. 25 Vt. 116; Morss v. The Boston & Maine R. R. Co. 2 Cush. 536; Perkins v. The Eastern R. R. Co. 29 Maine, 307; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; aff'd 4 N. Y. 349; Clark v. The Syracuse R. R. Co. 11 Barb. 112; N. Y. & Erie R. R. Co. v. Skinner, 1 Law Reg. 97; s. c. 7 Harris, 298.

[4] Cornwall v. The Sullivan R. R. 8 Fost. 161.

* In New Hampshire, it was held that a land owner could not maintain an action against a railroad company for damages resulting from the want of farm crossings and cattle passes, unless the company had agreed to provide them, or the land owner had applied to justices under the statute to have them located and constructed (Horne v. Atlantic & St. Lawrence R. R. 36 N. Hamp. 440).

† In Cornwall v. The Sullivan R. R., *supra*, it appeared that the plaintiff's land did not adjoin the railway, and that his sheep had no right to be upon it. The corporation owned a piece of land adjoining their railway. The plaintiff owned a tract adjoining the piece belonging to the corporation, the piece belonging to the corporation, lying between the railroad and the plaintiff's land. There was no fence between the plaintiff's land and the piece belonging to the company, and no steps had been taken by either party to have any division. Neither was there any fence between the railway and the piece owned by the company. The plaintiff turned the sheep upon his tract, and they strayed upon

fully running at large in the highway, it was held that, against such an animal, a railroad company were not bound to maintain either fences or cattle guards. When it escaped from the highway upon the railroad track, it was wrongfully there; and having been killed by the engine, without negligence on the part of the company, their agents and servants, the company were not responsible for the loss.[1] And in Woolson v. The Northern R. R.,[2] it was held that a railroad company was not liable for damage done by their engines and cars, to cattle which escaped from the highway upon the railroad track, because such cattle, while thus upon their track, were wrongfully trespassing upon the corporation.

§ 887. Under the existing statutes of several of the States railway companies are only bound to maintain fences on both sides of their track for the benefit of the owners and rightful occupants of adjoining lands, to prevent the cattle of such

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the defendant's piece, and then upon the railway, and were killed. The court, in holding that the plaintiff was not entitled to recover, said: "It is clear, that upon these facts, the sheep had no right to be upon the defendant's piece of land. They were trespassers there, each party being bound to keep his own cattle upon his own land. It is well settled, that where there are adjoining closes, with an undivided partition fence, which each owner if bound to keep in repair, as was the case here, each is required to keep his cattle on his own land at his peril. And this plaintiff would have been liable for any damage done by the sheep upon the defendant's piece of land. It is entirely evident then, that the sheep were not rightfully upon the land of the company adjoining the railroad. The law gave the plaintiff no right to have them there, and the defendants had given him no permission. And unless the corporation are obliged to fence against wrong-doers—against those who have no interest in the land adjoining the railroad, and no right to be upon it—the action must fail. Were this a question between adjoining owners of land, there could be no doubt upon the subject; for the doctrine is settled by numerous authorities, that the owner of a close is bound to fence only against cattle which are rightfully in the adjoining close. And these sheep being wrongfully upon the defendant's piece of land adjoining the railway, the company would not be obliged to fence their railroad against them. We have been unable to see why a person who is wrongfully upon a piece of land adjoining a railroad, should be permitted to say, so far as he is concerned, that the railroad shall be fenced for him, any more than he is permitted to say it to an individual; why he may be permitted securely to enjoy the wrongful use of land adjoining a railroad, which he has appropriated to himself, and upon which he is trespassing, any more than to enjoy the use of land of individuals similarly situated" (citing Tewksbury v. Bucklin, 7 N. Hamp. 518; Avery v. Maxwell, 4 N. Hamp. 36; Rust v. Low, 6 Mass. 90; Little v. Lathrop, 5 Greenl. 356; Pomfret v. Ricroft, 1 Wms. Saund. 321; Wells v. Howell, 19 Johns. 385; Thayer v. Arnold, 4 Metc. 589; Lord v. Wormwood, 29 Maine, 282; Dovaston v. Payne, 2 H. Black. 527).

[1] Chapin v. The Sullivan R. R. 39 N. Hamp. 564. [2] 19 N. Hamp. 267.

owners or occupants from escaping from the adjoining lands upon the track of their roads and there getting killed or wandering astray, and to protect the crops, grass, herbage, and other productions of such adjoining lands from the depredations of animals rightfully upon the railroad track. If, for example, the cattle rightfully upon an adjoining close should escape upon the railroad track by reason of the neglect of the railroad to construct and maintain a sufficient fence between their track and such adjoining close, they would be rightfully there, and the railroad corporation responsible not only for any injury done them by their own trains, but for any damages done to the crops of any other adjoining close into which they might escape by reason of like negligence of the corporation in neglecting to erect and maintain a lawful and sufficient fence between their road and such other adjoining close, as well as for any loss or damage happening by reason of such cattle straying upon the highway, or elsewhere. But railroad corporations are not bound any more than individual land owners to erect and maintain fences against cattle trespassing either upon lands adjoining their roads or upon their own tracks; nor are they responsible for injuries accidentally happening to cattle trespassing on their tracks, or for the depredations committed by such cattle so trespassing on their tracks and thence escaping upon adjacent lands, although they might not have thus escaped or committed those depredations but for the neglect of the corporation to maintain sufficient fences.[1] * Under the general railway act

[1] Chapin v. The Sullivan R. R. 39 N. Hamp. 564.

* In Towns v. The Cheshire R. R. 21 N. Hamp. 363, it was expressly held that railroad companies were not bound, under the statute, to make or keep fences, except against the lands of adjoining owners, and cattle rightfully thereon, and not against cattle escaping from a highway and trespassing upon the track of the railroad. In Cornwall v. The Sullivan R. R. 28 N. Hamp. 161, it was held that railroad companies were under no obligation at common law or by statute to fence their roads for the benefit of trespassers. In Perkins v. The Eastern R. R. 29 Maine 307, it was held that railroad companies were not bound under the statute of Maine, similar to that of New Hampshire on the same subject, to build and maintain fences on the line of their road through common and uninclosed lands. So in Ricketts v. The East & West India & Birmingham Junction R. R. 12 Eng. Law & Eq. R. 520, it was held that the defendants were not liable to maintain fences against cattle trespassing on a close adjoining their

of England,[1] which imposes upon railway companies the same liability in respect of the maintenance of fences that is imposed by the common law upon occupiers who are bound to maintain and repair fences for the benefit of the adjoining occupiers, it was held, where the plaintiff's sheep escaped from his own land into the adjoining close and were trespassing there, and then passed on to the defendant's railway from defect of fences, and were killed by a train, that the defendants were not liable, the plaintiff not being the owner or occupier of the land adjoining the railway, and the company therefore not being bound to fence against him.[2] But where cattle are on a highway in charge of the owner, he is an occupier of land adjoining the railway, within the words of the statute, so as to make it obligatory upon the company to maintain fences for the safety of his cattle so traversing the highway.[3] *

road. Jervis, C. J., in delivering the opinion of the court, stated that the act of parliament requiring railroad companies to fence their roads had imposed upon them just the same liability as by law existed upon the owners of adjoining lands in regard to maintaining partition fences, and no other. In Hurd v. The Rutland & Burlington R. R. 25 Vt. 124, it was said: "The defendants, under the provisions of the act (requiring them to fence both sides of their road), are required to build and maintain a fence for the purpose of keeping the cattle of owners of adjacent lands from the premises and track of the road." And in Jackson v. The Rutland & Burlington R. R. 25 Vt. 150, Redfield, C. J., said: "This enactment (the provision requiring them to maintain fences) only places the defendants in the position of an adjoining proprietor."

[1] 8 & 9 Vict. c. 20, s. 68.

[2] Ricketts v. East & West India Docks, &c. R. R. Co. 12 C. B. 174. And see Manch. Sheff. & Linc. R. R. Co. v. Wallis, 14 C. B. 224; 23 L. J. C. P. 85.

[3] Midland R. R. Co. v. Daykin, 17 C. B. 129.

* In New York, it has been held that the fact that the owner of a horse that was run over and killed by a train of cars permitted him to run at large in the highway, or to trespass upon his neighbor's premises, will not constitute a defense to a railroad company that is in default under the statute requiring them to erect and maintain fences on the side of their road. Munch v. N. Y. Centr. R. R. Co. 29 Barb. 647, was an action to recover damages for killing the plaintiff's colt on the defendant's railroad. Early in March, the colt was let out of the stable, about noon, to water. He passed out of the gate on to the highway. The plaintiff did not follow him. Afterward the colt was seen in a neighbor's field adjoining the railroad track. There was a gap down in the railroad fence, and the colt passed out of it on to the railroad track. The next that was heard of the colt, he and another horse were on the track on the highway crossing, and they jumped the cattle guards west of the crossing. Soon after, the colt was killed by a passing train. It appeared that the gap in the railroad fence was opened by one Young a week or two before the colt was killed, without any permission from the defendants or their agents, and that the agents of the defendants had no knowlege that the fence had been let down. The judgment of

§ 888. Railroad companies are not bound to presume that cattle will be found upon their track; and if they injure

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the county court, which was for the plaintiff, was affirmed by the general term of the Supreme Court.

In New York, the statute (Rev. Sts. 5th ed. pp. 689, 690) provides that: "Every corporation formed under this act shall erect and maintain fences on the sides of their road of the height and strength of a division fence required by law, with openings, or gates, or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle guards at all road crossings suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages unless negligently or wilfully done." The foregoing statute made a very great change in the law of New York. It required such fences on the sides of the railroad as were directed by statute between adjoining proprietors of cultivated lands, and made companies liable for injuries done by trains to animals upon the track, though they had escaped from the owner's close through his negligence, and though his lands did not adjoin the railroad, but were distant from it.

In Massachusetts, the earlier railroad acts did not require companies to make or maintain fences, but they paid damages to land owners, which included the expense of fencing, as in the case of highways. This system was modified by the statute of 1841, ch. 125, and wholly changed by the statute of 1846, ch. 271. By Gen. Sts. of Mass. ch. 63, § 42, where the owner of land has not received all the damages assessed to him, or has not agreed to maintain suitable fences upon the road, the county commissioners may require the corporation to make and maintain fences suitable for the benefit and security of the land owner and of travelers upon the road. By § 43, each corporation shall make and maintain suitable fences, with convenient bars, gates, or openings therein at such places as may reasonably be required upon both sides of the entire length of any railroad which shall have been constructed subsequently to May 16, 1846, except at the crossings of a turnpike, highway or other way, or in places where a convenient use of the way would be thereby obstructed; and shall also construct and maintain sufficient barriers at such places as may be necessary, and, when it is practicable to do so, to prevent the entrance of cattle upon the road. It will be perceived that in the foregoing railroad act "suitable fences" are required, without describing them or referring to any standard. Fences between adjoining proprietors are to be maintained only in case they improve their lands. If a person suffers his land to remain unimproved, or if it is a mere wood lot, he is not bound to maintain any part of the fence. But the fences to be built along the railroad must be built upon both sides of the entire length of the road, with certain specified exceptions. They may be suitable fences in many places, though they differ much from the fences required to be built by the adjoining proprietors of improved lands.

The statute of Massachusetts does not give any right of action to the owner of animals who negligently suffers them to escape from his own land, or of animals that are wrongfully on the land adjoining the railroad. It speaks of the benefit and security of the land owner, clearly referring to the adjoining land owner, and of travelers on the road. Its construction cannot properly be extended so as to include land owners whose land does not adjoin the road. They are left to their common law rights and liabilities. If their animals are wrongfully on the adjoining land, and go upon the company's land where the fences are defective, they are trespassers. The adjoining land owner himself would not be a trespasser in case his animals escaped through a defective fence which the company is under obligation to maintain. But there are

or destroy cattle, without negligence, they will not be liable to the owner. The loss, in such case, would be owing to the owner's own fault, and he would be responsible for the trespass, and for any injury done to the train or the persons upon it. Even when he is entitled to recover for injury done to his animals wilfully or carelessly, he may be liable for the trespass done by them; and he cannot recover without proving that his own negligence has not contributed to the injury.[1] Accordingly, where sheep strayed from the owner's land and went upon a railroad track, and were there killed by a passing train, but it did not appear that the train was carelessly managed, it was held that the company was not liable in damages, although the fence was one which the company was bound to make and maintain.[2]* Where, however, in an action of trespass against a railroad company, for injury to the plaintiff's sheep, caused by the want of cattle guards at the farm crossing prepared by the defendants for the use of the plaintiff, with the plaintiff's assent to its location, and not through any fault of the plaintiff, it was held that he was entitled to recover.[3]†

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many cases in which he is bound to maintain the fence. This is so whenever the railroad was made prior to 1846, and when he contracts to make the fence. In such case, if his animals escape, he is a trespasser. The legislation of Massachusetts provides for the protection and indemnity of passengers who may be injured, and of adjoining proprietors who have a right to require the company to maintain fences; but it leaves other land owners to take all reasonable risks of their cattle being injured if they wrongfully go upon the road (Chapman, J., in Eames v. Salem & Lowell R. R. Co. 98 Mass. 560).

[1] Eames v. Salem R. R. Co. 98 Mass. 560. [2] Ibid.

[3] Chapin v. The Sullivan R. R. 39 N. Hamp. 564; Ib. 53; White v. Concord R. R. Co. 30 N. Hamp. 188.

* The plaintiff's sheep got upon the defendant's railway, through defect of fences, and were run over by a locomotive engine driven by a servant who had directions from a railway company to drive at a certain rate per hour. It was held that trespass would not lie against the company, and that if the cattle had a right to be on the railway the plaintiff's remedy was by action on the case, for causing the engine to be driven in such a way as to injure that right (Sharrod v. London & Northwestern R. R. Co. 4 Exch. 580; 14 Jur. 23).

† Hurd v. Rutland & Burlington R. R. Co. 25 Vt. 116, was a declaration in trespass containing two counts, in the first of which it was alleged that the injury arose by the act of the defendants' servants in running their locomotive engine against an ox of the plaintiff, whereby the animal was injured and rendered of no value. In the second count, the plaintiff complained that the defendants drove their engine against a cow belonging to the plaintiff, whereby the animal was killed. For these several injuries, occurring at different times,

3. *Driving from land animals wrongfully thereon.*

§ 889. A person upon finding an animal trespassing in his field, may turn the beast out, using no more force than is necessary.[1] * But if he do not exercise reasonable care,

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the action was brought. The general question involved in the case was, whether the injury arose under circumstances which rendered the defendants liable in trespass. The railroad was constructed over the farm of the plaintiff, under an assessment of damages by commissioners. No objections were taken or urged against the correctness of the proceeding by which the land was thus appropriated, nor was the title and right of the defendants to the exclusive use and possession of the premises denied. In the construction of the road, the defendants were to make for the plaintiff's use two farm crossings, one over and the other under the railway, both of which were made, and the over-crossing was protected by suitable cattle guards. Fences on both sides of the road were erected of lawful height and strength, except at the entrance of this over-crossing. The cattle of the plaintiff were pastured in the adjoining field, and passed through over the entrance, at this over-crossing, to the track of the road where the injuries were sustained. The main question in the case was resolved into the inquiry whether a liability was imposed on the defendants, by their neglect or refusal to erect a suitable fence by this over-crossing, so as to prevent the plaintiff's cattle from passing from the adjoining field to and upon the track of the road. For if the cattle escaped, or were found upon the railway, through a want or defect of fences which the defendants should have erected and maintained, the injuries sustained would be a consequence of that wrong, and the defendants, in some way, would be responsible. It was held to be the duty of the defendants, under the statute, to guard the farm crossing by a continuous fence as much as any other part of the road; and that for the purpose of securing to the plaintiff the benefit of the farm crossing, as well as to prevent his cattle from wandering upon the track of the road, the defendants should have erected bars or gates, such as would be in conformity with general usage for such purposes; that as the injury arose at that place, and for the want of a suitable fence of that character, the liability of the defendants would seem to be a natural consequence, unless some other fact existed by which they were relieved from that responsibility; that if the plaintiff refused to have bars placed there, and forbade the defendants to make them when they offered so to do, or were in the act of erecting them, it would operate, as against the plaintiff, as a legal excuse for their omission to build the fence; that the duty created by the statute was personal to the plaintiff and such others as were adjoining landholders; and each adjoining proprietor, so far as he was personally concerned, might waive or discharge the defendants from its performance; and after such waiver he would be estopped from setting up the want of a sufficient fence as a substantive ground of complaint.

[1] Cory v. Little, 6 N. Hamp. 213.

* In Cory v. Little, *supra*, Little brought an action of trespass against Cory in the court below, for turning Little's horse into the woods, whereby she strayed away. It appeared that Little and Cory each owned a field, with the field of a third person between them, the distance between the two fields being about fifty rods. The horse had gone from Little's field into Cory's, in which there was growing grain; and Cory upon discovering the animal there, did not restore it to Little's field, but took it in an opposite direction through three sets of bars to a path in the woods, and turned the animal out, hitting it as he did so, with a stick. The defendant's counsel asked the judge to charge the jury, that the action could not be maintained. But the judge refused so to instruct, and charged the jury that the defendant had a right to turn the plaintiff's horse out of his field, but that in so doing he was bound not to use any unnecessary

he will be liable to the owner of the animal for any injury occasioned thereby;[1] and by a gross abuse of his privilege—such as driving the animal away to a great distance—he will become a trespasser *ab initio*.[2] Where cattle escape through defect of the defendant's fences, or in consequence of the defendant's taking down a sufficient division fence, which the plaintiff is bound to maintain, and the defendant drives them into the highway, and there leaves them, he will be liable as a trespasser.[3] * But the plaintiff cannot recover

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force or to act unreasonably, and that what force was necessary, and what acts were reasonable, were questions to be determined by the jury. Judgment having been rendered for the plaintiff, the Supreme Court, in reversing it, said: "The mare was in Cory's close wrongfully, and he had a right to remove her. The only question to be decided is, whether he made himself a trespasser by an improper exercise of this right. There was no road adjoining his close into which he could turn her. He had only the choice to turn her back into the close of the owner, or to turn her into the woods, in the way he did. In order to turn her back into Little's close, there were two fences to pass. In the other way there were three. But this circumstance is immaterial; as is also the circumstance that he turned her away in a direction opposite to that of Little's close. We are not aware of any rule of law, that made it his duty to turn her out in the way that had the fewest obstructions, or in a direction towards Little's close. He took the nearest way to turn her from his own close, and probably the way which was the most likely to prevent her return; and there was no evidence that he did her any injury. What was the evidence then, that proved him to be a wrong-doer? We see none. He found the beast in his field, and turned her into the road. This is all. There is no color of pretense that he could be held to be a trespasser for this."

It is trespass to let down a fence on another's land, to drive hogs therefrom, instead of driving them through a gap or gate (2 Ired. 247).

In an action for breaking down a fence, the plaintiff may recover for the loss of his hogs caused thereby (Welch v. Piercy, 7 Ired. 365).

[1] Totten v. Cole, 33 Mo. 138. [2] Gilson v. Fisk, 8 N. Hamp. 404.

[3] Carruthers v. Hollis, 8 Ad. & E. 113; 3 Nev. & P. 246; 2 Jur. 871; Roby v. Reed, 39 N. Hamp. 461.

* In Roby v. Reed, *supra*, it appeared that a horse was being pastured by one Fellows, whose land adjoined that of Osgood; that Reed, in passing across the pasture with a load of grain, took down some of the fence which Fellows was bound to maintain; and that the horse got out of the pasture into the field of Osgood, at the place where the fence had been taken down. The fence was taken down by Reed, several days before the horse got out, but Fellows knew nothing of it. Reed finding the horse in Osgood's field, as the servant of Osgood, turned him into the road. The jury having found a verdict for the plaintiff, the Supreme Court in directing judgment to be entered on it, said: "The jury must have found, under the instructions of the court, that the horse escaped from the pasture where he rightfully was, into the adjoining close of Osgood, through the fault of both the defendants, in taking down and not replacing a good and sufficient division fence, which Fellows, the owner of the pasture, was bound to maintain. It could not be said, that the horse would have been wrongfully in Osgood's close, if he had been there on account of the neglect of Osgood to build a fence, which she was bound to maintain. Neither can his being there be considered wrongful as to the defendants, when it was

for a loss which was not the result of the defendant's act. Where it was proved that the defendant occupied public land partially inclosed, on which he pastured his cattle; that the plaintiff drove his cattle to pasture through the defendant's inclosure, on to the same land, from which they were driven by the defendant; that they afterward strayed on to the land of a third person, who notified the plaintiff to come and take them away, which he did not do, and several of them died from starvation; it was held that as the loss of the cattle was not the proximate result of the defendant's trespass, he was not liable therefor.[1]

4. *Seizure of animals trespassing.*

§ 890. The owner and occupier of land cannot lawfully seize and detain animals trespassing, which at the time are in the actual possession and use of the person having charge of them; for that might lead to a breach of the peace. But in order to exempt them from seizure, it must appear that they are under the immediate control of some one.[2]

§ 891. The right to distrain property *damage feasant* existed at common law.[3] In several of the States the proceeding, which is purely remedial, is regulated by statute. In New York, the party distraining is authorized to detain the property in pledge for the payment of his damages. By seizing it at the time, and on the premises where the injury

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owing to a defect in Fellows' fence caused by them. If the horse was there by the wrongful act of the defendants, without any fault of others, it would seem to be immaterial what that wrongful act was. If the defendants had led or driven the horse into Osgood's close, it would not be for them to say that he was wrongfully there; at least not until the plaintiff or Fellows had notice, and an opportunity to take him away. Causing a defect in Fellows' fence was a wrongful act of the defendants. The jury have found that the horse was in Osgood's close by reason of that act, and the defendants are as responsible for his being there as if they had driven him there. To allow them to say that he was wrongfully there would be to permit them to take advantage of their own wrong."

[1] Story v. Robinson, 32 Cal. 205.

[2] 9 Vin. Abr. 121, Distress, A, Pl. 4; Gilbert on Distress, 4th ed. p. 21; Field v. Adams, 12 Ad. & E. 649.

[3] Bac. Abr. Tit. Distress, F; 3 Bl. Com. 6.

was committed, he is enabled to secure redress for an actual wrong against an unknown or irresponsible owner. If the animal escape from his premises, though he be in fresh pursuit, his right of distress is gone. The party making the seizure is required to have the damages properly appraised by the fence viewers, upon a view of the premises and the examination of competent witnesses. They are bound to certify the amount of damages to which he is entitled; and he is required, within twenty-four hours thereafter, to put the animal in the nearest pound, where the owner can find and replevy it, or reclaim it, on payment of the damages and the fees of the fence viewers and pound master. The party distraining is bound to give notice to the owner, if known, to enable him to replevy or redeem the property before the sale. The remedy by distress is cumulative, and satisfaction obtained in this mode is a bar to an action for damages.[1]*

§ 892. At common law, cattle distrained *damage feasant*

[1] N. Y. Rev. Sts. 5th ed. v. 3, p. 841; Rockwell v. Nearing, 35 N. Y. 302.

* Hale v. Clark, 19 Wend. 498, was an action for taking six swine belonging to the plaintiff. It appeared that the swine were in the defendant's barn eating up his grain, and he had a right, under the statute, to take and detain them until the damages were paid. It was the duty of the defendant to cause the damages to be appraised by the fence viewers of the town within twenty-four hours after making the distress. By neglecting to do so, he forfeited his right to detain the swine for the damages, and the plaintiff might have retaken his property; or, if the defendant refused to deliver it on demand, he might have had an action of trover or replevin. But the plaintiff declared for the taking of the swine; and this presented the question whether the neglect of the defendant to have the damages appraised within the time prescribed by the statute made him a trespasser *ab initio*. The court said: "If the defendant had put the swine in the public pound before having the damages appraised, or had killed the distress, or done any other unlawful act in relation to it, this would have been such an abuse of an authority given to him by the law as would have made him a trespasser from the beginning. But here there was no wrongful act. The neglect to have the damages appraised was a mere *nonfeasance* which could not make the original taking tortious." In Allaback v. Utt, 51 N. Y. 651, the defendant's cattle having strayed upon the plaintiff's premises, the latter distrained them. Afterward, during the same day, the defendant, against the plaintiff's protest, threw down the fence of the latter and drove the cattle away. It was held that as the law authorized the detention of the cattle twenty-four hours, the plaintiff was entitled to exemplary damages, although the injury done by the cattle was only nominal.

In Mississippi, it has been held that if a person find cattle trespassing upon his land, he may hold them until paid for the damage; but if he seize them when not entitled to damages, the owner of the cattle may maintain an action for such seizure (Dickson v. Parker, 3 How. Miss. R. 219).

cannot be impounded until the damages have been assessed;* and if they are, the trespass is carried back by relation to the original taking, so as to render a party a trespasser *ab in-*

* The same is required by the statute of New York. In Sackrider v. M'Donald, 10 Johns. 253, Chief Justice Kent, in the course of his opinion, remarked that the impounding of cattle in a public pound "before the damages were appraised, was not a mere *nonfeasance*, but a positive act unauthorized by the statute, and for which the action of trespass was well brought." In the same case, Spencer, J., said: "It appears to me that the sense of the legislature is clearly expressed, that the damages must be ascertained before the beasts are put into a public pound. When they are thus impounded, they are in the custody of the law; they are, in fact, in execution by summary process afforded by the law for injuries done on a man's land; and when impounded in a public pound, the party has no mode of regaining possession but by paying the damages and the fees to the pound keeper, or by replevying them. To maintain that beasts may be impounded before the damages are assessed, deprives the owner of a security afforded by the section of the act under consideration; for if any dispute arises upon the sufficiency of the fence, the fence viewers who appraise the damages are to determine thereon, and their decision is to be conclusive. A case may happen, in which, though damage has been done, it may arise from the defect of fences of the party distraining, in which case no damages would be appraised. Again, it was proper to fix a time before the distress was impounded in a public pound, for they were liable to rescue in case the distress was taken without cause or contrary to law; but after they are put in the public pound, they cannot be rescued" (s. p. Pratt v. Petrie, 2 Johns. 191).

The statute of New York (Rev. Sts. 5th ed. vol. 3, pp. 841, 842), on this subject, is as follows: "When any distress shall be made of any beasts doing damage, the person distraining shall keep such beasts in some secure place other than the public pound until his damages shall be appraised; and within twenty-four hours after such distress, unless the same was made on a Saturday, in which case, before the Tuesday morning thereafter, he shall apply to two fence viewers of the town to appraise the damage. Such fence viewers shall thereupon immediately repair to the place, and view the damage done; and they may take the evidence of any competent witnesses of the facts and circumstances necessary to enable them to ascertain the extent of such damage, for which purpose either of them is hereby authorized to administer an oath to every such witness. The said fence viewers shall ascertain and certify under their hands the amount of such damage, with their fees for their services; and if any dispute shall arise touching the sufficiency of any fence around the premises where such damage was done, the said fence viewers may examine witnesses in relation thereto, and for that purpose may administer oaths to such witnesses; and they shall determine such dispute; which decision shall be conclusive. Within twenty-four hours after the said damages shall be so appraised, unless the amount so ascertained and the fees of the fence viewers shall have been paid, the person making such distress shall cause the beasts distrained to be put in the nearest pound in the same county, if there be one, there to remain until the same be sold, as hereinafter directed, or until replevied according to law, or until the damages so certified and the fees of the fence viewers and pound master be paid; and he shall deliver the certificate of the fence viewers to the keeper of such pound."

Merritt v. O'Neil, 13 Johns. 477, was an action for trespass in taking *damage feasant* a hog of the plaintiff, and impounding it before having the damages ascertained. Plaintiff's counsel insisted that as the damages were not assessed, according to law, before the hog was impounded, the defendant was a trespasser *ab initio*, and that the fact that the plaintiff was himself the pound master made no difference. Held, that the defendant could not claim any benefit from this distinction, he having put the hog into the pound, notwithstanding the plaintiff was the keeper, and it having been received and treated as a beast impounded.

*itio.** The owner of the cattle may prevent their being distrained by tendering sufficient amends; and if they be detained after the tender and before they are impounded, he may maintain an action for the detainer.[1] But he must make a sufficient tender; and the fact that the party suffering from the trespass demands an exorbitant sum, will not relieve the

[1] Singleton v. Williamson, 31 L. J. Exch. 287; Thomas v. Harries, 1 M. & Gr. 695; 1 Sc. N. R. 524.

* But a person who lawfully impounds beasts running at large is not liable as a trespasser *ab initio*, although he fails either to restore or sell them according to law, through the default of the pound keeper or other person, or from the insufficiency of the pound. In Coffin v. Vincent, 12 Cush. 98, which was an action of trespass against field drivers for impounding sheep, the plaintiff endeavored to controvert the foregoing proposition. The court remarked that it was, no doubt, true that any failure on the part of the defendants to "act in entire conformity to the provisons of the statute, and to do all that it required, would have been an abuse of the authority conferred on them by the law, and would have made them liable as trespassers *ab initio*. But if all which they did was allowed and authorized by the statute, and if they omitted nothing which they could possibly have done, there could have been no failure on their part, and of course no abuse of official authority. And such appear very clearly to have been the facts. The sheep were legally taken up and regularly dealt with, until they were delivered into the town pound. As soon as that was done, the custody of them passed to the pound keeper, and from thence, until the arrival of the day fixed by precise and positive provisions of law, when a further official duty was to be performed by the defendants, they had no care of, and could exercise no control over, the animals, and would not have been responsible for them if they had all perished in the pound for want of necessary care, or of adequate supplies of food. During this intermediate period, while the defendants were neither charged with their control or superintendence, nor had any right to interfere in the management of the place where they were confined, and were guilty of no default or neglect respecting them, the sheep were rescued or escaped from the custody of the pound keeper; so that when the day arrived on which the defendants might otherwise have legally proceeded to cause their sale, they were not to be found, and all further action in relation to them had become impossible. Mere inaction under such circumstances was no failure of duty, and of course no abuse of authority" (see Smith v. Gates, 21 Pick. 55; Pickard v. Howe, 12 Metc. 198; Rev. Sts. of Mass. ch. 113, § 1). In the same case, it was objected that at the trial in the Court of Common Pleas, the jury should have been instructed that the burden of proof was on the defendants, to show that the notice posted up by them contained a statement of some particular specified cause, known to the law, for which each animal impounded was taken up. But as the jury were directed that before they could find a verdict for the defendants, they must be satisfied that the notice of the impounding was posted up within twenty-four hours after the animals were put into the pound, and that it contained a statement of the time, place and cause thereof, it was held that the objection was groundless. Merrick, J.: "Such direction necessarily implied that these facts essential to their defense, and asserted by them, were to be proved by the defendants, and was not less intelligible, and scarcely less direct, than if it had been said in express terms that the law imposed on them the burden of proof. Besides, if the plaintiff supposed that any peculiarity in the trial, or in any of its circumstances, made it expedient or desirable that a more precise or exact statement of the obligation resting on the defendants in this particular should have been given to the jury, the suggestion ought to have been made to the court at the time."

owner of the cattle from estimating and tendering the proper amount.[1]* So likewise, where cattle are impounded, the owner, after demanding them, must tender the legal charges and expenses of impounding and keeping them.[2]

§ 893. Where cattle are wrongfully impounded, the payment by the owner of the cattle, to the pound keeper, of his fees, being the only mode by which the cattle can be regained without a resort to legal process, it cannot be regarded as a waiver of the right to damages. The wrong-doer has no reason to complain that the owner of the cattle has taken back his property, and seeks only to recover for the injury he has sustained by the wrongful taking and impounding of the cattle, instead of leaving them in the pound to be sold, and claiming their full value.[3]

§ 894. When cattle taken *damage feasant*, and placed by the owner of the premises in a public pound, receive injury from other cattle confined therein, the person putting them there is not liable therefor, such consequences occurring without his agency or knowledge.[4] But it is otherwise if he incurs an obligation which he fails to perform.† Accord-

[1] Gulliver v. Cosens, 1 C. B. 795.
[2] Keith v. Bradford, 39 Vt. 34.
[3] Coffin v. Field, 7 Cush. 355.
[4] Brightman v. Grinnell, 9 Pick. 14.

* In Indiana, where cattle which have strayed on to another's land are distrained by him, the owner of the cattle may recover possession of them without payment of the damage done, if the land upon which they entered was not inclosed by a lawful fence (Blizzard v. Walker, 32 Ind. 437).

† In Goodsell v. Dunning, 34 Conn. 251, which was an action for taking the plaintiff's horse in the highway in front of the defendant's premises, it was argued that the defendant's treatment of the horse, while in his custody, was such as to render him a trespasser *ab initio*, notwithstanding the first taking might have been lawful. It was claimed that, after the horse had been kept in the defendant's yard for a day or more, he changed his mind in respect to the law under which he would act, and attempted to turn the transaction into an ordinary impounding under the former statute, and for that purpose, placed the horse in the town pound, which he could not lawfully do. The defendant, however, averred that the horse was placed in the pound by him merely for safe keeping, and that he did not intend thereby to part with the possession, but to retain it pursuant to the statute of 1863. The horse was taken up on the 20th of May; and after the twenty-four hours within which the plaintiff might have regained possession of it had elapsed, the defendant gave the requisite notice to the town clerk who took the proper steps to dispose of the animal according to law, and he accordingly advertised that it would be sold on the 4th of June then next. In the mean time, as it was necessary that it should be properly kept and cared for, and as the defendant did not have conveniences for

ingly, where, under a statute making it the duty of a party impounding cattle, to see that they had suitable food, and as nearly as could be reasonably done, to feed and give them water as often as was required by the usage of the country and good husbandry, a person took up milch cows, going at large on the highway, in hot weather, and drove them three miles to a public pound where they were detained from seven in the morning until five in the afternoon, without food or water, it was held that he was a trespasser *ab initio*.[1] *

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keeping it, he, with the advice of the town clerk, put the horse in the town pound for safe keeping. It was held that although this was not the use for which pounds were built, yet that the plaintiff had no reason to complain of it so long as his horse was kept with ordinary care and prudence; that the fact that the pound to which the horse was taken was some four or five miles from the residence of the defendant, and that the road by which he took it there, was a few rods longer than another road which he might have taken, were matters of no importance except as evidence tending to show that proper care was not taken of the animal; and that, as it had been found that proper care was taken in the custody and general treatment of the animal, it could not be determined as a matter of law, that the authority given by the statute had been abused by the defendant.

[1] Adams v. Adams, 18 Pick. 384.

* If the pound keeper unlawfully remove from the pound, animals intrusted to his care, any subsequent proceedings in relation to them, by the party impounding them, will make him a joint trespasser with the pound keeper. Cate v. Cate, 44 N. Hamp. 211, was an action of trespass for taking two oxen belonging to the plaintiff. The defendant pleaded the general issue, with a brief statement under which he justified, alleging, among other things, that he found the oxen in his inclosure *damage feasant;* that he drove them to the common pound, and placed them in the custody of the pound keeper, and that he then gave due notice of his proceedings, as well to the pound keeper as to the owner of the oxen; that the plaintiff neglecting to pay the damages and costs, the oxen still remaining in the pound, the defendant applied to a justice of the peace of the county, for the appointment of appraisers to assess the damage done by the oxen, and for an examination and sale of said oxen, pursuant to the statute, which was accordingly done. But it appeared that after the pound keeper had received the oxen into the pound, he took them therefrom, and drove them to his own barn, and then to a distant pasture in the neighboring town, where they were kept ten days. A verdict having been found for the plaintiff, the Supreme Court, in directing judgment to be entered on it, said: "The law presumes the pound keeper to keep and feed the animals intrusted to him at the pound, and not elsewhere, and allows him a reward for such service. The misconduct of the pound keeper has legally placed the oxen in the hands of the plaintiff, and all the proceedings of the defendant, subsequent to the illegal acts of the pound keeper, confer no jurisdiction over the animals, and they all fall to the ground as void, and make him a joint participator in such wrongful acts of the pound keeper. In law, the defendant may be considered as having in this instance aided and abetted in the commission of the wrong inflicted upon the plaintiff, as being accessory thereto, as having wrongfully intermeddled with the plaintiff's property, and to be held personally responsible for the injury. Manifestly, after the wrong done by the pound keeper here, the defendant could neither apply for, or the justice of the peace grant a legal warrant for the defendant, so as to clothe him with the power of selling or disposing of the oxen of the plaintiff. Nor does the liability of

§ 895. The owner of the land may, if he please, relinquish the proceedings by distress before satisfaction for the damage, and bring an action of trespass.* Colden v. Eldred[1] was an action of trespass brought by Eldred against Colden, in a justice's court, for damage done to his grain by the defendant's sheep. The only question before the Supreme Court, was whether the defendant ought not to have been permitted to prove that the sheep had been distrained and impounded for the same trespass; and it was held that, as the mere distress, or even impounding, if relinquished, would be no satisfaction for the injury, this part of the defense was properly excluded by the court below.

§ 896. The legislature transcends the limit of its authority when it enacts that one citizen may take, hold, and sell the property of another without judicial process, and without notice to the owner, as a mere penalty for a supposed private injury. Such an enactment is within the terms and intent of the provision in the bill of rights that no person shall be deprived of life, liberty, or property without due

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the defendant here depend upon the knowledge he may have had of the misconduct and the laches of which the pound keeper had been previously guilty. The law inquires merely whether the act done and complained of be injurious to another. It is difficult to comprehend how the defendant, subjected as he was to the necessity of having frequent intercourse with the pound keeper, for the purpose of obtaining accurate knowledge of the proceedings with him from time to time, could have been ignorant of the conduct of the pound keeper. But allowing that the defendant was in fact ignorant of what the pound keeper had wrongfully done, he still must be held as having sold the oxen by mistake, and is therefore chargeable for the act done. There was also extraordinary delay here, more than twenty days having elapsed from the first taking of the oxen prior to the day of sale, and unreasonable expense was thus created in keeping the oxen. Proceedings of inferior courts may be treated as invalid by those who have cause to complain of them. Here the chain was broken by the misconduct of the pound keeper. The proceedings of the magistrate were simply void, and the defendant became a trespasser for selling the cattle under his pretended authority or warrant of sale."

[1] 15 Johns. 220.

* The statute of Massachusetts, of 1788, ch. 65, § 3, provides that any person injured in his tillage, &c., may have trespass *quare clausum fregit*, or may impound the creatures doing the damage, or some of them, at his election, with or without the aid of a field driver, and in case he impound the creatures "he may restrain them in one of the town pounds, or in some other place under his immediate care and inspection, as may be most convenient for relieving them with suitable meat and water, which relief it shall be the duty of the person impounding to furnish, or cause to be sufficiently furnished, during their confinement."

process of law.[1] In North Carolina, an ordinance passed by the commissioners of the town of Fayellville, directing the constable to take up and sell all hogs found running at large in the streets, was held void, because it condemned the property without allowing the owner to be heard.[2] And in New York it was held, on similar grounds, that if cattle pasturing in the field of their owner escaped to the land of another, and were there seized by the latter and detained by him, the seizure was not justified by the statute;[3]* but that the remedy was either by an action of trespass or by distress *damage feasant*.[4] Rockwell v. Nearing[5] was an action for the wrongful taking by the defendant of a cow belonging to the plaintiff. The defendant attempted to justify the taking under the provisions of the foregoing act. His answer stated in substance that the defendant took a cow which was then running at large in the public highway opposite to land owned and occupied by him, contrary to the provisions of the said act; and that before the time advertised by the

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[1] Const. of N. Y. Art. 1, § 6; Leavitt v. Thompson, 56 Barb. 542.

[2] Shaw v. Kennedy, 2 Tayl. 158.

[3] Laws of N. Y. of 1862, ch. 459, p. 844; Ib. of 1867, ch. 814.

[4] Cowles v. Balzer, 47 Barb. 562. [5] 35 N. Y. 302.

* The object of the statute of New York of 1862 (amended by act of 1867), referred to in the text, as declared by its title, is to prevent animals from running at large in public highways. It takes away the power of town meetings to make rules and regulations for determining the times and manner in which cattle, horses, and sheep should be permitted to go at large on highways, which power the towns of New York had possessed for a great many years, and in numerous instances had exercised. The first section of the statute declares that it shall not be lawful for any cattle, horses, sheep, and swine to run at large in any public highway in the State. The second section authorizes any person to take into his custody—1. Any animal which may be in any public highway opposite to his land, against the provisions of the first section; 2. Any animal which may be *trespassing upon his lands*. The third section requires that immediate notice of the seizure be given to some justice or commissioner of high ways of the town, who shall post notices that the animal will be sold at a time and place to be specified, and who shall make such sale for cash. The fourth section authorizes the owner to reclaim possession of his property before sale on making proof of title. The fifth section relieves him from the payment of any costs, and entitles him to restitution on payment of compensation for keeping the animal, if the running at large or trespassing was caused by the wilful act of a person other than the owner in order to effect the seizure.

In Wisconsin, the word "stray," or "estray," in the statute (Rev. Sts. ch. 43, and Laws of 1869, ch. 54), signifies a strolling beast, the owner of which is not known to the person taking it into his possession (Roberts v. Barnes, 27 Wis. 422).

commissioner of highways for the sale, the cow was taken from his possession, without his knowledge, in the night, by some person unknown to him, and without his assent or connivance, and that after diligent search he was unable to find her or to ascertain who took her away. It was proved that the cow was in the defendant's yard when he took her up; that she had been running in the defendant's door-yard; that she had been in the highway opposite his land twice that day; that he drove her first into the highway, and then into his barn yard; that she was kept in his stable until taken away; that she was advertised to be sold on the defendant's premises, and was sold to him by the commissioner at public auction for one dollar and eighty-eight cents, against the protest of the plaintiff, when the animal was not present, and without any description of the cow being given to the bidders. At the trial, before a justice of the peace, the plaintiff recovered the value of the cow. Upon appeal, the judgment was reversed, upon the ground that the proof was satisfactory to show a justification for the taking, and that the cow, while lawfully in the defendant's possession, was stolen. The Court of Appeals, however, reversed the judgment of the court below, and affirmed that of the justice,* holding that the statute was unconstitutional, and

* In Rockwell v. Nearing, *supra*, Porter, J., in delivering the opinion of the New York Court of Appeals, said: "So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to the owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for retaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution. * * * It follows from these views that the seizure and sale of the defendant's property was unlawful, and that the judgment of the court below should be reversed. We should have no difficulty in arriving at the same result if we were at liberty to assume the validity of the act of 1862 in respect to private trespassers. The party who resorts to a severe and summary remedy unknown to the common law, is held to the duty of strict compliance within the statute. Even in the case of a distress authorized by the common law, any subsequent abuse of the power conferred renders the party liable as a

that even if the law had been valid there was such an abuse of authority on the part of the defendant as operated by relation to render the original seizure unlawful.*

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trespasser *ab initio*. The defendant knew that the property he seized belonged to the plaintiff, who resided within a mile of him in the same town. Ordinary good faith required him to notify the owner that the lost cow was in his stable; and, though the act of 1862 is silent in respect to such notice, it may well be questioned, under the authorities, whether the obligation to give it is not implied in a case where the owner is known. But the defendant, by his subsequent acts, rendered himself clearly liable as a trespasser from the beginning" (referring to The Six Carpenters' Case, 8 Coke, 146; Sackrider v. McDonald, 10 Johns. 253; Dumont v. Smith, 4 Denio, 319; Comm'rs of Highways of Kinderhook v. Claw, 15 Johns. 537; Peters v. Newkirk, 6 Cow. 103; Elmendorf v. Harris, 23 Wend. 628; Doubleday v. Newton, 9 Howard, 71; Cresson v. Stout, 17 Johns. 116; Hopkins v. Hopkins, 10 Ib. 369; Connah v. Hale, 23 Wend. 462).

In the matter of the Empire City Bank, 18 N. Y. R. 200, Denio, J., observes in relation to the provisions of the statute of New York authorizing notice by advertisement to stockholders: "It may be admitted that a statute which authorized any debt or damages to be adjudged against a person upon purely an *ex parte* proceeding, without pretense of notice, or any provision for defending, would be a violation of the constitution, and void. But when the legislature has provided a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion the courts have not the power to pronounce the proceedings illegal."

In California, it is lawful for sheep to range at large over uninclosed land (Logan v. Gedney, 38 Cal. 579).

In Kentucky, where no demand is made by the owner of an estray within two years, it becomes the property of the finder (Hudson v. Agee, 6 Bush, 366).

Where cattle, which are running at large on a highway, join a herd which are being driven to market, the drover is liable as a trespasser if he knows the cattle do not belong to him, or if, after being notified that strange cattle are in the herd, he does not use proper diligence to ascertain the fact (Young v. Vaughan, 1 Houston, Del. 331).

A person who has the custody of an estray may maintain an action against a stranger for injury thereto, although the party in possession has not given the notice required by law in the case of estrays (Chicago, &c. R. R. Co. v. Schultz, 55 Ill. 421).

* Where a statute authorizes the owner of cattle seized for unlawfully running at large upon the public highway, to bring an action of replevin, as in the case of an illegal distress, by which the right of seizure may be tried according to the forms of law, and the notice provided by the act is reasonably certain to give the owner of the cattle knowledge of the seizure, such statute is not unconstitutional (Rockwell v. Nearing, 35 N. Y. R. 302, per Morgan, J.)

Goodsell v. Dunning, 34 Conn. 251, was an action of trespass for taking the plaintiff's horse in the highway in front of the defendant's premises, under the act or Connecticut of 1863; and the question in the case was whether the defendant proceeded legally after having first taken the animal into his custody. The statute in question provides that when an animal is taken up under the act, the person so taking it up shall give immediate notice to the owner if known. In this case the owner was known, and it was claimed that the notice which the statute required was not given. The parties resided within forty rods of each other, and the plaintiff saw the defendant take the horse into his custody. The defendant went with a written notice to the plaintiff's house; but as the door was closed upon him, and he could not gain admittance in order to deliver it, he placed the notice in the handle of the door, where the plaintiff got it in the forenoon of that day. It was held that the "immediate notice," required by

§ 897. The seizure of cattle for unlawfully running at large on the public highway, may properly be called the police power of the legislature, which it is authorized to exercise for the public benefit. This power, as was remarked by Shaw, C. J., in Com. v. Alger,[1] "is vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth."[2] In New York, the constitutionality of the act of 1867, which amends the act of 1862, "to prevent animals from running at large in public highways," has been affirmed by recent decisions of the Court of Appeals; and it has been held to authorize the seizure of cattle trespassing upon private inclosures when they entered from the highway, as well as when found running at large therein. The party seizing the cattle does not hold them under the process issued by the magistrate, but by virtue of the original seizure authorized by the statute. He is not responsible for irregularity

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the statute, meant reasonable notice, and that the notice given by the defendant was sufficient. It was claimed by the plaintiff, that the writing was not a sufficient notice in point of form, because it did not state that the defendant had taken the horse under the 193 section of the act. "The plaintiff," said the court, "must be presumed to have known the law in regard to taking up animals in the highway against another's land; and with this knowledge he is informed that his horse has been taken and impounded in the defendant's yard according to the laws of the State. But this could be lawfully done, only by virtue of this section of the act. We think therefore, that this was in substance informing him that the animal had been taken up under this section."

In the same case it was urged that the word "impounded," in the notice, had a technical meaning which excluded the idea that the horse was taken under the act of 1863, and implied rather that it was taken under the old statute in relation to pounds. It was held that this might have been so, if the words "in my yard," had not been used in connection with the word "impounded," showing that it was a different impounding from that intended by the old statute; there being no other lawful mode of impounding except under the act of 1863.

Declaration for seizing pigs. Plea that the defendant was possessed of a close named H., in which the pigs were eating, and were taken damage feasant. Replication, that the defendant was not possessed of the said close in the said plea mentioned, in which the pigs were alleged to be eating, and issue thereon. There were several adjacent closes called H. It was held that the defendant was bound to show that he was possessed of a close in which the pigs were eating, it not being enough for him to show his possession of a close named H. (Bond v. Downton, 2 Ad. & E. 26).

[1] 7 Cush. 53.

[2] See Sedgw. on Stat. & Const. Law, 505.

in the summons, and his right to hold the cattle pending the proceedings before the justice is not affected thereby.[1] The above mentioned statute has no application to trespasses through division fences between neighbors, but only to those committed from the highway.[2] *

[1] Campbell v. Evans, 45 N. Y. 356; Cook v. Gregg, 46 Ib. 439; Leavitt v. Thompson, 52 Ib. 62.

[2] Jones v. Sheldon, 50 N. Y. 477.

* The New York courts have differed in opinion as to the constitutionality of a law permitting cattle to run at large upon the highway. The determining of the times and manner in which horses, cattle and sheep should be allowed to roam on highways, had been exercised in that State, without being questioned, until Judge Cowen, in his note to the case of Bush v. Brainard, 1 Cow. 78, suggested a doubt as to the right of the legislature to confer such an authority upon the electors of towns. The same doubt was expressed by Savage, Ch. J. in Holladay v. Marsh, 3 Wend. 142. Yet substantially the same provision was adopted by the legislature in the revision of the statutes of 1830. In The Tonawanda R. R. Co. v. Munger, 5 Denio, 255, although the question was not involved in the case, Beardsley, C. J. expressed the opinion that a town regulation authorizing cattle to run at large on highways was void. He said: "The interest of the public in a highway confers no right to use it as a sheep-walk, or pasture ground for cattle. Subject to the right of passage, and the right to make repairs and the like, the soil of a highway, and the grass and herbage growing thereon, are still in the strictest sense private property. Cattle at large in the highway, will not only trample down, but also crop and eat the grass and herbage there growing; and if the legislature have power to authorize their running at large, the grazing cannot be wrongful. What would this be, but the taking the private property of the owner of the land used as a highway, and transferring it to the owner of the cattle? In my judgment, the legislature have no such power, whether compensation be made or not, but certainly in no case, unless compensation is made."

In White v. Scott, 4 Barb. 56, the question arose as to the meaning and extent of the statute of New York conferring upon town meetings throughout the State, power to make rules and regulations, "for determining the times and manner in which cattle, horses, or sheep shall be permitted to go at large on the highways." The court heard the arguments of counsel upon the point; but on looking into the record, found that there was not a sufficient foundation laid for the question. The constitutionality of the act was however considered and discussed by McCoun, P. J., who delivered the opinion of the court. In the course of his remarks, he said: "Opinions upon points not necessary to be decided in order to dispose of the case in hand have not the force and effect of binding authority for other cases. We cannot therefore undertake to decide the question at present, though we think there can be very little doubt of the constitutionality of the power as conferred by, and expressed in the statute, but that the power is not to be understood as authorizing the making of a town law, by which horses, cattle and sheep shall be permitted promiscuously to run at large and depasture the highways of the town. On the contrary, the going at large, as authorized by the statute, must be under rules and regulations as to time and manner; and we think that these words in the statute are restrictive, and are to be construed with a due regard to the rights of property, and individual ownership of the soil of highways. That the power of a town meeting cannot lawfully be exercised beyond allowing the owners of the soil to turn their own animals out to feed on such parts of the highway as they respectively own, under such safeguards as shall prevent any obstruction of public use or travel, and as shall at the same time avoid collisions and trespasses by the beasts of one owner upon the property of another." On the other hand, in Griffin v. Martin, 7 Barb.

5. *Pursuing domestic animals with dogs.*

§ 898. At common law, a person may lawfully employ a dog to drive from his own grounds the cattle of another which are wrongfully thereon, doing damage. Baron Comyn[1] says: "If a master set on his dog to chase sheep out of his land, and the dog pursue them into another's land, and the master recall his dog *quam cito vidisset*, an action does not lie." In the case to which Comyn refers,[2] it appeared that the defendant with a small dog drove the plaintiff's sheep from his land, where they were trespassing, and the sheep entered another man's premises next adjoining, where the dog followed them, and the defendant tried ineffectually to recall his dog. It was held that the action could not be maintained, as the defendant had not incited the dog to pursue the sheep after they had left his premises, but had done all in his power to call the dog back. It is true that the action was there brought by the owner of the land into which the sheep were driven. But the decision must have proceeded on the ground that the driving from the party's own land was lawful. Otherwise, the trespass complained of could not have been excused as having been unavoidable or involuntary. For one trespass can never be justified or excused by another. The law of these cases was adopted and sanctioned by Judge Swift in his Digest.[3] In Michigan, where a cow wrongfully strayed upon another's land, through a breach in the fence, it was held that she might be driven off by setting a dog upon her, unless it appeared that owing

297, a majority of the court, Hand, J., dissenting, held that the statute was not in conflict with the constitution. And in Hardenburgh v. Lockwood, 25 Barb. 9, Harris, J., in delivering the opinion of the court said: "I regard the right to allow cattle, horses or sheep to go at large on highways, as one of the easements or servitudes pertaining to the land occupied as a highway. The right is supported by usage as old as the history of our country. The land is to be presumed to have been taken with reference to this usage, and the exercise of this right by the proper authorities. The owner may well be presumed to have been compensated for this, as well as every other easement or servitude to which the land as a highway may be subjected."

[1] 1 Comyn's Dig. 419.

[2] Mitten v. Faudrye, Popham, 161, cited 4 Burr. 2094.

[3] Swift's Dig. p. 527.

to the size, character, or habits of the dog, or in the mode of setting him on, the owner of the land acted without ordinary care or prudence.[1] The same was held in Vermont in relation to land which was improved, but not inclosed.[2]* But if a person worries cattle trespassing on land to which he has no title or right of possession, he will be liable to the owner of the cattle therefor.[3] So likewise, the pursuing of cattle with a ferocious dog is unlawful, and will subject the offender to the payment of damages for any injury resulting therefrom.[4]†

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[1] Wood v. La Rue, 9 Mich. 158.

[2] Clark v. Adams, 18 Vt. 425.

[3] McCoy v. Phillips, 4 Rich. 468.

[4] King v. Rose, 1 Freeman, 347; Amick v. O'Hara, 6 Blackf. 258.

* Clark v. Adams, *supra*, was an action of trespass for setting a dog upon the plaintiff's cattle, and thereby causing the death of a heifer. The following instructions of the county judge were held correct: That "if the jury should find that the plaintiff's cattle were upon the defendants' land, doing damage, they had a right to drive them off; and that if they employed their dog for that purpose by setting him on the cattle, and were not in any way wanting in ordinary care and prudence arising from the size and character of the dog, or in the manner of setting him upon the cattle, and afterward pursuing them, they must find for the defendants, notwithstanding they should find that the heifer in question was injured in consequence of the dog having been set upon the cattle." A verdict having been found for the defendants, the Supreme Court, in refusing to disturb it, said: "It is claimed that the act of the defendants was unlawful, because the land from which the cattle were driven was not inclosed by a legal fence. But this objection can avail nothing for the present purpose. It was not a highway, nor a common, but cleared and improved ground which the defendants owned and occupied exclusively. At common law, they might have distrained the cattle, or supported an action of trespass against the plaintiff. And although by our statutory regulations in regard to fences, they may have been deprived of those remedies, yet their right to exclusive possession and enjoyment was not thereby lost. They were consequently entitled to enforce that right by all other lawful means within their power. Of course then they might drive the cattle from the land; and we have only to inquire whether they were authorized to do this by means of their dog in the manner they did. We do not consider ourselves at liberty to deny the present existence of such a right. Nor do we think that after the finding of the jury in favor of the defendants, it can be justly held that the right was improperly exercised in this instance. The question in such a case should always be whether the party acted with a due regard to the preservation of his neighbor's property from injury, merely intending a prudent and safe exercise of his own right."

† In an action against the owner of a dog for injuries to cattle belonging to the plaintiff, it appeared that the servant of the defendant set on the defendant's dog, by which the plaintiff's cattle were bitten; that the defendant was in no wise implicated, unless by the circumstance that at the time of the occurrence he stood near; and that as soon as he saw what his servant was doing, he ordered him to take the dog off. It was held that the defendant was not liable (Steele v. Smith, 3 E. D. Smith, 321).

6. *Willful killing of domestic animals.*

§ 899. Trespass is the proper remedy for shooting another's cattle, or for pursuing and killing them with dogs;[1] and it will be no defense in such case that the cattle had broken into the plaintiff's field and were injuring his crops.[2]* Where B. was about to shoot or kill the hogs of C., which were in B.'s field, and A. allowed his servant to go with B. in pursuit of the hogs, which were killed by them, it was held that A. was liable therefor in an action of trespass.[3] It is unlawful to kill fowls which are trespassing.[4] Where in an action of trespass for destroying the plaintiff's fowls, it was proved that the defendant scattered poisoned Indian meal upon his (the defendant's) land, having first notified the plaintiff that he intended to do so, and that the fowls going afterward upon the defendant's land, ate the meal, in consequence of which some of them died, it was held that the plaintiff was entitled to recover.[5]† And in a recent case

[1] McCoy v. Phillips, 4 Rich. 463; James v. Caldwell, 7 Yerg. 38; Painter v. Baker, 16 Ill. 103.

[2] Ford v. Taggart, 4 Texas, 492; Cannon v. Horsey, 1 Houston, Del. 440; Bost v. Mingues, 64 N. C. 44.

[3] Mardree v. Sutton, 2 Jones L. N. C. 146.

[4] Mathews v. Fiestel, 2 E. D. Smith, 90.

[5] Johnson v. Patterson, 14 Conn. 1.

* A dog which is playing with his master's son on his master's premises, is not "at large" within the statute (Genl. Sts. of Mass. ch. 88, § 58), permitting the killing of such dogs, if not licensed, &c.; and an officer who calls him away and shoots him on the owner's land, and then enters the same and attempts to shoot him a second time, is responsible in damages (McAneany v. Jewett, 10 Allen, 151.)

† In Johnson v. Patterson, *supra*, the court, in the course of an elaborate opinion, said: "Upon the principles adopted in England, no distinction is made between the various kinds of property which a party may injure or destroy by spring guns or other similar devices. If the fowls in question may be shot or poisoned, so may horses, oxen and other valuable animals which will sometimes stray into a neighbor's field, notwithstanding the prudent vigilance of their owner. Indeed the rule expressly authorizes not only the destruction of all kinds of animals, but of human life. Our people hitherto have never by their usages acknowledged this to be the common law of the State; and its adoption in its full extent would tend to impair the moral sense, and that tender regard for the lives and property of others for which they are distinguished, and which ought to be cherished as essential to the virtue and harmony of society. * * * In order to vindicate the means long used by land holders for the protection of game, and show their consistency with legal principles, the English judges have adopted theories which are exceedingly refined. If A. stands by while the trespasser treads on the wire, although he does nothing, he will be

in Massachusetts, it was held that the rule that a land owner has no right to kill his neighbor's cattle when found trespassing, applies to domestic fowls; and that as notice given of his intention to kill them would be a mere threat to do an illegal act, it would not vary the liability.[1]

§ 900. Although cattle killed by cars, were at the time trespassing on the railroad, yet the company is liable if the killing was willful; as by not stopping the train or blowing the whistle, where there was time to do both. We have seen,[2] that even in driving off animals trespassing on land, reasonable care must be used. If they get upon a railroad track where they may expose passing trains to great danger, the managers of the train are still bound to use reasonable care to avoid injuring the animals, and may not carelessly run upon them.[3] *

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liable for the damage, because the act is his own. But if he leaves the place after having arranged the machinery, fully intending to effect the same injury, and the trespasser is shot, in the same way, they say it is not the act of A., but that of the trespasser, and A. is innocent. In this case if the defendant, after scattering the poisoned meal, had returned to his garden, and seen the fowls devouring it, the act, as is admitted, would be his own, and he would be subjected in this suit, unless he did all in his power to prevent the injury; and the only ground on which his justification can be placed is, that he left the meal and it was eaten in his absence. Had he been present, *he* would have poisoned the fowls; but as he was not present, it was the act of the plaintiff. * * * We cannot justify the defendant in committing the comparatively small trespass for which the plaintiff complains, upon any principles which have been admitted in this State, or which we can reconcile with those just provisions of the English common law which we have already incorporated into our own in regard to the means which may be used to prevent a simple trespass."

Where damages are sustained by the plaintiff in consequence of the use which the defendant makes of his own property, it is necessary to inquire not only whether the defendant has been guilty of culpable negligence on his part, but whether the plaintiff is free from a similar charge (Bush v. Brainard, 1 Cowen, 78). Where therefore a person left maple syrup in an open wood belonging to him, and a cow being suffered to run at large strayed there, drank the syrup, and was killed, it was held in an action by the owner of the cow therefor, that although the defendant was guilty of gross negligence in leaving his syrup where cattle running at large in the woods might have access to it, yet that as the plaintiff had no right to permit his cattle to go at large there, he had no right of action (see 5 Hill, 283; 5 Denio. 265; 18 N. Y. R. 251; 21 Ib. 117).

Where a horse strayed on to the uninclosed land of the defendant, and was killed by falling into an old well, it was held that the owner of the horse could not recover for his loss (Maltby v. Dihel, 5 Kans. 430).

[1] Clark v. Keliher, 107 Mass. 406. [2] *Ante*, § 889.

[3] Stucke v. Milwaukee &c. R. R. Co. 9 Wis. 202; New Albany &c. R. R. Co. v. McNamara, 11 Ind. 543; Eames v. Salem & Lowell R. R. Co. 98 Mass. 560.

* In Isbell v. N. Y. & New Haven R. R. Co. 27 Conn. 393, the defendants in-

§ 901. Dogs are within the protection of the law, which recognizes property in them, and presumes damage when they are willfully injured. In an action for the wrongful killing of a dog, the following instruction was held erroneous: That "it was incumbent on the plaintiff to show by a preponderance of evidence that the dog killed by the defend-

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sisted that the plaintiff's cattle being at large without a keeper, they were to be presumed to have escaped from the plaintiff's inclosure through his insufficient fence, which they claimed was the same as if they had been turned out upon the highway, or left to wander without restraint, and so were unlawfully at large, and being trespassers, the defendant's agents were under no obligation to exercise ordinary care to avoid injuring them. The court, among other things, said: "Even if the premises assumed by the defendants are throughout correct, it by no means follows that an obstruction on the road, of the kind in question, may be ejected in any way most convenient to the defendants' agents. It must, we think, be done with prudence and reasonable care. The force may not be excessive, barbarous, and unnecessarily destructive. The plaintiff has not forfeited his cattle, because they have strayed away, but may justly demand of the defendants to conduct as the circumstances at the moment require, doing no unnecessary injury to his property, and carrying out the spirit of the golden rule, which applied to a case like the present, is as good law as it is sound morality. The kindred maxim, *sic utere tuo ut alienum non lædas*, is but another expression of that rule, and, in our view, should govern the defendants' conduct in this instance, even if there be a possible remote neglect on the part of the plaintiff, or a technical liability for the trespass of the cattle. * * * A boy enters a door-yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull dog; still he is a trespasser, and if he had kept away, would have received no hurt. Nevertheless, is not the owner of the dog liable? A person is hunting in the woods of a stranger, or crossing a pasture of his neighbor, and is wounded by a concealed gun, or his dog is killed by some concealed instrument, or he is himself gored by an enraged bull. Is he in all these cases remediless, because he is there without consent? Or an intoxicated man is lying in the traveled part of the highway, helpless, if not unconscious, must I not use care to avoid him? May I say that he has no right to incumber the highway, and, therefore, carelessly continue my progress regardless of consequences? Or if such a man has taken refuge in a field of grass, or a hedge of bushes, may the owner of the field, knowing the fact, continue to mow on, or fell trees, as if it was not so? Or if the intoxicated man has entered a private lane, or by-way, and will be run over if the owner does not stop his team which is passing through it, must he not stop them? These are instances, I am aware, of personal rights. But what is true in relation to the person, is essentially true in relation to dumb animals and other kinds of property, though perhaps the rule would be applied in the latter case with less strictness. * * * Let us suppose, in this case, that instead of the plaintiff's cattle, the plaintiff himself had been on the railroad track, and that he was too deaf to hear the noise of the train, or the ordinary alarm given in such a case. This would certainly have been most culpable and inexcusable conduct on his part. But would it have absolved the defendants from the duty to exercise reasonable care, if they saw the plaintiff, or with proper attention might have seen him? Ought they not, in that case, to check the speed of the train? May they run over him merely because he is on the track? They may well suppose that he is deaf, or blind, or insane, or bewildered, and have no right, as we think, to continue their headway as if he was not there. If they are bound to ring their bell or sound their whistle, as they certainly are, they may be bound, for the same reasons, to go further, and check their speed a little, or stop entirely."

ant was the property of the plaintiff, and of some pecuniary value; and unless they so believed, from a preponderance of the evidence, they should find for the defendant."* It appeared that the dog, which was passing along the highway, was driven by some boys into the defendant's yard, whereupon the latter shot him. The dog was not doing any mischief at the time, but the defendant claimed that he suspected him of having previously destroyed his hens' nests. It was held, that the killing was unjustifiable.[1] In a similar case recently tried in Massachusetts, it was proved that the dog, which had previously bitten two persons, was kept chained in the day time in the plaintiff's yard by a chain ten feet long, and taken into the plaintiff's house at night. It was held that, although the dog was a dangerous animal, and accustomed to bite those who came near it, yet if it was confined so that all persons properly on the plaintiff's premises were in no danger from it, and was otherwise kept according to law, and the defendant had not been attacked by it, the act of the defendant was not justifiable.[2] †

§ 902. Opinions in regard to the value of dogs which have no standard or marketable value, being necessarily fanciful, depending upon the predilection of the witness, are not competent. To render opinions admissible, it must first be shown that the dog in question is a marketable animal, either belonging to some peculiar breed or possessing some peculiar qualities which make him an animal usually vendible at some proximately regular price. Where, therefore, in an action for the willful killing of a dog, it was shown that the animal was a trained farm dog, and the plaintiff, who was a witness in his own behalf, offered to testify that he was acquainted with the value of such dogs, and had seen them bought and sold, it was held that, as this

[1] Brent v. Kimball, 60 Ill. 211. [2] Uhlein v. Cromack, 109 Mass. 273.

* In order to maintain an action for killing a dog, it need not be proved that the dog was of some pecuniary value (Dodson v. Mock, 4 Dev. & Batt. 146).

† In Massachusetts, the keeping of dogs is regulated by the Genl. Sts. ch. 88, §§ 52, *et seq.*, and the St. of 1867, ch. 130.

fell short of offering to prove that the dog was a marketable animal, or had any market value, with which the witness was acquainted, the evidence was properly excluded.[1] *

§ 903. If a dog be killed while in possession of a bailee, the action may be brought by the owner.[2] Where geese were destroyed by poison by the sole act of the defendant's wife, it was held proper to join the husband and wife as defendants, although the act was committed without his command or assent, and not in his presence.[3] But where hogs went on to the land of tenants in common, through the insufficiency of their fence, and were killed or injured by some of them, it was held that the actual wrongdoers were individually liable.[4]

§ 904. The fact that the owner of animals unlawfully killed takes possession of them does not constitute a waiver of the trespass, but only goes in reduction of the damages.[5] The rule of damages is the value of the animal when alive, unless the case requires exemplary damages. The value of the dead animal cannot be deducted, unless the owner derives an actual benefit from it.[6] In an action for entering the plaintiff's premises and killing two of his horses which were diseased, it was held that a verdict for double the value of the horses was excessive, the defendants having committed the act without malice, and under the mistaken idea that they had a right to abate in this manner what they regarded as a nuisance.[7]

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[1] Brown v. Hoburger, 52 Barb. 15.

[2] White v. Brantley, 37 Ala. 430; *ante*, § 545, *note*.

[3] Mathews v. Fiestal, 2 E. D. Smith, 90.

[4] McKay v. Woodle, 6 Ired. 352. [5] Champion v. Vincent, 20 Texas, 811.

[6] Indianapolis &c. R. R. Co. v. Mustard, 34 Ind. 50.

[7] Franz v. Hilterbrand, 45 Mo. 121.

* To entitle the plaintiff to recover in an action for killing a domestic animal, the declaration must allege that the act was willful and malicious, or words importing the same thing (Ridge v. Featherston, 15 Ark. 159). Accordingly, in an action for killing a mare, it was held error in the court to refuse to charge the jury that "the plaintiff could not recover unless it was proved to their satisfaction that the defendant did kill the plaintiff's mare unlawfully" (Harding v. Fahey, 1 Iowa, 377).

7. *Rightful killing of domestic animals.*

§ 905. As dogs are chiefly propagated, kept, and trained for purposes which require that they should retain in some degree their natural ferocity and inclination to mischief, they are liable to injure the property of others, and to become noisy and accustomed to bite persons, and therefore dangerous to the community and a common nuisance. These characteristics impose corresponding obligations upon their owners and give corresponding methods of redress for an injury committed by them. A ferocious dog accustomed to bite mankind may be destroyed by any one.[1] * Public convenience and safety require and justify such a rule of law. The animal is only regarded as reclaimed and domesticated for the convenience of his master, and all other persons, to whom he is a dangerous and vexatious annoyance and nuisance, may treat him as *fera naturæ* and slay him.[2] In an early case in New York, where it appeared that a dog was dangerous and unruly, and his owner knew it, but permitted him to run at large, or kept him so negligently that he escaped from his confinement, it was held that a person was justified

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[1] Woolf v. Chalker, 31 Conn. 121; Dunlap v. Snyder, 17 Barb. 561.

[2] King v. Kline, 6 Penn. St. R. 318.

* At common law, property in a dog, though recognized, has always been held to be entitled to less regard and protection than property in other domestic animals. Blackstone (vol. 4, p. 236), says: "As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them; yet they are not of such estimation as that the crime of stealing them amounts to larceny."

Credit v. Brown, 10 Johns. 365, was an action of trespass for killing the plaintiff's dog. The plaintiff proved that the defendant admitted that he killed the dog, and said that he did so because the dog assaulted him in the night in the highway. There being no proof to charge the defendant except this confession, it was held that it must be taken altogether and amounted to a justification (see 2 Hill, 442).

In England, the owner of a ferocious dog, who permits him to run at large upon the highway, is indictable for a misdemeanor (Burn's Justice, 578; 9 Ad. & El. N. S. 101; 2 Strange, 1264; Card v. Case, 5 M. G. & S. 622; and see Loomis v. Terry, 17 Wend. 496; Maxwell v. Palmerton, 21 Ib. 407; Sherfey v. Bartley, 4 Sneed, 58).

A man may lawfully kill an enraged bull in the necessary defense of himself or his family (Russell v. Barrow, 7 Port. 106).

in killing the dog upon common law principles. The court remarked that such negligence was wanton and cruel, and that it was little better than mockery to say that a person injured by such an animal might sue for damages.[1] "The owner who persists in keeping such an animal, without restraining him so that he can do no harm, ought not to complain of his destruction. He ought to be grateful to escape so; for he is undoubtedly liable to exemplary punishment; and if one injured or exposed to injury chooses to right himself by abating the nuisance, he deserves to be regarded as a public benefactor."[2]

§ 906. In an action for killing a dog, it is not necessary to prove that it was done in immediate self-defense;[3] and the defendant may justify the act by showing that the dog was ferocious, without proving that the owner of the dog had knowledge of it.[4]* A dog may become a nuisance from

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[1] Putnam v. Payne, 13 Johns. 312.

[2] Redfield, C. J., in Brown v. Carpenter, 26 Vt. 638, citing King v. Huggins, 2 Ld. Raym. 1583.

[3] Brown v. Carpenter, *supra*. [4] Maxwell v. Palmerton, 21 Wend. 407.

* Maxwell v. Palmerton, *supra*, was an action of trespass brought before a justice of the peace for killing the plaintiff's dog. It was proved that the dog was a dangerous animal, and had attacked several persons. Some of the witnesses were permitted, notwithstanding the objection of the plaintiff, to express their opinion as to the ferocious character of the dog, and it was not shown that the plaintiff knew the bad disposition of the dog. A judgment having been rendered for the defendant before the justice, it was affirmed both by the Common Pleas and Supreme Court. Nelson, C. J., delivering the opinion of the latter court, said: "I doubt if it be necessary in this and the like cases to prove a *scienter* upon the owner. If the dog be, in fact, ferocious, at large, and a terror to the neighborhood, the public should be justified in dispatching him at once. It seems to be settled, that such proof is not necessary where a dog is in the habit of chasing conies in a warren or deer in a park, and that he may be killed for the protection of those animals. How much more proper is it that this should be the rule, and most singular would it be were it otherwise, when the persons and lives of rational beings are in danger? Were it necessary, I think the jury were warranted, from the proof in this case, in finding a *scienter*. At all events, though we might differ with them upon that question, such difference of opinion would afford no ground for reversing the judgment. Perhaps the opinions of the witnesses that the dog was a dangerous animal, ought not in strictness to have been received. But the witnesses gave the grounds of their opinions, and they could not have materially varied the case. The facts were stated which had come under their observation, from which they considered him dangerous. It would be distrusting the intelligence of the jury too much to believe that the opinions of the witnesses could have added anything to the effect of the facts in the particular case."

The fact that a dog stole an egg, snapped at one man's heel, and barked at

being noisy; and if such a dog constantly resorts to a neighbor's premises, and cannot otherwise be restrained, it may be killed.* In Brill v. Flagler,[1] which was an action of trespass for killing a dog, it was admitted by the plaintiff that the dog was in the constant habit of going on the premises and about the dwelling of the defendant, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and willfully neglected to confine him, and that the defendant, unable to remove the nuisance in any other way, killed him. Judgment having been rendered for the defendant in the Common Pleas, it was affirmed on appeal.† But the mere

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another's horse, and was suspected years before of having worried a sheep, will not justify the killing of him (Dodson v. Moek, 4 Dev. & Batt. 146).

To justify the castration of a mule that ran at large, and was troublesome to the defendant, it must appear that his troublesome qualities were known to the owner (Norris v. Banta, 21 Texas, 427).

In an action of trespass for shooting and wounding the plaintiff's horse as the cavalry were manœuvering with the infantry on parade, the plaintiff being a lieutenant of the calvary and the defendant a sergeant of the infantry, it was held that the defendant might prove that the plaintiff violated orders, and crowded upon the infantry in different parts of the parade (Tomlinson v. Booth, 2 Root, 52).

[1] 23 Wend. 354, cited with approval in Woolf v. Chalker, 31 Conn. 121.

* Whether dogs kept on the premises of their owner may, by their noise, become nuisances to adjoining proprietors, and subject their owner to an action for a nuisance, seems to be an open question. In Street v. Tugwell, 2 Selw. N. P. 1047, where an action was brought for keeping a kennel of pointers so near to the plaintiff's dwelling-house as to disturb his family during the day time, and prevent them from sleeping in the night, there was a verdict for the defendant. But that case has been doubted. It has been remarked that Lord Kenyon, in refusing a new trial, intimated that if the nuisance was continued a new action could be brought, which was an intimation that an action could be maintained; and in Brill v. Flagler, *supra*, Nelson, J., intimated that the decision was not a correct exposition of the law. It has been suggested that if the noise of a boiler manufactory (Fish v. Dodge, 4 Denio, 311) or a steam engine (Davidson v. Isham, 1 Stockton, 186) may be a nuisance, *a fortiori* should be a kennel of pointers which disturb the sleep of a family.

† In Brill v. Flagler, *supra*, Nelson, Ch. J., who delivered the opinion, said: "No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be a mockery to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case. The fact is expressly averred, that the dog could not be restrained or prevented from haunting the dwelling-house and disturbing the family by an incessant barking and howling, night and day, by a resort less severe than taking his life. This, I admit, is a very material averment, and the party should

intrusion of a dog upon another's premises will not justify his being killed. Where, in an action for killing a dog, the defendant pleaded that the dog was trespassing, and that the defendant, as the servant of the owner of the property which was being injured by the dog, not being able to prevent the dog from doing further injury, killed him, it was held that the plea was bad.[1]

§ 907. A person may lawfully kill an animal when it is necessary for the preservation of his property, if the animal be found in the act of destruction.[2] In North Carolina it was held that the owner of a cow was justified in killing an unruly ass which, while at large, attacked the cow, threw her down, and was proceeding to stamp her.[3] In Leonard v. Wilkins,[4] which was an action for shooting the plaintiff's dog, it was proved that the dog at the time he was shot was running on the premises of the defendant with a fowl in his mouth, and that the same dog had worried and injured the fowls and geese of other persons in the neighborhood. The Supreme Court, in affirming the judgment of the court below, which was for the defendant, said: "The verdict below was not against law. The dog was on the land of the defendant, in the act of destroying a fowl, and the defendant was justified in killing him in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined. It was for the jury to say whether the killing was justified by the necessity of the case, and as requisite to

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be held to strict proof. A needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable. Regarding, however, as I do, the facts stated in the plea, as presenting a case of serious and intolerable nuisance, of which the owner of the animal occasioning it was fully advised, but willfully neglected to interfere, if no other reasonable means could effectually remove it, short of destruction, I cannot doubt but those used were fully justified upon established principles of the common law. The act was essential to the free and perfect enjoyment, by the defendants, of their property, as well as to the protection and comfort of their families."

[1] Tyner v. Cory, 5 Ind. 216.

[2] Barrington v. Turner, 3 Lev. 28; Janson v. Brown, 1 Camp. 41; Wells v. Head, 4 C. & P. 531; King v. Kline, 6 Penn. St. R. 318.

[3] Williams v. Dixon, 65 N. C. 416. [4] 9 Johns. 233.

preserve the fowl, and the fowl being on the land of the defendant was enough without showing property in the fowl." And it has been held that if a dog, after killing sheep, goes back for the apparent purpose of destroying others, the owner of the sheep may lawfully kill him, although not in the act of pursuing sheep when he is killed, and that it need not be proved that there was no other way of preventing the injury.[1] Where a hog which was known to its owner to have eaten poultry was seen with a duck in its mouth, and on being chased dropped it, and then immediately again ran after it, and was killed by the owner of the duck while in such pursuit, it was held that he was justified in so doing.[2]* But where the evidence showed that a hog had destroyed one chicken and tried to kill another, and being found seventy-five yards from where the defendant's chickens usually resorted was killed by him, it was held error in the court to instruct the jury to find "whether the hog was of a predatory character and had the reputation of a chicken-eating hog, and if such was the case, any one had a right to destroy it as a public nuisance."[3] †

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[1] Parrott v. Hartsfield, 4 Dev. & Batt. 110.

[2] Morse v. Nixon, 8 Jones L. N. C. 35; s. c. 6 Ib. 293.

[3] Ibid.

* The statute of Illinois authorizes any person who shall discover any dog in the act of killing, wounding or chasing sheep, or discover such dog under such circumstances as to show that the dog has been recently engaged in killing or chasing sheep for the purpose of killing them, to immediately pursue and kill such dog (Act of Ill. of 1853; Gross' St. 45). The county courts or boards of county supervisors are authorized to impose a tax upon dogs, and make such other regulations within their counties as they may deem proper in relation to dogs; and any owner of a dog who refuses or neglects to comply with such regulations cannot recover for any killing or injury done to his dog, and is also liable to a fine of $10 (St. of Ill. of 1861; Gross' St. 45).

† Even in England, where the owners of dogs are in some respects peculiarly privileged both by the common and statute law, a party has frequently been held excused in destroying these animals. It has been decided there that a man may kill a dog to prevent mischief to his beast, even when the dog is in the act of chasing it from his master's inclosure; so, also, to prevent dangers to himself. The keeper also may kill a dog found in a warren, or chasing a deer in a park, though he might have been taken alive (Nelson, Ch. J., in Brill v. Flagler, 23 Wend. 354).

Wright v. Ramscot, 1 Saund. 84, was trespass for killing a dog. The defendant pleaded that the mastiff ran violently upon a dog of one E. B. and did then and there bite said dog, and that he, as his servant, killed the mastiff that he might do no further mischief. The plaintiff demurred, and it was conceded

§ 908. A statute which authorizes the killing of dogs, is not an act to take private property for public use, or to deprive parties of their property in dogs, but a mere police regulation such as the legislature may constitutionally establish.[1] * But a statute which permits the killing of dogs found running at large, does not authorize their being pursued into a private house. In Kerr v. Seaver,[2] the only justification alleged by the defendant, for entering the plaintiff's dwelling-house and killing his dog, was that the dog was not

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by Saunders, on the argument, that if the plea had stated that the mastiff could not have been otherwise taken off it might have justified the killing.

The right to kill a bull or other furious beast, from which one's person is in present danger, or a dog chasing sheep or other animals so that they are exposed to harm, or a dog seen at large which is accustomed to bite mankind, is an exception to the rule that a person has no right to destroy life, or inflict permanent injury, or use greater force than is necessary for the removal or prevention of a trespass. But in England, it has long been usual for the proprietor of land to place spring guns and other deadly engines upon an inclosure, so concealed as not to be seen, to wound, kill or destroy any man or animal that comes upon the place; and it is there held, that if proper notice be given, he is justified in inflicting any injury on men or animals trespassing on the grounds, even to the taking of life.

[1] Morey v. Brown, 42 N. Hamp. 373.

[2] 11 Allen, 151; Bishop v. Fahay, 15 Gray, 61.

* In Morey v. Brown, *supra*, which was an action for killing a dog, under a statute providing that "no person shall be liable, by law, for killing any dog which shall be found not having around his neck a collar of brass, tin or leather, with the name of the owner or owners carved or engraved thereon," a dog belonging to one Jeremiah P. Morey, which had on a collar engraved with the initials "J. P. M.," was killed. It was held that the person killing the dog, was not liable as a trespasser, although he knew at the time to whom the dog belonged. The court said: "This act was intended to secure responsibility for damages committed by dogs, and requires the owners' names to be attached to them, in order that the dogs may carry notice of such ownership. The inscription of the letters 'J. P. M.' upon the collar, was not a carving or engraving of the name of Jeremiah P. Morey thereon. Indeed, the plaintiff hardly claims this, but he argues that a person has the right at any time to assume any name he chooses, and that the plaintiff had assumed the name of 'J. P. M.' Of this there is no evidence, unless it may be found in the fact that 'J. P. M.,' the initials of the plaintiff's name, were engraved on the collar. But if this entire position of the plaintiff were admitted, he must still fail in this suit. There is no evidence that the plaintiff was known by the name of 'J. P. M.,' and if it were conceded that he had the right to assume it at any time, the inscription upon the collar of a name so assumed, by which the plaintiff was not known, would not be a compliance with the statute. The plaintiff concedes it to be the intention of the law to furnish notice of the name of the owner of the dog. But placing upon the collar a mark or name by which the owner is not known would hardly give such notice. Actual notice of the ownership of the dog will not supersede the necessity of a compliance with the statute. Its provisions are direct and positive, and the consequences of a neglect of the statutory requirements are explicitly enacted" (citing State v. McDuffie, 34 N. Hamp. 528; Tower v. Tower, 18 Pick. 262).

licensed, and provided with a collar, as required by the statute, by which "any person may, and every police officer and constable shall, kill or cause to be killed all such dogs whenever and wherever found." It was held that the statute could not reasonably be construed as giving to every citizen a license to hunt or pursue these animals into a neighbor's dwelling-house, to the disturbance of his family, and a risk of a breach of the peace; that the defendant, in entering the plaintiff's house, to seize the dog after the plaintiff's wife had refused to give it up, was a trespasser and had no ground of exception to the judgment against him for nominal damages. Whether the defendant might also have been held liable for the value of the dog, was a question not raised.

CHAPTER V.

PARTIES ENTITLED TO REDRESS.

1. Right of action acquired by possession.
2. Action by husband and wife.
3. Action by tenants in common against stranger.
4. Action by tenant in common against his cotenant.
5. Action by landlord against stranger.
6. Action by landlord against tenant.
7. Action by tenant against stranger.
8. Action by tenant against landlord.
9. Action by and against corporations.
10. Action where the land is held in trust.
11. Action by executors and administrators.
12. Action by heir or devisee.

1. *Right of action acquired by possession.*

§ 909. Mere occupancy of land, however recent, gives the possessor a title against every one who cannot show a better claim, and is sufficient to enable him to maintain an action against a stranger.[1] * He who is in the peaceable possession

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[1] Look v. Norton, 55 Maine, 103; Moore v. Moore, 21 Ib. 350; Hunt v. Rich, 38 Ib. 195; Black v. Grant, 50 Ib. 364; Kilbourne v. Rewee, 8 Gray, 415; Inhabs. of Barnstable v. Thacher, 3 Metc. 239; Todd v. Jackson, 2 Dutcher, 525; Tarry v. Brown, 34 Ala. 159; Criner v. Pike, 2 Head, Tenn. 398; Gardiner v. Thidbodeau, 14 La. An. 732; Catteris v. Cowper, 4 Taunt. 547; Clancy v. Houdlette, 39 Maine, 451; Myrick v. Bishop, 1 Hawks. 485; Richardson v. Merrill, 7 Mo. 333; Webb v. Sturtevant, 1 Scam. 181; Brandon v. Grimke, 1 N. & M. 356; Inskeep v. Shields, 4 Harring. 345; Fletcher v. Cole, 26 Vt. 170; but see Tubbs v. Lynch, 4 Harring. 521; Doolittle v. Linsley, 2 Aiken, 155; Graham v. Houston, 4 Dev. 232; Catterlin v. Douglass, 17 Ind. 213; Linard v. Crossland, 10 Texas, 462.

* The entering upon land and severing and carrying away a part of the realty by one continuous act, can be recovered by a person in the mere actual possession only by an action of trespass *quare clausum fregit* (Sturgis v. Warren, 11 Vt. 433).

The vendee of land in possession under a contract to purchase, may maintain an action against a wrong-doer who makes no claim of title (Rood v. N. Y. & Erie R. R. Co. 18 Barb. 80). So likewise, possession under a verbal contract for land, will enable the possessor to maintain trespass, the deed being executed after the trespass (Carney v. Reed, 11 Ind. 417).

An action of trespass on the quarantine lands of the widow before the assignment of her dower, cannot be maintained by the heir, he not being in possession (Latham v. Latham, 3 Call, 181). So on the other hand, a widow who remains in the mansion house without any assignment of dower, cannot maintain an ac-

of land is regarded as the owner, except in a contest with one who has a better right. We accordingly find that privileges accorded by statutes to the holders of land, are always given *prima facie* to those who possess them, and not to those who have a legal title, which may or may not be enforced.[1] * A. and B. fenced certain land which they did not

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tion of trespass committed beyond the inclosure, but within the boundaries of the tract (Carey v. Buntain, 4 Bibb. 217).

Parker v. Parker, 17 Pick. 236, was an action of trespass *quare clausum* and *de bonis asportatis* brought by the heir against the widow, for breaking and entering the close, and cutting and carrying away a growing crop of rye. The defendant claimed the premises in question as her dower. The assignment of dower, and assent to it on the part of the heir and widow, were before the alleged trespass, but the acceptance of the return by the Probate Court was after the supposed trespass. It was held that the soil and freehold were in the defendant as her dower, by relation, at the time the trespass was alleged to have been committed by her. The court referred to Mansfield v. Pembroke, 5 Pick. 449, in which it was held that the wife had a seizin sufficient for the purpose of gaining a settlement from the time of the assignment of dower.

A widow, after the expiration of her quarantine of forty days, has no right to the possession of the family mansion, and no right to enter thereon for her dower, before it has been assigned to her. Such is the law in New York, though it is otherwise in some of the other States (Corey v. The People, 45 Barb. 262).

A person who is in possession of land at the time of the injury may maintain trespass therefor, though not in possession at the commencement of the action (Smith v. Ingram, 7 Ired. 175; Gilchrist v. McLaughlin, Ib. 310).

[1] Bigler v. Antes, 21 Penn. St. R. 288; McLean v. Farden, 61 Ill. 106.

* Where in an action for wrongfully removing a fence, it appeared that the defendant was in possession of the land on which the fence stood at and previous to the commencement of the action, it was held that trespass would not lie, but that the remedy was ejectment (Brown v. Carter, 52 Mo. 46).

In Frost v. Duncan, 19 Barb. 560, the complaint alleged that the defendants wrongfully entered upon the plaintiff's land, cut down trees growing thereon, burned the same into coal, and converted the coal to their use. The land was in the actual possession of the defendants, who claimed it under a deed executed about seventeen years prior to the alleged wrong. The plaintiff's counsel contended that the New York Code had changed the rule, and that, as there was clearly a wrong, there might be a direct redress, without resorting to the pre-existing circuitous remedies. It was held that, although the Code had essentially changed the remedy, yet it had not given a right of action where none existed before; and that as the law gave no right of action to an owner out of the possession of land, for injuries to it previous to the adoption of the Code, it gave none now.

In an action of trespass *quare clausum fregit*, it appeared that the premises in question were conveyed to the plaintiff, who was the wife of W., after their marriage, and that she had issue by him, capable of inheriting it. W. immediately took possession which he retained several years, and until his right in the premises was set off on execution in favor of a judgment creditor who conveyed to the defendant. Subsequently, the plaintiff was divorced from her husband, after which, and while the defendant was in the actual occupancy of the land, the plaintiff entered thereupon, and demanded of the defendant possession thereof, claiming it as her own; but the defendant refused to quit. It was held that the right of the wife, which was suspended during the marriage, was restored by the divorce, and that consequently the title to the

own, for the grass, and assigned to each one-half without any division fence. After occupying three years, A. gave C. permission to enter to cut hay, which was taken from B.'s half. In an action of trespass brought by B. against C. therefor, it was held that he was entitled to recover.[1] Where a highway having been discontinued, the plaintiff fenced it in and occupied the land, and the defendant removed the fence and took away gravel, it was held that this was clearly a trespass, the plaintiff's occupancy constituting a good possessory title against all persons who had not a better right.[2] So where the plaintiffs, who were employed as contractors to construct a navigable canal, had erected a dam composed of piles and earth, with the consent of the owner of the soil, for the purpose of completing their work, it was held that they might maintain trespass against the defendants as wrong-doers, for breaking and destroying the same.[3] In Blaisdell v. Roberts,[4] it appeared that the plaintiff was in possession of the premises in dispute, claiming under a levy made by his father. This possession had continued in the plaintiff or his father about sixteen years. But he failed to connect himself with any title to the premises originating by deed. It was held that his possession under the levy was sufficient *prima facie* to authorize him to maintain the action; the defendants having failed to show any existing legal title in them, or either of them. Where the plaintiff proved that at different times, for more than twenty years he had cut fire-wood and timber on the premises for his own use and for sale; that he had claimed title to the land, and that he had allowed some persons to cut wood there and forbidden others; it was held that enough had been shown to maintain the action against

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land was then vested in her; but that, as she was not in possession, she could not maintain the action (Wheeler v. Hotchkiss, 10 Conn. 225).

Acts of possession need not be renewed from year to year, to enable the person or his grantee to maintain trespass. All that is required is, that there shall be continual claim (Hibbard v. Foster, 24 Vt. 542).

A delivery of possession under a writ of *habere facias possessionem* will not be a defense for a previous trespass on the land (Smith v. Guild, 34 Maine, 443).

[1] Morse v. Iman, 42 Ill. 150.

[2] Bowley v. Walker, 8 Allen, 21.

[3] Dyson v. Collick, 1 D. & R. 225; 5 B. & A. 600.

[4] 37 Maine, 239.

one who showed no title.[1] * The daughter, or even a female servant of the occupier of a house, has such a possession of

[1] Kilborn v. Rewee, 8 Gray, 415.

* Where in an action of trespass *quare clausum fregit* the plaintiff had testified that he was in the occupation of the *locus in quo* at the time of the alleged trespass, and did not attempt to show any title thereto besides that of actual possession, and the defendant did not cross-examine the plaintiff concerning the nature of his possession, and no evidence was given of its nature besides the conveyance to the wife's sole and separate use, it was held error in the judge at the trial in the Superior Court to rule that the plaintiff had not such a title to the property conveyed to his wife as to enable him to maintain the action (Brown v. Benjamin, 8 Allen, 197). In the foregoing case, the court remarked that there were ways in which the plaintiff might have had rightful possession in his sole personal right; that he might have been assignee of his wife's lessee, or might have received possession directly from her; that, as no inquiry was made of the plaintiff, as there might have been, respecting the nature of his possession, and as there was no evidence that the defendant was not a mere stranger and wrongdoer, the ruling of the court below could not be sustained, it being settled law that actual possession of real estate is sufficient to enable a party in possession to maintain trespass *quare clausum fregit* against a stranger, and every one must be deemed a stranger who cannot show any title or elder possession.

In Hyatt v. Wood, 4 Johns. 150, it appeared that one Green occupied the premises in question from 1795 to March, 1805. The plaintiff entered upon the land and occupied it, under a permit from Murray & Mumford, in February, 1805, with the consent of Green, who had previously agreed to give up the possession to Murray & Mumford; and he continued in the peaceable possession until the following July, when he was dispossessed by the defendant. The defendant claimed to have bought the premises of Green, and to have paid him $850 therefor; and he produced in evidence a deed from Green to him, bearing date Nov. 7th, 1804, in which Green averred that he was in possession of the improvements of the lot which he had sold to the defendant, and promised to deliver up the peaceable and quiet possession of the same to the defendant, his heirs and assigns, on the 1st of March following. It appeared that the deed was not in fact executed until two or three weeks after its date, and that when it was delivered the defendant paid Green $700. The plaintiff having been nonsuited at the Circuit, the Supreme Court refused to set the nonsuit aside. The latter court said: "The plaintiff entered under Murray & Mumford, and also by the permission of Green, and whilst he was in possession. Murray & Mumford appear to have no title to the lot, for none is shown. Green is the only person who appears to have had any interest in it, and that is a possession for nearly ten years. As against all but the rightful owner, Green's possessory interest must prevail. By the deed of the 7th of November, 1804, the defendant became clothed with all Green's right of whatsoever kind it might be; and by the instrument of that date, Green acknowledged that he held the improvements sold to the defendant, and promised to yield up possession to the defendant on the 1st of March after. Thus Green virtually became the tenant of the defendant until the 1st of March, and after that day he became a tenant at sufferance. It is a most salutary principle that a person holding the possession of lands for another cannot, by his fraudulent acts in derogation of the rights of the landlord, change or control those rights. It is evident in this case that the plaintiff did acquire his possession by the connivance of Green, and with a view on the part of both to defeat the defendant's possessory title acquired at an anterior period for a valuable consideration, and *bona fide*. It is also apparent that the plaintiff's title under Murray & Mumford is merely colorable, and that he in fact gained nothing from them; and that the plaintiff must be considered as having acquired his possession under Green. Consequently, he stands precisely in his place, and must be regarded as a tenant at sufferance since he entered before the 1st of March by Green's permission, and continued in after

her bedroom as will enable her to maintain trespass against a person who wrongfully forces himself into it while she is in bed.[1]

§ 910. Although improvements be not extensive or valuable, yet if they are such as indicate an intention to reduce the land to possession for the purpose of actual and permanent occupation they will constitute possession, and the use of timbered land for a long period for fuel, fences, &c., has been held sufficient to enable a party to maintain trespass for encroachments.[2] But the construction of bridges across a ditch on the side of a highway, with poles, in order to drive cattle into a swamp, and the ranging of cattle therein, and the occasional cutting there of a few trees, does not constitute such a possession as will support an action of trespass.[3] Possession of wild land belonging to the State cannot be obtained by a stranger by claiming to a certain boundary, and using the land for wood and making sugar.[4] Using water in a mill pond is not evidence of title to or possession of the land covered by the water.[5] Where A. gave B. the key of his house in order to place him in possession of personal property therein, it was held that B. had not such a possession of the house as would enable him to maintain trespass for breaking and entering it.[6] *

Green's right to the possession was at an end. If, however, the plaintiff is not to be regarded as a tenant at sufferance, still I think the nonsuit was correct. It cannot be pretended that the plaintiff has any right or interest in the land or the possession. He has certainly nothing more than a naked possession, whereas the defendant is clothed with Green's title, which is a possessory title of at least nearly ten years' standing."

[1] Lewis v. Ponsford, 8 Car. & P. 687.

[2] McLean v. Farden, 61 Ill. 106; Davis v. Easly, 13 Ib. 192; Brooks v. Bruyn, 18 Ib. 539; 24 Ib. 372; Rogan v. Perry, 6 Wis. 194.

[3] Morris v. Hayes, 2 Jones, 93. [4] Roe v. Wilbur, 57 Penn. St. R. 406.

[5] Bartholomew v. Edwards, 1 Houston, Del. 17.

[6] Davis v. Wood, 7 Mo. 162.

* Occasional acts of turning cattle on to land and cutting timber, which were at the time resisted by the landlord and his tenants, who all along maintained the exclusive possession of the land, will not defeat the possession of the landlord, but will only amount to trespasses (Swift v. Gage, 26 Vt. 224).

Where the plaintiff proved an entry of a surveyor upon the land by order of one Atkinson, and a conveyance from Atkinson and wife to the plaintiff, it was held sufficient evidence of possession under color of title to support an action

§ 911. A title to land by exclusive possession is sufficient to comprehend the entire estate, the right to its present and future enjoyment against any person who can show none in himself, and under it he may, as lessor, recover rent of his lessees and damages of trespassers for permanent injuries to the land or buildings erected thereon.[1] * Thoreau v. Pallies [2]

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against one who entered without any color of right (Cobleigh v. Young, 15 N. Hamp. 493; and see Wendell v. Blanchard, 2 Ib. 456; Woods v. Banks, 14 Ib. 101).

Byrne v. Van Hoesen, 5 Johns. 66, was an action of trespass *quare clausum fregit* for entering the plaintiff's close and cutting down and carrying away trees. It was proved that the former husband of P. B. died in possession of the premises, which possession was transmitted to him from his ancestors; that he left three infant children who were minors, and that at his death his widow entered into possession, and had retained it ever since. Held, that the possession was sufficient to maintain trespass, and that as her entry and reception of the profits had not been accompanied with any acts or declarations inconsistent with her as guardian in socage to her children, the intendment of law was, that she was in possession by that right.

In Pennsylvania, the purchaser of unseated lands for taxes, when he receives his deed, takes but an inchoate or inceptive title, which requires the lapse of two years from the date of sale to ripen into an absolute title. This it will do if the land be not redeemed in the mean time. The only certain interest the buyer has up to that time, by virtue of his purchase, is in the money paid and 25 per cent. on that amount on redemption. He is not invested with any title to the land whatever, because the owner's title is not divested. The incidents of title remain, one of which is, in the absence of actual possession, to draw the possession to the title, and to enable the owner, upon his constructive possession, to maintain trespass. "This exists up to the last moment before the two years have closed in. After that, and not before, his title is divested if he do not redeem. Up to that time he would not be a trespasser by entering on the land and cutting timber, or doing any other act affecting the freehold. This is by reason of title. And for the same reason he may bring suit against a trespasser on the lands at any time within the two years without redeeming" (Thompson, J., Shalemiller v. McCarty, 55 Penn. St. R. 186).

[1] Barnstable v. Thacher, 8 Metc. 239; Shrewsbury v. Smith, 14 Pick. 297; Hubbard v. Little, 9 Cush. 475.

[2] 1 Allen, 425.

* In Williston v. Morse, 10 Metc. 17, the plaintiff claimed title under a deed from the town of Russell. All the title the town had was by an entry into the premises claiming title thereto, and causing the same to be surveyed previously to its conveyance to the plaintiff. The defendant proved that he and one Morse, under whom he claimed title, had possession of the premises before the entry of the town; and upon this evidence the counsel for the defendant asked the court to charge the jury that if the defendant had proved a possession in himself or Morse, of an earlier date than the plaintiff's deed, that was sufficient to prevent the plaintiff from maintaining his action. The court declined so to charge, but instructed the jury that the action might be maintained although the defendant or Morse had committed acts of trespass on the premises earlier than the entry and survey by the town. A verdict having been found for the plaintiff, the Supreme Court said: "These instructions, as it seems to us, had a tendency to mislead the jury, and to withdraw their attention from the real question of title upon which the case depends. The evidence on the part of the defendant had a tendency to prove that he entered into the premises claiming title; and if so,

was an action for forcibly entering upon the plaintiff's land then inclosed by a fence, throwing down the fence, digging holes in the soil, inserting posts therein, and erecting a barrier attached to the posts within about eighteen inches of the door and windows of the plaintiff's building. The plaintiffs proved that they were, and for eleven years preceding the doing of the acts complained of, had been, by their tenants, in the open, peaceable and exclusive possession of the land, under a claim of title in fee thereto, and that this was well known to the defendant. The defendant did not assert any title to the premises, but only claimed a right of way. It was held that the plaintiff had shown sufficient to support the action.

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then such entry, although he had no valid title, and although the entry would be a trespass against the true owner, would nevertheless be sufficient to establish a legal possession against any one who should afterwards enter upon him without right or any previous possession. It has been argued for the plaintiff that the deed from the town of Russell to the plaintiff vested in him a good title against every person but the true owner; and that it could not be avoided by a stranger who sets up no title but by acts of possession. The doctrine is well settled, that a party may enter on land without title, and may acquire title by possession, by acts which would not constitute a disseizin of the true owner; and that such a possessory title is valid against all persons who cannot prove an elder and better title. Much too great stress is laid by the plaintiff's counsel on the deed from the town. He contends that the deed is presumptive proof of a legal title in the town. But it is not necessary to discuss that question in the present case. For there is no doubt that the town of Russell had a sufficient seizin to enable them to convey the premises to the plaintiff, as they had, before the conveyance, taken a survey of the land, claiming title, and that was a sufficient seizin and possession to enable them to pass their title to the plaintiff. Nothing, however, but their title could pass thereby. The plaintiff, by entry under his deed, might acquire a legal seizin against all persons not having a prior title. And the plaintiff has no better title than the town of Russell had. If the defendant, therefore, had a prior possession, this action cannot be maintained. It is denied by the plaintiff that the defendant had any such possession, or that, if he had, it would avail him against the plaintiff, who claimed under a deed and entry and possession. Whether the defendant had a prior possession or not, was a question of fact for the jury; and if he had such a possession, this action certainly cannot be maintained" (citing Slater v. Rawson, 6 Metc. 439; Ward v. Fuller, 15 Pick. 185).

An action for carrying away the proceeds and profits of land may be maintained, although the plaintiff shows no legal title to the land (Oglesby v. Stodghill, 23 Geo. 590).

Where a bankrupt remains in the possession of land which has been demised to him, he may maintain an action for trespasses for injuries done to the land. But if he abandons his possession, he loses the right of action, unless he returns and resumes the possession with the assent of the landlord, before any other person has entered (Clark v. Calvert, 8 Taunt. 752; Topham v. Dent, 6 Bing. 515).

§ 912. From the foregoing rule, it is obvious that where in an action for trespass to land it appears that the plaintiff has the mere prior possession, and that although the defendant has a good paper title to it, yet that a third person has acquired title by possession adverse to the grantor of the defendant, the plaintiff will be entitled to recover. In Hughes v. Graves,[1] the plaintiff was in actual possession, and his possession was prior to any possession by the defendant or his grantors. The defendant showed a faultless claim of title on paper, but it appeared that one Quenton had acquired the ownership by possession adverse to the defendant's grantors. If Quenton's title had been by deed from the defendant or his grantors, it is clear that the defendant could not have disturbed the plaintiff's prior possession. Quenton's adverse possession for the statutory period gave him an absolute indefeasible title to the land against the whole world, on which he could either sue or defend as against the former owner. The plaintiff was liable to be interrupted in his possession only by Quenton or some person under him; the case being precisely as if the defendant or his grantors had conveyed to Quenton.*

[1] 39 Vt. 359; and see Holmes v. Newlands, 39 Eng. C. L. 43 (11 Ad. & E.)

* A person in possession of land sold under execution to another may maintain trespass against another for entering on the land before he receives a deed from the sheriff (Presnell v. Ramsour, 8 Ired. 505). But the occupancy of land under a deed to commence *in futuro* is sufficient to entitle the occupant to maintain an action of trespass against a stranger (Allen v. Taft, 6 Gray, 552).

Bessom v. Freto, 13 Metc. 523, was an action of trespass *quare clausum*. The defendant claimed title to the premises under a conveyance from one Roundy to Hannah Martin, and from the latter to him. In the deed from Roundy to Martin, the grantor, after describing the estate as having been conveyed to him, made the following reservation: "Excepting and reserving also to Betsey Bessom above named, that she may continue to live in the dwelling-house herein conveyed, during the term of her natural life, without paying any manner of rent therefor." The defendant took his title subject to this reservation. The court, per Shaw, C. J., said: "Though a party cannot show title in himself, by a reservation in a deed between others to which he is not a party, yet such reservation will prevent the reserved part from passing to the grantee. So here, though the plaintiff could not directly claim title to herself, yet it was a good reservation to the grantor, Hannah Martin, for the life of this plaintiff; and if said Hannah did not interfere to defeat the plaintiff's possession, but permitted her to occupy the house, she had a possession lawful and valid against all others, and might maintain trespass, if her right of possession was violated. The principal difficulty lies in the uncertainty of the description of the part reserved. But the court are of the opinion that if the plaintiff, when the deed was made

§ 913. The plaintiff's possession by inclosures need not be shown.[1] The fact that he has exercised acts of ownership is sufficient.[2]* In Machin v. Geortner,[3] it was proved that the lot on which the alleged trespass was committed had been used as the wood lot to the farm on which the plaintiff lived for about twenty years; that during all that time the plaintiff and his father, under whom he claimed title, had cut their fire-wood, saw logs and rail timber on the lot, and had also made maple sugar thereon, and had a house thereon for that purpose; that it was the only wood lot the plaintiff had; but that it was not fenced, nor was there any clearing upon it. The precise dimensions or contents of the lot were not given, but it was to be inferred from the evidence that it was not larger than was required for the purposes of fuel, fencing, &c., for the farm to which it was attached; and it was held that a constant and uninterrupted use for those purposes was undoubtedly sufficient to constitute an actual possession, and to enable the plaintiff to maintain trespass for any encroachment upon it.

§ 914. Title to part only of a certain tract will not prevent a recovery for an injury to land not covered by the plaintiff's deed, but which the plaintiff has in possession, against a person making out no justification.[4] So, likewise, possession of a part of a lot of land under a written but unrecorded contract of purchase, given by a person who has no title to the lot, will extend by construction to the whole lot,

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by Hannah Martin to the defendant, was in possession of that part of the house upon which the trespass is alleged to have been committed, the said Hannah was disseized *pro tanto*, and that part did not pass. This was a question of fact, and parol evidence was competent to prove her possession at that time."

[1] Woods v. Banks, 14 N. Hamp. 101.

[2] Tyson v. Shueey, 5 Md. 540; Sawyer v. Newland, 9 Vt. 383.

[3] 14 Wend. 239.

[4] Hunt v. Rich, 38 Maine, 195.

* Where one of two tenants in common entered upon a lot of wild land which was some miles from any cultivated or inhabited lot, and during the winter seasons took therefrom timber from time to time, in considerable quantities, but did not lease or inclose any part of the lot, it was held that he thereby acquired possession of the whole lot as against every one but the true owner, and might maintain trespass (Hibbard v. Foster, 24 Vt. 542, citing Sawyer v. Newland, *supra*.

so as to enable the one in possession to maintain trespass against a stranger.[1] Where the place of the trespass was described as part of lot No. 6, bounded by particular lines and monuments, it was held that the evidence might apply to any part of the land included in the boundaries, whether on lot No. 6 or not; and the extent of lot No. 6 being a matter of reasonable doubt, that an entry by the plaintiff under his deed of lot No. 6 only, on what he claimed by clearly defined bounds as part of that lot, and subsequent possession in accordance with that entry, would enable him to maintain an action against any stranger without title who might interfere with his possession, whether the land ultimately proved to be part of lot No. 6 or not. "If the defendant had shown that another person had a better right than the plaintiff to the land in dispute—as that the *locus in quo* was part of a lot to which the plaintiff had no title, either by deed or adverse possession—it might perhaps have availed him in the reduction of damages, but would have been no bar to the maintenance of the action."[2]

§ 915. If a person own two adjoining parcels of land by different titles, the possession of one is not the possession of the other.[3] But where several detached lots of wild and unoccupied land in the same county are mortgaged by one instrument, and upon one condition, an entry by the mortgagee on one lot in the name of all will give him constructive possession of all the other lots, so that he may maintain trespass against a person afterward entering without right upon any of the lots.[4]

§ 916. Where trespass is committed on land which is afterward shown to belong to the State, the grantee in possession may maintain an action for the trespass, he being liable to the State for mesne profits.* Cutts v. Spring[5] was

[1] Hunt v. Taylor, 22 Vt. 556. [2] Poor v. Gibson, 32 N. Hamp. 415.

[3] Morris v. Hayes, 2 Jones L. N. C. 93. But see Fish v. Branamon, 2 B. Mon. 379.

[4] Green v. Pettengill, 47 N. Hamp. 375. [5] 15 Mass. 135.

* The actual possession of crown lands under a parol license from the crown

an action of trespass *quare clausum fregit* for entering on land and cutting timber. The defendant offered to prove that since the alleged trespass the State had recovered judgment against the plaintiff, on the ground that he held more land than he was entitled to hold under the grant from the then province of Massachusetts, and that the commissioners had assigned to him certain land, being a part of what he claimed to hold, but not including the *locus in quo*. The judge before whom the cause was tried refused to admit this evidence. And the Supreme Court, in sustaining his ruling, said: "It is wholly immaterial to the defendants whether the location covered more land than the terms of the grant would warrant. The plaintiffs were seized as well as possessed in regard to every one but the commonwealth, which might or might not reclaim part of the land located as not conveyed. The action, therefore, is rightly brought, and the value of the trees is the proper measure of the damages. For the commonwealth has a right to call the plaintiffs to account by a suit for the mesne profits, or in some other way; and as the defendants were wrong-doers to the plaintiffs, the latter ought to be in possession of the value of the trees as a fund to meet the claim of the commonwealth. If not called upon, they have a right to keep the money for their own use, being accountable to none but the commonwealth."

§ 917. Although when a State employs its power, for the preservation of property, to take which there is no person in existence, the property is not considered as passing by escheat to the State, yet the State is entitled to the possession as against mere strangers and trespassers. Where, therefore, a township of land in Maine was granted, before the separation, by Massachusetts, reserving therein certain lots for the support of education and public worship, it was held that until the beneficiaries of the lots came into existence, the

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entitles the party in possession to maintain trespass against a stranger (Harper v. Charlesworth, 6 D. & R. 572; 4 B. & C. 574). And the action will lie in behalf of an occupier of the public lands of the United States (Duncan v. Potts, 5 Stew. & Port. 82; Grover v. Hawley, 5 Cal. 485).

State of Maine had such a possession of the lots, as to entitle it to maintain trespass against strangers for cutting timber.[1] *

§ 918. The possession of land may be constructive. Formerly, a right of property, and a mere right of entry, were not deemed sufficient to enable a person to maintain trespass for an injury to land; but he must have had actual possession at the time of the trespass.[2] The strict rule of the common law has, however, been modified, and now the possession of land follows the title.† The legal owner is

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[1] State v. Cutler, 16 Me. 349.

[2] Campbell v. Arnold, 1 Johns. 511; Wickham v. Freeman, 12 Ib. 183; Stevens v. Hollister, 18 Vt. 294; Daisey v. Hudson, 5 Harring. 320; Clark v. Hill, 1 Ib. 335.

* The president and trustees of an incorporated village have not such a possession of the streets as to enable them to maintain trespass *quare clausum fregit* for an injury thereto (Conner v. New Albany, 1 Blackf. 88).

Previous possession of land, together with acts of ownership, by a person through whom the plaintiff derives title, will authorize a recovery against one afterward found in possession without title or claim (Cox v. Davis, 17 Ala. 714). When one enters upon land, without any color of title, he is considered in possession of no more land than he actually occupies. To make out his defense to an action of trespass, he must show that he had a prior possession of the exact places where the alleged trespass was committed (Moor v. Campbell, 15 N. Hamp. 208; Riley v. Jameson, 3 Ib. 23; Kincaid v. Logue, 7 Mo. 167; Sloane v. Moore, Ib. 170.

† In Massachusetts, it has been held that a deed of wild land, not recorded, without proof of possession under it, will not enable the grantee to maintain trespass against a stranger. Estes v. Cook, 22 Pick. 295, was an action of trespass *quare clausum*, the premises in question being two lots of wild land. To prove a constructive possession, the plaintiff produced deeds of the land executed to him before the commencement of the action, but not recorded at the time of the trial. It was held that this evidence was not sufficient to entitle the plaintiff to recover. The court said: "By the express words of the statute, a deed not recorded is declared void as against all persons but the grantor or grantors and their heirs only; and this has been the uniform construction of the statute, and a similar provision in the provincial statute of 9 Wm. 3, ch. 7. The object of this provision was to give notoriety to the transfer of real estate by recording the conveyance as a substitute for the ceremony of livery of seizin required by the common law to give validity to a deed of feoffment, and to prevent the fraud and deception which might be practiced if a deed of bargain and sale were valid and effectual to pass the estate without some act to give notoriety to the transfer. The only question that has arisen as to the construction and operation of this provision in the statute, is whether, if the grantee enters under his deed and continues in the open and undisturbed possession of the granted premises, or if a subsequent purchaser has notice of a prior conveyance, such possession or notice would be equivalent to the recording of the prior deed. This question, however, does not arise in the prssent case. For there was no evidence that the plaintiff ever entered under his deeds, or had any possession of the granted premises."

By the statute referred to in Estes v. Cook, *supra*, it is provided that no

presumed to be in possession, and may maintain trespass unless there is an adverse possession, or some claim by one in possession of a right by contract or operation of law, to the exclusion of the owner.[1] * Where a person claiming title

bargain, sale, mortgage, or other conveyance, in fee simple, fee tail, or for term of life, or any lease for more than seven years from the making thereof, of any lands, tenements, or hereditaments, shall be good and effectual in law to hold such lands, tenements, or hereditaments, against any other person or persons but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in the manner required by the statute (Rev. Sts. of Mass. ch. 37, § 4).

In South Carolina, it has been held that where land is uninclosed and uncultivated, the owner cannot prevent others from hunting wild animals thereon (M'Conico v. Singleton, 2 Rep. Com. Ct. 244; Broughton v. Singleton, 2 N. & M. 338).

[1] Poole v. Mitchell, 1 Hill, S. C. 404; Amick v. Frazier, Dudley's S. C. R. 340; Vance v. Beatty, 4 Rich. 104; Chesley v. Brockway. 34 Vt. 550; Robinson v. Douglas, 2 Aik. 364; Dejarnett v. Haynes, 23 Miss. 600; Richardson v. Millburn, 11 Md. 340; Ridgely v. Bond, 17 Ib. 14; Richardson v. Palmer, 38 N. Hamp. 212; Inhabs. of Barnstable v. Thacher, 3 Metc. 239; Renshaw v. Lloyd, 50 Mo. 368; Griffin v. Creppin, 60 Maine, 270; Terpenning v. Gallup, 8 Clarke, Iowa R. 74; Cohoon v. Simmons, 7 Ired. 189; Davis v. Clancy, 3 M'Cord, 422; Dobbs v. Gallidge, 4 Dev. & Batt. 68; Leadbetter v. Fitzgerald, 1 Pike, 448; Wilson v. Bushnell, Ib. 465; Shipman v. Baxter, 21 Ala. 456; Mason v. Lewis, 1 Iowa, 494; Melcher v. Merryman, 41 Maine, 601; Stearns v. Palmer, 10 Metc. 32.

* It is said in Bacon's Abridgment, 160, "Only the person who has the possession in fact of real property to which an injury has been done can maintain an action of trespass for the injury, because the gist of an action of trespass for an injury to either real or personal property is the being disturbed in the possession of the property; and the having the general property does not in the case of real property, as it does in the case of personal, draw to it a possession in fact."

Though the doctrine of constructive possession as applicable to land constitutes an important branch of American law, yet it is scarcely to be found in the English books. It is, indeed, peculiar to the condition of things in a new country, where an important business of the inhabitants is the reduction of wild land to a state of cultivation. When the settler enters upon a lot of wild land, it is impracticable for him at once to inclose it with that unequivocal mark of possession, a substantial and permanent fence. It would be no advantage to the land, and a useless expense. He occupies a part, erects a dwelling, and gradually extends his improvements, making such inclosures only as may from time to time be necessary for the protection of his crops. The residue of the land is suffered to lie open. The law of constructive possession declares that the deed of the land to the settler on record, which describes with precision the boundaries of the land, shall, so far as his title is concerned, be a substitute for a substantial and permanent fence around the whole; that his possession of the land, though actual but for a part, shall, by force of his claim under the deed, be constructive for the residue (Chandler v. Spear, 22 Vt. 388, per Hall, J.)

The above doctrine, which, when applied to a tract of land of suitable size for purposes of individual cultivation and improvement, seems justified and demanded by the wants and interests of a people in a new country, is only applicable to such tracts as are purchased for the purpose of actual cultivation (Chandler v. Spear, *supra;* citing Jackson v. Woodruff, 1 Cow. 276; Jackson v. Vermilyea, 6 Cow. 677; Jackson v. Richards, 6 Cow. 617; Jackson v. Oltz, 8 Wend. 440; Sharp v. Brandow, 15 Ib. 597).

Where the jury were instructed that "either the possession or the right of possession will authorize an action of trespass for an injury to land," it was held

to a tract of land, places a servant in a house on it, with the privilege of taking fire-wood, he has such a possession to the whole tract, as will entitle him to maintain trespass against a mere wrong-doer for cutting timber on the land.[1] If the premises rightfully belong to the plaintiff, but are in the actual possession of no one, or are occupied by a tenant at will or at sufferance, the plaintiff can maintain trespass as for an injury to his own possession against a stranger, and the proof will maintain the averment.[2] * So, likewise,

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error, because the right to the possession and right of entry are synonymous, authorizing an action of ejectment, but not of trespass (Polk v. Henderson, 9 Yerg. 310).

From the time the *caveat* is entered until the right of the patent is finally determined in ejectment, neither party (supposing him not in possession) has such a title as will sustain trespass against the other. "An action brought afterward by the patentee will lie for all injuries committed pending the dispute, and this, together with the writ of estrepement, is a sufficient protection to him who is finally adjudged to be in the right" (Black, C. J., Shoenberger v. Baker, 22 Penn. St. R. 398).

[1] Lamb v. Swain, 3 Jones Law, N. C. 370.

[2] 1 Chit. Pl. 6th Am. ed. 177, note; 2 Greenlf. Ev. § 614; Van Brunt v. Schenck, 11 Johns. 377; Starr v. Jackson, 11 Mass. 519; Kellenberger v. Sturtevant, 7 Cush. 465; Safford v. Basto, 4 Mich. 406; Ward v. Taylor, 1 Barr, 238; Mather v. Trinity Church, 3 Serg. & R. 513; Baker v. King, 18 Penn. St. R. 138.

* Where previous to the conveyance of land to A., movable property thereon, which was part of the realty, was sold by A.'s grantor to B., without the knowledge of A., and B., before A.'s deed was recorded, and without notice of the same, entered on the land and removed the property, it was held in an action of trespass by A. against B. therefor, that he was entitled to recover, although A.'s grantor remained in possession of the land a few days subsequent to its sale to A. (Chesley v. Brockway, 34 Vt. 550). This was an action for entering on land and removing therefrom a quantity of manure. The plaintiff claimed title to the premises under a deed from one Varney, dated April 24, 1858, and recorded May 1, 1858. It appeared that prior to the date of the conveyance from Varney to the plaintiff, the defendant bought the manure of Varney, and paid for it, and that he took the manure away between the 24th of April and the 1st of May, 1858, without knowing that the premises had been sold to the plaintiff. Varney remained in the house on the premises a few days after he had conveyed them; but the plaintiff had not given him liberty to do so. A verdict having been returned for the plaintiff in the court below, the Supreme Court, in refusing to disturb it, said: "When Varney sold the manure to the defendant, he was the owner of it, and of the land. The defendant's right to take it was, at that time, unquestionable, but his right would not ripen into a perfect title, until he actually took it. Until such taking and severance by the defendant, the manure remained a part of the realty. While thus remaining, Varney sold the land to the plaintiff, without giving him notice of the sale of the manure to the defendant. Thus the title to the manure passed by the deed to the plaintiff. At this point both plaintiff and defendant were *bona fide* purchasers—each having the same right of ownership. He who first perfected such right would get the complete legal title. The defendant could do it if he got the manure into his possession before the plaintiff's deed was recorded, or he had actual notice of the deed. The plaintiff could do it, if he recorded his deed, or if the defendant

the owner of a building is not out of possession because he has leased rooms in it, as such, to divers individuals. He still remains in the general possession of the building, and may maintain trespass if the building be destroyed, though these rooms are the chief parts of the building.[1] *

§ 919. The principle is well settled, that if a person enters upon a tract of land with visible boundaries, under a deed of the entire tract, his actual occupation and improvement of a part is construed a possession of the whole, although a portion be not inclosed.[2] This is more emphatically so when he makes a notorious claim to the whole;[3] and if, while he is thus in possession, a person, without color of

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had actual or legal notice thereof, before taking possession of the manure. It is clear that the plaintiff had such a possession as fully sustains the action. The injury was one affecting his interest in the land—in no wise affecting the rights of the temporary occupant. The occupant Varney remained in the house at the mere pleasure of the plaintiff, and only for a few days. He claimed no possession, or right of possession in the land. His possession was of the most transient character, and for no purpose of cultivating or using the land. In such a case, the title draws to it the possession for the purpose of redressing injuries to the estate of the real owner, as much as if the possession were really vacant."

A person claiming title by estoppel, being in the constructive possession of the land, may maintain trespass (Phelps v. Blount, 2 Dev. 177).

Where A. recovered judgment against B. in an action for unlawfully detaining land which was in the possession of C., B.'s tenant, and the sheriff put A. in constructive possession under a writ of *habere facias possessionem*, but B. afterwards obtained a *supersedeas* of the judgment, and C. refused to deliver the landlord's share of the crop to A., but delivered it to B., although he had before the *supersedeas*, and on A.'s request, told A. that he would deliver it to him; it was held that A. could not maintain trespass against C. therefor, the writ of *habere facias possessionem* giving A. no possession as against C. (Kretzer v. Wysong, 5 Grat. 9).

[1] Curtiss v. Hoyt, 19 Conn. 154.

[2] Welch v. Louis, 31 Ill. 446.

[3] Crowell v. Bebee, 10 Vt. 33; Kincaid v. Logue, 7 Mo. 167; Sloane v. Moore, Ib. 170; Brooks v. Bruyn, 18 Ill. 539.

* There is a difference between renting an entire building and the rooms of the building specifically. In the one case, the destruction of the building, as by fire, does not put an end to the lease, nor the payment of rent; in the other, it does produce that effect. This distinction was recognized in Stockwell v. Hunter, 11 Metc. 448, and Kerr v. The Merchants' Exchange Co. 3 Edw. Ch. R. 315. In the first of these cases, it was held that a demise of the basement room of a building several stories in height, without any stipulation by the lessor or lessee for rebuilding in case of fire or other casualty, gave the lessee no interest in the land, though he paid all the rent in advance; and if the whole building was destroyed by fire, his interest in the room was terminated. In the second case, it was held that where a tenant hires rooms only, his interest ceases with the destruction of the building. Therefore, where the complainants hired certain apartments designated by numbers, in the Merchant's Exchange, in New York, which was destroyed by fire during the demise, it was held that they could not claim new rooms on the old site, in the new Exchange.

title, enters upon another part of the lot, he will not be regarded as in joint possession of the whole lot with the owner, so as to acquire a title to the lot adversely to the owner.[1] * Where, in such case, it was proved that the defendant at various times had cut and sold wood from the land, it was held that such acts constituted trespasses, and not a disseizin.[2] But when one holds adverse possession of any part, the owner cannot maintain trespass for an act done on it while he is thus kept out[3]—the presumption that one's possession under his recorded deed is co-extensive with his grant being always overborne and repelled by an adverse possession so long as it exists.[4] † It seems, however, that it

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[1] Hubbard v. Austin, 11 Vt. 129.

[2] Ring v. King, 4 Dev. & Batt. 164; Bakersfield Cong. Soc. v. Baker, 15 Vt. 119.

[3] Gent v. Lynch, 23 Md. 58.

[4] Gardner v. Gooch, 48 Maine, 487.

* "It is now well settled, that possession of a portion of a lot of land, claiming the whole, gives color of possession, which, in construction of law, is possession itself; and that to produce the effect, it is not requisite that the claim should be by deed recorded in the proper office, or that it should be even by a deed containing all the statute requisites to convey land. It is enough that it be in writing, capable of being produced on request, or even that it be distinctly indicated upon the land by unequivocal monuments which would not fail to attract the attention of counter claimants" (Redfield, Ch. J., in Swift v. Gage, 26 Vt. 224).

An actual entry under a deed or grant of land is not necessary, in New Hampshire, to enable the grantee to maintain trespass *quare clausum fregit* (Warren v. Cochran, 10 Fost. 379; Concord v. McIntire, 6 N. Hamp. 527; Chandler v. Walker, 1 Fost. 282).

The assignee of a lease cannot maintain an action for trespass to the leasehold premises unless he has actually taken possession of them (Harrison v. Blackburn, 17 C. B. N. S. 678).

† Aikin ads. Buck, 1 Wend. 466, was an action of trespass for taking and carrying away a number of saw logs which had been purchased by the plaintiffs and received by their agent and marked as their property. The logs were mostly cut on the north end of a certain lot, to thirty acres of which the vendor of the logs claimed a possessory right. The defendant proved that he was an agent of the Peru Iron Company, and that when the logs were cut the company occupied the south end of the lot, and claimed to hold the entire lot, which was wild and uninclosed. The defendant offered in evidence a deed of the lot from the sheriff of the county to one Cady, and a conveyance from Cady to the Peru Iron Company, also a certificate of sale and deed of the same lot from the sheriff to the defendant. This evidence being objected to, on the ground that the deeds bore date subsequent to the time when the logs were cut, and also that the judgments and executions, by virtue of which they were executed, were not produced, it was rejected, and a verdict directed for the plaintiffs. The Supreme Court, in denying a motion for a new trial, said: "The plaintiffs showed a sufficient possession of the property to enable them to maintain the action. The logs were actually received and marked by the agent of the plaintiffs, and left upon land belonging to or claimed by the Peru Iron Company. The plaint-

is otherwise in the case of land sold by the United States—the patent of the government transferring to the purchaser the entire legal estate and seizin.[1] *

§ 920. If both parties can be considered in any sense in possession, such mixed possession inures to the benefit of the one having the legal title.[2] Two persons were grantees of the same land, without either of them having the actual possession. The one to whom the land was last conveyed, entered thereon, cut timber, and erected houses and fences. It was held that the one who had the elder title might maintain an action for trespasses committed before the actual possession was taken.[3]

§ 921. Where two persons have a concurrent or mixed possession, and neither party has any other title, nor the exclusive priority of possession, neither can maintain trespass against the other.[4] In Tappan v. Burnham,[5] the action was for taking sea weed from the plaintiff's land. The plaintiff

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iffs had such a right to the logs, *prima facie*, as to be entitled to take them into their actual possession whenever they pleased; and this is sufficient to maintain the action. The defendant entirely failed in his defense. The logs were cut on the north end of lot 210, in Maule's Patent, and the defendant proved possession of a dwelling-house, and the working of an ore bed, on the south end of the lot by himself and the Peru Iron Company, and contends that that gave him or the company constructively the possession of the whole lot. In this he was mistaken. He showed no deed for the lot. His possession therefore was confined to the land actually occupied by him or the company, and cannot be extended by construction to a single acre beyond it."

[1] Cook v. Foster, 2 Gilman, 652; Butterfield v. Centr. Pacific R. R. Co. 31 Cal. 264.

[2] Abbott v. Abbott, 51 Maine, 575; Leach v. Woods, 14 Pick. 461; Slater v. Rawson, 6 Metc. 439.

[3] Bailey v. Massey, 2 Swan, Tenn. 167.

[4] Inhabs. of Barnstable v. Thacher, 3 Metc. 239; Brimmer v. Proprietors of Long Wharf, 5 Pick. 131.

[5] 8 Allen, 65.

* One who buys land for the United States may maintain an action for an injury to the land after his purchase and before his possession (Blevins v. Cole, 1 Ala. 210), committed by a person wrongfully entering and holding before the purchase (Gale v. Davis, 7 Mo. 544). In Illinois, to maintain trespass under the statute defining "the extent of possession in cases of settlement on government lands," the land need not have been inclosed, nor need the plaintiff have settled on the land (Gleason v. Edmunds, 2 Scam. 448).

Land claimed under the pre-emption laws will be protected from trespass as to such portion as is in the actual exclusive possession of the claimant (Colwell v. Smith, 1 Wash Terr. 109).

did not show any exclusive separate right in the soil, or any exclusive possession. The premises were uninclosed. The tide ebbed and flowed over them. The plaintiff exercised no acts of ownership over them, and had no possession of them except to take muck or sea weed therefrom, when it was thrown up by the action of the winds and waves. It appeared that during the period of the plaintiff's occupancy, and long prior thereto, many other persons had done similar acts on the premises. The plaintiff did no act and made no claim except to go on and take the drift weed; and it was not shown that he forbade others from exercising the same right. The defendant justified under a license from the town. It appeared that the town was in possession of the beach, exercising acts of ownership, and claiming the right to dispose of the sea weed thereon, long before the plaintiff's alleged possession and occupancy commenced. There was no evidence that this possession by the town was ever relinquished; but, on the contrary, the proof tended to show that the right of the town to the beach and to the drift weed, was asserted up to the commencement of the action. It was held that as the most favorable view which could be taken of the plaintiff's case was that his possession was a mixed and concurrent one with that of the town, he had not established such a right to the beach as would enable him to maintain the action.*

* Inhabs. of Barnstable v. Thacher, *supra*, was an action of trespass brought by the town against several persons for entering the plaintiffs' close and picking cranberries. The plaintiffs proved no title, but relied on their possession, which they had taken ten years previous, pursuant to a vote of the town, and held ever since. The defendants justified under a license from one Hallett, who claimed a right in the soil, and the right to pick cranberries, as one of the heirs of his father and grandfather; but there was no proof that his father or grandfather had any title to the premises. It was, however, proved that, under this claim of right, he had, from time to time, for forty years, picked cranberries on the premises, and had given license to others to pick; that he never yielded to the claim and regulations of the plaintiffs, but continued to assert his right of possession after the entry on the premises by them. The court, per Wilde, J., in nonsuiting the plaintiffs, said: "This possession of Hallett, although it was not exclusive, but was concurrent with others, and would not avail in an action by the proprietors of the land, is nevertheless such a possession as the plaintiffs had no right to interrupt. When they entered, in 1831, with the intent to obtain exclusive possession of the premises, and the right of regulating the picking of cranberries, they had no title nor pretense of title; and, as to Hallett, the town has acquired no

§ 922. If, by permission of the owner of land, two persons enter thereon for the exercise of separate and distinct privileges, the possession of each is co-extensive with his privilege; and if one encroach upon the rights of the other, the latter may maintain trespass therefor. Where it appeared that the plaintiff having bought all the cedar, pine, and tamarack timber standing on the land of another, sold the pine timber to the defendant, and that both parties having gone upon the land to procure the timber belonging to them respectively, the defendant carried away some of the cedar which had been cut down by the plaintiff; it was held that the plaintiff was entitled to recover.[1] *

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better title since, so far as it relates to the exclusive right of picking cranberries. Hallett has resisted this claim, and has had concurrent possession with the plaintiffs ever since they entered. We think, therefore, as Hallett had prior possession, he had a right to maintain it, notwithstanding the entry and claim of the town. The town had no better right to regulate the picking of cranberries, than any individual had."

[1] Haskin v. Record, 32 Vt. 575.

* In the above case, the court stated the grounds of their decision as follows: "The plaintiff having the right to all the timber upon the premises, except the pine, with the right to enter and remove it, and having entered for the purpose of removing it, is to be regarded as in possession of the premises to the extent necessary to enable him to accomplish it, and no further. Beyond this he has no interest in the premises, and no right to the possession; but, to this extent, his right and his possession are exclusive, both as to the defendant and the owner of the soil; and if either were to enter upon the premises and do any act in violation of these rights, the plaintiff would have his remedy by an action of trespass *quare clausum*. So, too, of the defendant. He is the owner of the pine timber, with the right to enter and remove it. The case shows him to be in possession of the premises for the purpose of removing the pine at the same time that the plaintiff is in possession for the purpose of removing the other timber. Their possession is like their interest, not joint, but separate, and limited by the extent of their interest. And the possession of both does not constitute the entire possession; for, except for the purpose of removing the timber, the owner of the soil is to be regarded as in the possession, and for any injury to the freehold not affecting the rights of the plaintiff or defendant in this suit, the owner of the soil could maintain the action of trespass *quare clausum*. In this case, therefore, when the defendant, being in possession for the purpose of removing the pine timber, goes further and takes the cedar timber belonging to the plaintiff, and for the removal of which, he is in possession, such act of the defendant is not only a violation of the plaintiff's right of property, but of his possession; and this cannot be affected by the fact that the defendant has the right to go to all parts of the premises where the pine timber is to be found to remove it. As it is only to that extent that he is to be regarded as in possession, when he goes beyond this, as he must in all cases where he attempts to take the other timber, he becomes a trespasser on the possession of the plaintiff; he goes where he has no right to go, and where he has no possession, his possession being limited by his right."

§ 923. Strictly, an exception of a part of the thing granted is void. But an incident to the grant may be reserved. Therefore, the reservation of a mill site out of a tract of land is good. Until, however, the grantor or his assigns exercise the right and build the mill and dam, the exception is inoperative, and the whole premises vest in the grantee, who may maintain trespass against any one, except the grantor or his assigns; and even against them, unless they are in the exercise of the right reserved.[1] *

§ 924. One may have constructive possession of land independent of paper title, and without the literal *possessio pedis* upon any part of the land.† It should, however, be marked by unmistakable *indicia* of right to control. A fence is always enough for this purpose. A mere marked

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[1] Dygert v. Mathews, 11 Wend. 35.

* In Dygert v. Mathews, *supra*, the court said: "The reservation of the land is for a specific purpose, and an appropriation to any other object, by the grantors or their assigns, is without right, and they can be in no better situation than strangers, and therefore are trespassers. All other rights to the premises in question, besides those reserved to the grantors, belong to the grantee, and for any encroachment upon them he has the appropriate remedy. The nature of the reservation may be very material to the grantee. In this case, he may have considered the erection of a grist mill on the place reserved no detriment to the grant, but there are many uses to which it might be appropriated incompatible with such a supposition. It would, therefore, be unjust to the grantee, and unreasonable to allow the grantors or their assigns to use the land in question in any other manner, or for any other purpose, than in pursuance of the intent of the parties, to be gathered from the exception in the deed; and that cannot be misunderstood. It may be added, until the right is exercised and the grist mill built, it cannot be ascertained with certainty what quantity of land will be necessary for that purpose, nor the precise location" (citing Thompson v. Gregory, 4 Johns. 81; Provost v. Calder, 2 Wend. 517).

† In Louisiana, the plaintiff in the petitory action is not bound to show as against a trespasser a perfect title (Coucy v. Cummings, 12 La. An. 748).

One who has an entire but exclusive interest, though but temporary, may maintain an action of trespass *quare clausum* (Dorsey v. Eagle, 7 Gill & Johns. 321).

A person legally entitled to land, having entered without making any formal declaration of his entry, may maintain trespass against a person wrongfully in possession at the time of entry, and continuing in such possession afterward (Butcher v. Butcher, 7 B. & C. 399; 1 M. & R. 220).

Until after assignment of dower, the dowress has no right of entry, and cannot recover in trespass against the heir, who has both the fee and the right of possession (Hoots v. Graham, 23 Ill. 81).

One who has been in possession of government land, but who has left the land, it having been purchased by another person from the government, cannot set up in justification his former occupancy as to trespasses commited by him upon the land after his abandonment (Welch v. Louis, 31 Ill. 446).

line has not of itself been held sufficient. But in the absence of all paper title, probably it might be so made as to be equally indicative of claim of title without any other monument.* Chandler v. Walker,[1] was an action for cutting and carrying away a quantity of timber from land known as lot No. 6. The plaintiff produced no paper title, and showed no legal right of ownership to the property, but stood solely upon his possession. It appeared that lot No. 6 was northerly of lot No. 7, the plaintiff's buildings being on the latter. On the north side of No. 6 was an ancient spotted line. The easterly part of that lot was cleared up to, and along that line, and a fence made as far as the clearing went. This clearing was occupied as a pasture. The southerly part of this lot was cultivated; and the northwesterly part, where the trespass was committed, was wood and timber land. The plaintiff had occupied that part of the lot for thirteen or fourteen years, up to the spotted line, as a part of his farm, as a wood and timber lot. The lot was not inclosed on the north, except at the easterly end, where the pasture was; but it was occupied for all the ordinary purposes of a farmer's wood lot up to a definite and known line. The following instruction in the court below was held correct: "That if the jury found that the plaintiff had been in possession of the *locus in quo* for the preceding thirteen or fourteen years, occupying it as part of lot No. 6 up to the spotted line, and as a part of his farm, and as a wood and timber lot attached to and belonging to the same, it would be a sufficient possession to maintain trespass against those who showed no title, or possession or right of possession, as was the case with the defendants; and that it was not necessary for them to find that there was a fence upon the whole length of said spotted line." An alleged trespass consisted

[1] 1 Fost. 282.

* Where, in an action of trespass to lands, it appeared that at the time of the alleged wrong, the plaintiff, who had no title to the premises, was in the act of inclosing them, but that one side of them remained open, it was held that he had not such a possession as would entitle him to recover (Allen v. Suseng, 1 Cold. Tenn. 204).

in carrying away a quantity of stone from a small lot containing about three quarters of an acre. The lot, which belonged to the plaintiff, was not inclosed, improved, cultivated, or used for any purpose. The part where the trespass was committed, was incapable of being used in any way on account of the stone; but on the residue of the lot there were two buildings used as a blacksmith shop and a store house. It was held that the possession of the buildings gave the plaintiff a constructive possession of the whole lot, and rendered the production of a paper title by him unnecessary.[1]

§ 925. Where there is a paper title, it requires very distinct occupancy to extend the possession beyond the limits described in the deed; inasmuch as the deed, while it is notice of claim to the extent of the boundaries therein set forth, is also a distinct disclaimer of any further pretensions. The owner of the adjoining lot is then put off his guard as to any merely equivocal acts, and is naturally led to put the most favorable construction upon them as explained by the deed.[2]

§ 926. A person who is in possession under a valid contract of purchase, may maintain an action of trespass against the subsequent vendee of the owner of the land for entering thereon.[3]* The obligee in a bond of conveyance is en-

[1] Brown v. Majors, 7 Wend. 495.
[2] Shedd v. Powers, 28 Vt. 652.
[3] White v. Livingston, 10 Cush. 259.

* White v. Livingston, *supra*, was an action of trespass for turning the plaintiff out of his dwelling, he being in possession under a bond from one Brown, the former owner, conditioned to convey the premises to the plaintiff if he should pay to Brown a certain note, on demand, with interest, and in the mean time to allow the plaintiff to remain in possession. Payment of the note had never been demanded, and the interest was paid regularly. The defendant claimed title to the premises under a quitclaim deed from Brown and a notice of the same to the plaintiff, before the alleged trespass was committed. At the trial in the Common Pleas, the judge ruled that the plaintiff was only a tenant at will; that such tenancy was terminated by the deed from Brown to the defendant, and that after due notice thereof to the plaintiff, the defendant had a right to enter and remove the plaintiff's goods. A verdict was accordingly rendered for the defendant. The Supreme Court, in ordering a new trial, said: "We are all of opinion that the legal effect of the condition of the bond given by Brown to White, was a demise to White of the premises therein described, so long as he should pay the interest quarterly on the note therein mentioned, and should not fail to pay the principal on demand; and that as White had

titled to maintain trespass against the obligor, for injuries to the freehold, before he has paid the balance of the purchase money, or received his deed;[1] and where the action is brought against a stranger, it is no defense that the plaintiff has not performed, or has forfeited the conditions of his contract.[2]

§ 927. A vendee of land under a contract of purchase, which does not give the right of possession, will be a trespasser if he enters. Nor does a contract to purchase, which gives a right to enter, authorize the purchaser to cut timber, unless the land is wild, in which case, the purchaser may clear up so much of it as good husbandry shall require.[3] If he fails to make his payments, and disavows all intent to make them, he is as much a wrong-doer as though his original entry had been without color of right, notwithstanding the owner of the land offers to allow him to retain possession if he will pay.[4] * The vendor may treat him as

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punctually paid the interest on the note, as rent, and it did not appear that payment of the principal had ever been demanded of him, his rights under the demise continued at the time of Brown's conveyance of the premises to the defendant. Not being tenant at will when that conveyance was made, his tenancy was not thereby terminated."

[1] Smith v. Price, 42 Ill. 399.

[2] White v. Guirons, Minor, 331.

[3] Van Deusen v. Young, 29 N. Y. 9; Erwin v. Olmsted, 7 Cow. 229; Ives v. Ives, 13 Johns. 235; Suffern v. Townsend, 9 Johns. 35; Cooper v. Stower, Ib. 331; Mooers v. Wait, 3 Wend. 104.

[4] Fuller v. Van Geesen, 4 Hill, 171.

* In Wendell v. Johnson, 8 N. Hamp. 220, which was an action of trespass *quare clausum*, it was proved that the defendant agreed to purchase the land that he paid $50 down, and gave his notes for the balance on which he afterwards paid $20; but that he ultimately failed to carry the contract fully into effect. The plaintiff gave him leave to clear a portion of the land in a husbandlike manner; and he took possession, and cut and carried away large quantities of timber from various parts, but no part of it was regularly cleared. The court said: "It would be doing the defendant no injustice to say, that for this abuse of the authority given him, he should derive no advantage from it; that under such circumstances he should be presumed to have abandoned the authority given him, and to have acted in his own wrong, and be made answerable as a trespasser in ordinary cases; but the law seems not to permit us so to consider his acts. There is another ground, however, on which this suit may be sustained. The authority to enter and clear a portion of the land was doubtless given the defendant, with the view and expectation of his fulfilling the agreement to purchase, and was a part of the same contract; and inasmuch as he has refused to perform that contract, he cannot now be permitted to protect himself under it. Such permission would be manifestly unjust towards the plaintiff, and would be enabling the defendant to take advantage of his own wrong. In the present

a trespasser or as a tenant at will, at his election. But if a deed has been given, pursuant to a parol agreement, the tenancy at will is merged in the executed contract, which will relate back to the time that possession was given under the agreement, and in that case no action of trespass can be maintained.[1]* If, however, trespass be committed by a

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case, the defendant not only refused to perfect the contract, but in the first instance violated it by cutting and carrying away the timber without clearing any part of the land, as he had stipulated to do. We entertain no doubt that the action on this ground is supported; and let judgment be entered on the verdict deducting the sums paid by the defendant towards the land."

Where a father covenanted to stand seized of a certain farm to his own use during his life, and upon his death to the use of his son and his heirs forever, provided that the son would furnish his father during life with suitable food, clothing and medicine, the conveyance to be void upon breach of the condition; it was held, that the condition having been broken, the father need not re-enter, because he was already in possession, and that he might maintain trespass *quare clausum* against the son for any entry upon the farm against the will of the father (Rollins v. Riley, 44 N. Hamp. 9).

Coke says: "If a man by his deed, in consideration of fatherly love, &c., covenant to stand seized to the use of himself for life, and after his death to the use of his eldest son in tail, the remainder to his second son in tail, with a proviso of revocation, and the father doth make a revocation according to the proviso, the whole estate is maintenant revested in him without entry or claim for the cause aforesaid" (Coke's Lit. 218 *b*).

In Rollins v. Riley, *supra*, the son claimed that the terms of the condition to the deed by which he was to be allowed the use of the farm and half the house so long as he maintained his father, made him a tenant at will or at sufferance, and that, therefore, the father could not maintain the action without a notice to quit, or without a re-entry. The court remarked that it seemed evident from the whole deed that the plaintiff intended to keep the possession in himself, and the right of possession, and that the arrangement that the son was to be allowed to have the use of the farm and half the house did not make him a tenant in any respect to his father, so as to give him the legal possession. That he might have had such a right there, being interested in the crops, so long as he performed his agreement, as that he could have maintained trespass *quare clausum* against a stranger who should enter and harvest his crops; yet that it was not such a possession as divested the possession of the plaintiff. That when the son failed to perform his agreement in furnishing the plaintiff with clothing, his right to have the use of the land ceased, and after that the plaintiff being in possession could sue in trespass for any subsequent interference with the land or house. No question was raised in the case with regard to the ownership of crops sowed or planted by the son previous to his failure to perform his contract, or with regard to the rights of the parties to such crops after the breach. The action was for entering with force the land and dwelling-house of the plaintiff and keeping him from the use and enjoyment thereof

[1] Woodbury v. Woodbury, 47 N. Hamp. 11.

* "Where a man under a contract of purchase, by permission of the vendor, enters upon the premises and enjoys a beneficial use, and afterwards fails to complete the purchase, it is doing no more violence to the real contract, or to the facts in the case, to hold that the purchaser was during this time a tenant at will, and that the law implies a promise to pay reasonable rent for such beneficial use, where the real contract is rescinded, than it is to hold that the purchaser originally with force and arms broke and entered the vendor's close, for such was in no sense the fact. Instead, therefore, of the vendor's waiving the tort, there was in

stranger on land which a person holds as owner, or as tenant of any less estate, his right of action for the trespass remains, whether the action be commenced before or after parting with the estate.[1] *

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fact no tort to waive. But the vendee, by refusing to perform his contract, has put himself in a position where he may be properly treated as a trespasser or as a tenant with equal propriety, at the election of the owner, having placed himself in that position by his own wrong act subsequent to his entry, though in fact he did not enter either as a trespasser or as a tenant." Sargent, J., in Woodbury v. Woodbury, 47 N. Hamp. 11, approving Clough v. Hosford, 6 N. H. 233, not for the reason there stated, that the tort might be waived and assumpsit brought, but because there is an election of remedies where the owner may treat the occupant either as a tenant or as a trespasser, when in fact he was neither, but where in consequence of his own wrong act he may readily, by a fiction of law, be converted into either (Alton v. Pickering, 9 N. Hamp. 494).

In an action of trespass *quare clausum fregit*, it appeared that the defendant went into possession of the land under a verbal contract of purchase, paid a part of the purchase money, and claimed the land as his own. No rent was reserved and none was due, and in no way, expressly or impliedly, did he acknowledge any one to be his landlord. The defendant not paying the purchase money according to the contract, the owner of the land conveyed it to the plaintiff. It was held that this did not constitute the defendant a tenant to the plaintiff, nor give the plaintiff any possession of the land so as to enable him to maintain trespass against the defendant for an injury done to the premises (Ripley v. Yale, 16 Vt. 257, citing Wheeler v. Hotchkiss, 10 Conn. 225).

A person holding under an oral lease from a tenant at will may maintain an action of trespass *quare clausum fregit* against one claiming under a subsequent written lease from such tenant at will (Hilbourn v. Fogg, 99 Mass. 11). Gray, J.: "In this case the plaintiff occupied her room as tenant at will of McGrath, and, while this tenancy at will continued, might maintain an action against McGrath or any person claiming under her for disturbing the plaintiff's possession. McGrath made a written lease of the room to Fogg, which, if the lessor had had a sufficient title, would have terminated the tenancy at will of the plaintiff and prevented her from maintaining this action for the removal of her goods. But the report finds that McGrath did not own the estate, and was herself a mere tenant at will of the rightful owner, and could not, therefore, make a valid alienation by written lease which would give Fogg a better title than she had previously granted to the plaintiff. This fact is in no way inconsistent with her title as lessor at will of the plaintiff, and the plaintiff, by having entered into possession as her tenant at will, was not estopped to deny that she had any greater estate and to maintain this action" (citing Dickinson v. Goodspeed, 8 Cush. 119; Curtis v. Galvin, 1 Allen, 215; Pratt v. Farrar, 10 Allen, 519; Cooper v. Adams, 6 Cush. 90, 91).

In Doe v. Barton, 11 Ad. & El. 307, Lord Denman said that if the lessor had been strictly tenant at will of another, no doubt his tenant might have shown the determination of that will on the part of the lessor's lessor.

[1] Cargill v. Sewall, 19 Maine, 288; M'Graw v. Bookman, 3 Hill, S. C. 265.

* In Cargill v. Sewall, *supra*, the plaintiff in error claimed to have a judgment against him, wherein the defendant in error was plaintiff, reversed, because the plaintiff in that action, which was trespass *quare clausum fregit*, sued, styling himself clerk and minister of the parish, and before judgment was rendered therein, had ceased to be such minister; the land on which the trespass was alleged to have been committed being ministerial land. The plaintiff in error contended that when the plaintiff ceased to be a minister of the parish, it worked a discontinuance of the suit, and that consequently the judgment thereafter entered up was erroneous. He contended that the dissolution of the parochial re-

§ 928. In all cases of disseizin, the owner may maintain trespass if the entry were made while he was himself in possession. But the damages will be restricted to the first entry, unless the plaintiff make a re-entry upon the land before action brought.[1] When another person has the actual occupancy, the exhibition of a paramount title is not sufficient to maintain trespass for acts committed subsequent to an ouster, either against the disseizor or against any one else. The right of the true owner to the use and profits of the land is suspended until he regains possession either by an entry or under a legal judgment. During the continuance

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lation was tantamount to a natural death, as it respected the action. It was assumed that the suit was by the plaintiff in his ministerial capacity solely; and it was likened to that of many other persons suing in an artificial capacity, which, when it ceases, terminates the power to do and perform any and every act depending upon such capacity. But it was held that this view was mistaken. The court said: "The plaintiff did, to be sure, style himself clerk and minister. But this may, if the merits of the case will admit of it, be taken and deemed to be merely *descriptio personæ*. It may, and indeed must, be contended by the plaintiff in error, that the merits are not such as to render this admissible. It is true that the land on which the trespass was alleged to have been committed, was described in the plaintiff's declaration as a ministerial lot. This, however, may also be regarded merely as a description of the land on which the trespass was committed, provided it be not essential to the maintenance of the action by the plaintiff in his artificial character or capacity solely. The plaintiff in this case was seized and possessed of the *locus in quo*. This estate was a tenancy of a certain description. If settled for life as the minister of the parish, it gave him an estate of freehold upon condition; if for a term of years, his estate in the land was commensurate with the term. The usufruct was in him for the time he might be so continued in the occupancy. He might cut therefrom what in law is denominated housebote; but like other tenants having less than a fee, he could not commit waste. The tenant then had all the rights incident to his tenancy. If a stranger trespassed upon the land, a right of action accrued to him, and vested in him personally. He might have brought his action without alluding to the nature of his tenure. His description then of himself as minister, and of the land as a ministerial lot, may be regarded as superfluous, and may be rejected as such, or as merely descriptive. If the right of action was in him personally when commenced, it would follow him after his tenure ceased. As the defendant in error was the tenant of the land when the trespass was committed; as he was answerable therefor as for waste; as the right of action for the trespass vested in him personally, and continued in him after he parted with the estate; the judgment against the plaintiff in error was properly entered up and must be affirmed."

Where a decree is granted to a divorced husband, setting aside a deed of land made by order of the court to the wife, an action of trespass cannot be maintained by him against a person who had previously bought of the wife and removed standing timber from the land (O'Hagan v. Clinesmith, 24 Iowa, 249).

A claim against a person on account of trespass on land may be assigned, and the assignee may bring an action therefor (More v. Massini, 32 Cal. 590).

[1] Rowland v. Rowland, 8 Ham. 40; Cutting v. Cox, 19 Vt. 517; Abbott v. Abbott, 51 Maine, 575.

of the disseizin the freehold is in the disseizor, and he alone has the right to receive the profits, or to recover for any direct injury done to the land.[1] There is, however, no principle upon which a mere disseizor can oust the true owner of a right to recover damages for an injury to his land by instituting an action and recovering them himself. If the party in possession has not a title adverse to all others, any one who enters upon him and does a permanent injury to the freehold must be liable also, it would seem, to the action of the lawful owner for such damages as he has sustained by the entry.[2]

§ 929. Every entry and trespass upon land does not amount to such a disseizin as will prevent the disseizee from maintaining trespass for acts done after the disseizin until a re-entry. To have such an operation it must be a disseizin by which the disseizor not only gains possession, but actually puts the disseizee out of possession.[3] * But where a person claiming title to land entered upon it and removed iron ore from time to time, without inclosing or residing upon the land, it was held that such entry and removal of ore constituted an actual possession by disseizin, and that the owner could not recover for injuries to the freehold subsequent thereto until he had recovered possession.[4]

§ 930. The entry of the owner upon land held by a trespasser, in order to take possession, manifested by acts of ownership on the land, such as plowing it or the like, or by a formal declaration accompanying the entry, will enable him to maintain trespass, but not if the demonstration of the owner be not made on the land and the wrong-doer continues to hold adverse possession.[5] In Chadbourne v. Straw,[6]

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[1] Caldwell v. Walters, 22 Penn. St. R. 378; Brown v. Ware, 25 Maine, 411.

[2] Woods v. Banks, 14 N. Hamp. 101.

[3] Holcomb v. Rawlins, Cro. Eliz. 540; Smith v. Burtis, 6 Johns. 197; Atkins v. Horde, 1 Burr. 108; Wendell v. Blanchard, 2 N. Hamp. 456.

[4] West v. Lanier, 9 Humph. 762.

[5] Bynum v. Carter, 4 Ired. 310. [6] 22 Maine, 450.

* Possession under a levy will constitute an ouster, notwithstanding the levy is void (Jewett v. Whitney, 43 Maine, 242).

which was an action of trespass *quare clausum*, it appeared that West, one of the defendants, entered into possession of the land and disseized the owner in the year 1828, and that he continued therein until after the plaintiff recovered a judgment against him in an action of entry in September, 1841; that the plaintiff made a formal entry upon the premises before the commencement of that suit, and that while it was pending the present action of trespass was brought against West and the other defendant, who was acting under him, for cutting and carrying away trees standing on the premises. The trespass was alleged to have been committed between January 3d and April 1st, 1841. It was held that the mere formal entry of the plaintiff, which did not disturb the possession of West made two years previous, was not equivalent to that actual or constructive possession required to entitle the plaintiff to recover.

§ 931. After the disseizee has re-entered, he may have an action of trespass for the intermediate damages or mesne profits during the time of the tortious dispossession. The law in such cases resorts to a fiction for the attainment of justice, and supposes the freehold to have been all along in the rightful owner by a kind of *jus postliminii*, and thus he is considered as having had a constructive possession while the actual possession was in the disseizor.* If, therefore, A.

* Bacon (Abr. Trespass, C) says: "If a man who once had the possession in fact of real estate, quit it or be deprived thereof, he cannot maintain an action of trespass *quare clausum fregit* for an injury done thereto which was done betwixt the time of his quitting or being deprived of the possession and his regaining the same by re-entry." But Rolle (2 Abr. Trespass, T) says: "If a man be disseized, after his re-entry he may have action of trespass against the disseizor for any trespass done by him after the disseizin, for by his re-entry his possession is restored *ab initio* and at all times after."

The general rule of law as to the right of the disseizee to maintain trespass *quare clausum fregit* against the disseizor is thus laid down by Blackstone (3 Bl. Com. 210): "Though a disseizee might have it (the action) against the disseizor for the injury done by the disseizin itself, at which time the plaintiff was seized of the land, he cannot have it for any act done after the disseizin until he gained possession by re-entry, and then he may maintain it for the intermediate damage done; for, after his re-entry, the law by a kind of *jus postliminii* supposes the freehold to have all along continued in him." Substantially the same is stated in 4 Kent Com. 119, and in 5 Bac. Abr. 166. Lord Coke, in his commentary upon Littleton, 257 *a*, says: "The disseizee shall have an action of trespass against the disseizor, and recover his damages for the first entry without any re-

disseize B. and C. disseize A. and afterward B. re-enters, he may maintain trespass against both C. and A., for both are wrong-doers.[1] * But the doctrine of entry by relation applies

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gress, but after regress he may have an action of trespass with a *continuando*, and recover as well for all the mesne occupation as for the first entry." Littleton, §§ 430, 256 *b*, is to the same effect.

In New Hampshire, "the party who has an estate in land, and a right of entry, is as a general rule supposed to have entered and become actually seized and possessed according to his title for the purposes of his remedy by writ of entry or action o trespass. This rule is not allowed to change the substantial liability and right of the parties. Where an entry is necessary to take advantage of a condition or forfeiture, it must be actually made. In that case, the estate of the plaintiff commences with his entry. Until he enters he has made no election to insist on the forfeiture or breach of condition. But where a party has an estate, and not a mere right by entry to obtain an estate, he may, by immemorial usage, without regard to the derivation of his title, count in a writ of equity on his own seizin, and a disseizin done to himself, although he never had actual possession of the land. The law in such case, for the purposes of the remedy, supposes him to have entered and become seized, and to have been disseized by the tenant" (Perley, C. J., in Dexter v. Sullivan, 34 N. Hamp. 478, citing Concord v. McIntire, 6 N. Hamp. 529; Gibson v. Bailey, 9 N. Hamp. 168; and see Tappan v. Tappan, 36 Ib. 120.

In 4 Leon. 184, and in Godb. 133, Anderson, C. J. says: "If one intrude upon the possession of the king, and another man entereth upon him, he shall not have an action of trespass for that entry, for that he who is to have and maintain trespass ought to have a possession. But in such case he hath not a possession, for every intruder shall answer to the king for his whole time, and every intrusion supposeth the possession to be in the king. This doctrine grows out of the principle that the king cannot either be disseized or dispossessed, and consequently the intruder cannot gain possession by his entry. It is an exception to the general rule founded on the prerogative of the king and public policy." But see Johnson v. Barret, Aleyn, 10, and remarks of Bayley, J., in Harper v. Charlesworth, 4 Barn. & Cress. 590.

[1] Emerson v. Thompson, 2 Pick. 473; Graham v. Houston, 4 Dev. 232; Taylor v. Townsend, 8 Mass. 411; Frost v. Duncan, 19 Barb. 560; Morgan v. Varick, 8 Wend. 587; Allen v. Thayer, 17 Mass. 299; Bigelow v. Jones, 10 Pick. 161; Stean v. Anderson, 4 Harring. 209.

* In Liford's Case, 11 Co. 51, Sir Edward Coke says: "If one disseizes me, and during the disseizin, he cuts down the trees or grass, or the corn growing upon the land, and afterwards I re-enter, I shall have an action of trespass against him *vi et armis*, for the trees, grass, corn, &c. For after my regress, the law, as to the disseizor and his servants, supposes the freehold always continued in me. But if my disseizor makes a feoffment in fee, gift in tail, lease for life, years, &c., and afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title; for this fiction of the law, that the freehold continued always in me, shall not have relation to make him who comes in by title, a wrong-doer *vi et armis*, for *in fictione juris semper æquitas existat*. But in such a case, I shall recover all the mesne profits against my disseizor, in the same manner as the disseizee in such cases should recover, in an assize at the common law before the Statute of Gloucester, ch. 1, damages only against the disseizor." He adds: "If my disseizor is disseized, I shall not have an action against the second disseizor, and I shall recover all my mesne profits against my disseizor;" and he cites the Year Books. Lifford's case was decided the 12th of James 1st, about A. D. 1615. Holcomb v. Rawlins, Cro. Eliz. 540, was decided in the 28th Elizabeth, about A. D. 1596. That was trespass *quare clausum fregit*. The defendant pleaded that long before, Thomas Clerk was seized in fee and let to

to the case of disseizor and disseizee only.[1] In Case v. Degoes,[2] the plaintiff sued the defendant for cutting and carrying away logs after notice of title and after being forbidden. The defendant justified under a license from one Bull, who at the time of the trespass was in possession under a writ of restitution awarded on an indictment against the plaintiff for a forcible entry, which was afterward quashed for irregularity, and restitution awarded. The point was, whether the defendant was answerable to the plaintiff in trespass for an act done whilst he was out of possession, notwithstanding the defendant had full notice of the plaintiff's title, and was forbidden. The court held unanimously that trespass would not lie. Bull was considered a trespasser by relation, and answerable for the damages. With respect to the doctrine of relation, it was held that it should not extend to strangers, but applied only to the same parties; that the defendant's being warned could not affect the question, but that it was enough that Bull was in possession.

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him for years. The plaintiff replied that he himself was seized until by the said Thomas Clerk disseized, who let to the defendant, and that after, he re-entered, and the trespass *mesne* betwixt. The defendant having demurred, his counsel cited some of the cases relied on by Coke. But the court, three justices to one, gave judgment for the plaintiff. Mr. Justice Buller, in his Nisi Prius Cases (86–7), quotes the doctrine of Liford's case, and says: "So the law is laid down by Lord Coke, but it may admit of doubt, for there are cases to the contrary, and the reason of the law seems to be with them."

The grant of A. covered land previously granted to B., and much more. A., who had knowledge of the grant to B., occupied by his agents part of B.'s grant, with a claim to the whole within his own grant, but not long enough to give him title by possession. Subsequent to A.'s occupancy, C. acquired an adverse *pedis possessio* of three years' duration within the grant to B., which he abandoned, and was succeeded by D. It was held that A. could maintain trespass *quare clausum fregit* against D. (McColman v. Wilkes, 3 Strobh. 465).

Where a person, without any previous authority, enters on land in behalf of the owner, his entry will inure to the benefit of the owner, if he afterwards ratify it; and an action for a trespass committed on the land previous to the entry will amount to a ratification where an entry was necessary to maintain the action (Dexter v. Sullivan, 34 N. Hamp. 478).

An agent cannot be permitted to defeat the object for which he was employed, and the moment he resists the entry of the owner, he becomes a trespasser (Looram v. Burlingame, 16 La. An. 199). When a person commits a disseizin as agent of another, his possession and claim are his principal's, and he cannot avail himself of them as a disseizor in an action of trespass against him for acts afterward done by him upon the land in his own behalf (Atkinson v. Patterson, 46 Vt. 750).

[1] Litchfield v. Ready, 5 Exch. 939; 20 L. J. Exch. 51.

[2] 3 Caines, 261.

§ 932. A lawful entry on land by a disseizee, with the exercise of acts of ownership thereon, revests in him the possession sufficiently to enable him to maintain an action of trespass against the disseizor for his subsequent entry,[1] or to justify the forcible ejection of the disseizor.[2] * Tyler v. Smith [3] was an action of trespass for entering the plaintiff's premises and taking hay therefrom. It was objected that the plaintiff, at the time of the alleged trespass, was disseized by the defendant. But assuming that the previous acts of the defendant amounted to a disseizin, it was proved that the plaintiff had regained the actual seizin before the commission of the trespass. The following instruction of the court below, was held correct: That if the jury were satisfied, upon the evidence, that the plaintiff, before the hay was taken from the land, peaceably entered thereon, no person being then on the land, and took possession thereof under his title, and the defendant afterward, without the plaintiff's consent, and against his prohibition, entered on the land and carried away the hay, the defendant was a trespasser, and the plaintiff was entitled to a verdict. In Mussey v. Scott,[4] the plaintiff had contracted to sell the premises in question to the defendant. But the latter having failed to make his payments, the plaintiff demanded possession, and in the absence of the defendant for the day, forced open the door of the house, which was fastened, and after setting out the de-

[1] Cleveland v. Jones, 3 Strobh. 479, note; Putney v. Dresser, 2 Metc. 583.

[2] Browne v. Dawson, 12 Ad. & E. 624; see Newton v. Harland, 1 Man. & G. 644.

[3] 8 Metc. 599. [4] 32 Vt. 82.

* In an action of trespass *quare clausum fregit*, the following instruction was held correct: "That if the plaintiffs had title to the land in question, at the time the trespasses complained of were committed, their having been previously disseized and dispossessed thereof by the defendant, would not prevent their recovery, provided they had, previous to such acts of trespass, regained and retaken possession, so that they were in possession at the time said trespasses were committed; that although a simple re-entry upon the land would not revest the possession in them, yet if they went upon the land as owners thereof, retook the possession, and remained there some two or three days, cutting and carrying away the wood and timber, keeping the defendant out of possession, and forbidding him from re-entering upon the same, such a retaking of possession would enable them to maintain the action for a trespass committed by the defendant at any time thereafter (Payne v. Clark, 20 Conn. 30).

fendant's furniture, fastened the door, and put up a notice on the door that he was in possession. The same day, the defendant re-entered, which was the trespass alleged. Judgment having been rendered for the defendant in the court below, it was reversed by the Supreme Court.

§ 933. But where the disseizee enters without right, he cannot maintain an action against the disseizor for evicting him. In Browne v. Dawson,[1] the plaintiff was master of a school which was under the control of trustees, and as such was allowed to occupy a school-house. The trustees had drawn up certain rules, one of which provided for the master's dismissal in case of misconduct. In pursuance of this rule, the trustees, on the 28th of June, dismissed the plaintiff, who acquiesced in the dismissal, and the school was then peaceably taken possession of by the trustees and locked up. On the following day, the plaintiff re-entered by force. On the 11th of July, he was ejected by the trustees. To trespass against them for such eviction, the trustees pleaded that the plaintiff was not possessed. It was held that the plaintiff had not, by his re-entry, a *prima facie* right of possession against the trustees as wrong-doers; and that they might set up the foregoing facts in defense without pleading "not possessed."

§ 934. Where land held adversely is sold and conveyed by the true owner, and a recovery is afterwards had in ejectment in the name of the grantor against the person wrongfully in possession, the deed from the grantor executed prior to such recovery will protect the grantee and those claiming under him against the charge of trespass brought against them by the defendant in the ejectment, for acts committed by them upon the land while the defendant in the ejectment was in possession of the premises, and before judgment was rendered in that action.[2] *

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[1] *Supra.*

[2] Edwards v. Roys, 18 Vt. 473.

* In Powell v. Smith, 2 Watts, 126, Gibson, C. J., remarked that nothing is clearer than that a mere recovery in ejectment, without entry or writ of possession executed, is not equivalent to an entry, even to bar the statute of limita-

§ 935. A subsequent conflicting possession of land cannot be extended by construction beyond the limits of the actual adverse possession, in order to defeat a prior constructive possession. Where, therefore, A. was in possession of part of an entire tract of land under a deed for the whole, and it was proved that the acts of the defendant were done under A. on that portion of the lot which was in the constructive possession of the latter, and it appeared that the plaintiff's possession was subsequent to that of A., and that the alleged trespass was not committed upon any part of the tract in the actual possession of the plaintiff, it was held that the plaintiff was not entitled to recover.[1]

§ 936. It is competent for a party to withdraw his claim to land in which he has a title—as by adopting a wrong line for his boundary—and by this means, although his title may remain, his constructive possession of the part abandoned ceases.[2] Or, after obtaining constructive possession he may lose it by acquiescing in the possession of another. A. went on to land under a claim of title, on which was a house in which no one had ever lived, nailed up the windows, and placed in the house some old boards. A year afterward, B. entered and tore off the boards and rented the house, and finally moved the house away. It was held that A. had not such a possession, without re-entry, as would enable him to maintain an action of trespass against B.[3]

2. *Action by husband and wife.*

§ 937. At common law, where the action is merely for the recovery of damages done to the real estate of the wife during the coverture, the husband may sue alone, or his wife

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tions, and therefore not equivalent to actual possession. On this principle, it was held in that case that the party who recovered the land in ejectment could not maintain replevin for fixtures which had been separated from the freehold by the party in actual possession after judgment and before the issuing of a *habere facias possessionem*. The remedy for this injury is in an action for mesne profits, by laying the spoliation separately in the declaration.

[1] Ralph v. Bayley, 11 Vt. 521.

[2] Crowell v. Bebee, 10 Vt. 33.

[3] Patterson v. Bordenhammer, 11 Ired. 4.

may be joined.* If the wife's close has a prescriptive right of way through the close of another, and the owner of the land erects a building across the way, the husband and wife may join in an action to recover damages for the stoppage during coverture.[1] If the wife die, the husband may maintain trespass for an injury done to her land during the coverture; and in case of his death, the action will survive to her.[2] † But to make the joinder of the wife proper, it must appear that she has an interest in the premises.[3] Robbins v. Sawyer[4] was an action brought by husband and wife for unlawfully dispossessing them of their dwelling-house, and greatly distressing the wife, she being at the time ill. It appearing at the trial that the wife had no interest in the premises, it was objected that she and her husband could not maintain a joint action. The judge ruled that a joint action of trespass *quare clausum* could not be maintained, but that the plaintiffs might recover for the personal injuries, whether temporary or permanent, sustained by the wife, occasioned by the acts of the defendant, and that issue alone was accordingly submitted to the jury. If the husband be entitled to the personal property of the wife, he cannot make her coplaintiff

[1] Bac. Abr. Baron & Feme, K; Tregmiell v. Reeve, Cro. Car. 437; Cushing v. Adams, 18 Pick. 110.

[2] 2 Com. Dig. Tit. Baron & Feme; 1 Roll. Abr. 347, 348; 1 Chit. Pl. 75; Allen v. Kingsbury, 16 Pick. 235; Clapp v. Stoughton, 10 Pick. 463; Adams v. Barry, 10 Gray, 361.

[3] Meader v. Stone, 7 Metc. 147. [4] 3 Gray, 375.

* It would seem to be more just that the husband should be required to make his wife a party in such cases; "otherwise, he or his personal representatives may reap the whole benefit of a recovery for an injury done to the freehold or inheritance of his wife, which may have rendered it almost worthless. As, for instance, where he happens to die after having obtained judgment, without having had execution of it for the value of the timber growing on the wife's land, which was cut down and taken by the defendant, and was the only thing which rendered the land valuable, his personal representatives would be entitled to have execution of the judgment, and he may, by will, give it to whom he pleases, thus, in effect, depriving the wife of her inheritance, without her consent" (Kennedy, J., Fairchild v. Chastelleux, 1 Penn. St. R. 176).

† Where, pending an action of trespass for an injury to the land of the wife, the husband dies, the suit may be prosecuted in the name of the wife alone. This is so at common law, the action being brought for an injury to the land of the wife, and she being therefore the party in interest. But in New Hampshire, it is expressly allowed by statute (Little v. Downing, 37 N. Hamp. 355, citing Knox v. Knox, 12 N. Hamp. 360; Rev. Sts. of N. Hamp. ch. 186, §§ 14, 15; Laws of 1844, ch. 139; Comp. Laws, 481).

in an action for the removal of corn or grass when severed from her land.[1]

§ 938. Under a statute providing that any married woman holding property to her sole and separate use, free from the interference or control of her husband, may sue or be sued in her own name, as though sole, in all matters pertaining to said property, where land is claimed under a deed to the wife, she will hold it to her sole and separate use, and can bring an action of trespass for any entry upon the land in her own name, just as though she were sole. In such case, the husband cannot join with the wife; 1st, because her disability being removed, there is no longer any necessity of the husband's joining in the suit; and 2d, because in a case of this kind, the husband has no interest in the suit, and hence should not be joined as a party to it any more than a stranger. If the action were brought to recover damages for some permanent injury to the land, which might affect the husband's right as tenant by the curtesy, or in any other way, a different question would be presented. If, in such case, the husband and wife are improperly joined as plaintiffs, the writ cannot be amended by striking out the name of the husband or allowing him to become nonsuit.[2]

§ 939. A wife may maintain an action in her own name for a trespass on her land, although her husband resides with her thereon, and cultivates the land.[3] When a wife who holds the legal estate in land to her sole and separate use, lives upon it with her husband, and he manages and controls it as if he were the absolute owner, receiving the crops, income and profits, it is to be presumed, in the absence of any evidence to the contrary, that he holds and occupies it with her consent as her tenant, under some lease, agreement or arrangement, verbal or written, by which the crops, rents and profits are to be appropriated by him to the benefit

[1] Tallmadge v. Grannis, 20 Conn. 296.
[2] Whidden v. Coleman, 47 N. Hamp. 297.
[3] Boos v. Gomber, 23 Wis. 284; s. c. 24 Ib. 499.

of the family, rather than that he carries it on for her in the capacity of a servant or hired man. In Albin v. Lord,[1] the claim was that the defendant broke and entered the plaintiff's close, cut and carried away timber, and picked and carried away cranberries. The court remarked that as the legal title was shown to have been not in the plaintiff but his wife, it was perhaps doubtful whether so far as the cutting and carrying away of timber were concerned, anything more than nominal damages could be recovered; but that it was quite clear that for the picking and carrying away of the cranberries, which were an annual crop, the plaintiff was entitled to full damages.

§ 940. Where land is conveyed to husband and wife in fee, the husband may maintain in his own name an action of trespass *quare clausum fregit*, for cutting down and carrying away timber; for he has not only an equal, if not a greater control and authority over the estate during the coverture than he would have had if it were his wife's, but he has likewise the same interest and right in the inheritance that she has, which is not the case where the inheritance belongs exclusively to her.[2]

3. *Action by tenants in common against stranger.*

§ 941. At common law, in an action for trespass on land owned by several, all the cotenants must be named in the writ.[3]* The reason assigned for this rule, is, that

[1] 39 N. Hamp. 196.

[2] Fairchild v. Chastelleux, 1 Penn. St. R. 176.

[3] Bac. Abr. Joint Tenants, K; Rice v. Hollenbeck, 19 Barb. 664; May v. Slade, 24 Texas, 205; Hobbs v. Hatch, 48 Maine, 55.

* The rule in New York, that tenants in common must join in actions to recover for injuries to the realty, has not been changed by the Code (De Puy v. Strong, 37 N. Y. 372).

The executors of a deceased tenant in common may be joined as plaintiffs with the surviving tenant (Patton v. Crow, 26 Ala. 426). In an action for a nuisance to the land of two tenants in common which is continued after the death of one of them, the devisee of the deceased tenant in common should join the survivor (Bac. Abr. Joint Tenants, K).

Where two persons were partners in mining, it was held that a joint action of trespass might be maintained by both for injury to the mines, although the lease of the premises was made to one who owned all the stock, fixtures, capital, and property (Douty v. Bird, 60 Penn. St. R. 48).

although their estates are several, yet the damages survive to all, and it would be unreasonable for them to bring several actions for a single injury.[1] They may agree to occupy distinct portions of the land, without in any way affecting their rights as tenants in common. It will not have that effect unless their possession is exclusive and adverse to the rights of the other tenants. When not adverse, the possession of one tenant in common is the possession of the other, and they must join. The fact that after a division, one of the tenants conveyed an equal and undivided part of the whole premises, and that for injuries to the land, they jointly make a claim for damages, is satisfactory to show that no division and occupancy in severalty was made which they intended should affect their rights as tenants in common. And if such was not their intention, it is not for one who is a stranger to the title to give to it a legal effect which was not intended by the parties in interest. Under such circumstances, the possession of each of the tenants would be the possession of his cotenants, and not such an adverse possession as could ever ripen into an absolute title in severalty. They may make a parol division of land, provided possession in severalty is taken by them in pursuance of the division. Such division and possession, however, is not binding as between themselves unless continued long enough to acquire a title by adverse possession. They may at any time within that period, disaffirm the division and obtain a new partition. But if the tenants affirm the division, and their possession is in severalty, and of a character adverse to the right of possession by the other tenants, it will be a good title in severalty as to all persons who are strangers to the title; and after the period for acquiring a title by adverse possession has elapsed, the division will be binding as between themselves. When a title in severalty has been thus protected, they cannot join in an action of trespass for any injury to the premises, since they

[1] Hare v. Celey, Cro. Eliz. 143; Some v. Barwith, Cro. Jac. 231.

then have no joint legal title, and the unity of possession has been destroyed by their division in fact, and their occupancy in severalty.[1]

§ 942. In some of the States, tenants in common may join or sever in personal actions for injuries to the land.[2]* In Maine, an action having been brought by one of several tenants in common, for cutting and carrying away trees, it was held that the receipt of his cotenants for the value of the timber belonging to the plaintiff, given by them to the defendants, did not take away his right to maintain the action previously commenced for the loss.[3]† In New Hamp-

[1] Welden v. Bridgewater, Cro. Eliz. 421; Johnson v. Goodwin, 27 Vt. 288.

[2] Palmer v. Dougherty, 33 Maine, 502; Rev. Sts. of Maine, ch. 129, §§ 7, 17.

[3] Longfellow v. Quimby, 29 Maine, 196.

* In an action of trespass for breaking and entering the plaintiff's mill, and thereafterwards co-operating with the cotenants of the plaintiff in tearing down and destroying the mill and in carrying away the materials thereof, whereby the plaintiff was wholly deprived of the benefit of his mill, it was held that the plaintiff was entitled to recover (Jewett v. Whitney, 43 Maine, 242). May, J.: "It is said the plaintiff was not in actual possession when the acts of trespass complained of were committed. It appears that he was a tenant in common with others, and his cotenants were in the actual occupancy of the mill accounting to him for his share of the profits. It does not appear that they were lessees. At most, they were but the servants of the plaintiff, carrying on upon shares his portion of the estate. Their possession was his possession. Such possession is sufficient to maintain trespass *quare clausum*. If, however, the the plaintiff's cotenants could be regarded as tenants at will of his share in the estate, still the action would be maintainable for acts injurious to the freehold. It is in substance a usurpation of the fee and an expulsion of the plaintiff from his portion of the estate. The defendant was not a tenant in common with the plaintiff, and the acts complained of do not appear to have been done by the license or direction of any person that was. The plaintiff's cotenants seem to have been passive, taking no adversary part in depriving the plaintiff of his share of the profits of the mill. They merely assented to the title assumed by the defendant, and agreed to account to him for the profits of the plaintiff's share, and subsequently did so. This case is therefore wholly unlike that of Rawson v. Morse *et al.* 4 Pick. 127" (citing also Davis v. Nash, 32 Maine, 411).

† In Maine, by the Rev. Sts. of 1857, ch. 95, secs. 14 and 15, it is provided that all or any tenants in common, &c. may join or sever in personal actions for injuries done to their lands, setting forth in the declaration the names of all the cotenants, if known, and the court may order notice to be given in such actions to all other cotenants known, and all or any of them, at any time before final judgment, may become plaintiffs in the action and prosecute the suit for the benefit of all concerned. The court is required to enter judgment for the whole amount of the injury proved, but award execution only for the proportion thereof sustained by the plaintiff, and the remaining cotenants may afterward, jointly or severally, sue out a *scire facias* on such judgment, and execution shall be thereupon awarded for their proportion of the damages adjudged in the original suit.

Hobbs v. Hatch, 48 Maine, 55, in which more than fifty years had elapsed

shire, where one tenant in common brings an action of trespass *quare clausum fregit*, to recover his portion of the damages sustained, and there is no plea in abatement, the release of the other tenant is no bar to the maintenance of the suit, it not being a joint action.[1] * In Vermont, one tenant in common may recover the damage due his cotenant as against

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since the estate, being wild land, descended from the father to the plaintiff and seven others, his children, a part of whom were dead, leaving issue, presented a striking example of the uncertainty sometimes occurring as to the names and residence of cotenants. In that case, which was an action of trespass for cutting and carrying away trees, brought by one of several tenants in common of the *locus in quo*, the court remarked that the evident intention of the foregoing statute "was, that one cotenant in real estate should not be deprived, by a plea in abatement, of redress for an injury to his interest therein, by reason of refusal of his cotenants to join in a suit, or to allow him to use their names in the same if they were known to him. The court may order notice to be given in such action to all other cotenants *known*, implying that before this action of the court the case must be entered upon the docket. And cotenants may become plaintiffs at any time before final judgment, and the court may give this notice to any one not originally named in the writ, when it shall become known that he is a cotenant. How is such knowledge to be brought to the attention of the court? The statute contains no provision for a change in the rule of pleading in such actions. If the cotenants of the plaintiff are not named in the writ in its origin, and this omission is relied upon by the defendant, no reason is perceived for taking this objection in a different mode from that required before the statute was enacted. In the latter case, the defendant pleaded in abatement, if he supposed there were not all the parties in interest in the land made plaintiffs. And under the present statute, why should he not make his objection in the same manner, the same parties being omitted to be named in the writ? By analogy, the plea in abatement is as indispensable in one case as in the other. The defendant must give a better writ; thereupon an amendment may be allowed, or, if the plaintiff claims the entire right in the land, or the possession thereof, an issue to the country may be made. If an amendment should be granted, on its being made known that a cotenant is omitted, and notice be ordered to him and the action proceed, there is no reason for the denial of this course when all cotenants are omitted in the original writ."

[1] Wilson v. Gamble, 9 N. Hamp. 74; Webber v. Merrill, 34 Ib. 202; s. p. Jones v. Lowell, 35 Maine, 538.

* In Austin v. Hall, 13 Johns. 286, the action was by tenants in common for trespass upon their lands. The defendant pleaded a release by one of the plaintiffs, and the court held that the action was strictly a personal action, and that the plaintiffs were bound to join in it, and that the release was a bar to the action. No authority was cited. This case is referred to in Decker v. Livingston, 15 Johns. 479, and the court say: "There can be no doubt that when there is such a unity of interest as to require a joinder of all the parties interested in a matter of a personal nature, the release of one is as effectual as the release of all." In Co. Litt. 198 *a*, after reference to a variety of cases, including trespass upon the lands of tenants in common, in which all must join in the action, and in case of the death of one the action survives to the other, it is said: "But if two be tenants in common of goods, as of one horse, or of any other personal, then if one die, his executors shall be tenants in common with the survivor." We have here the reason why tenants in common must unite to recover damages for a trespass upon their lands. The right to the damages—a mere *chose in action*—survives.

a mere stranger.[1] In New Jersey, the action may be brought by one of several tenants in common; but the plaintiff can only recover damages in proportion to his interest in the premises.[2] In Pennsylvania, a tenant in common may maintain trespass for an injury done to his possession, "because that possession is not confined to any particular part of the premises, but is commensurate with the whole, in relation to which he has the right to an exclusive possession, except as against his cotenant; and the measure of damages will be regulated by the extent of his interest."[3]

§ 943. Where two take lands individually, and afterward agree by deed that the lands were purchased jointly, "for promoting the joint interest of the parties, by securing to them the timber on said lands, to be sawed into plank," the instrument will be deemed a covenant on the part of each to stand seized to the use of the other of an individual interest in the trees growing on the lands, and will enable the parties to maintain a joint action of trespass for an injury to the trees.[4]

§ 944. If the legal title to land is in the plaintiff, and he is in possession of it, he can maintain an action of trespass, although the defendant is also in possession, claiming title as a tenant in common with the plaintiff. For if the title is in the plaintiff, and he has possession, the defendant's claim and possession are unlawful, and can be no justification of the alleged trespass.[5] A testator having in 1815 devised one-third of his real estate to his wife during her widowhood, and the residue to his two sons B. and C., soon afterwards died. After the children became of age, in 1826, it was agreed in writing between the widow and them that the estate should be divided between them, by three persons whom they named, which was accordingly done, and the devisees thereupon took possession of their respective shares. In 1828 the widow exe-

[1] Hibbard v. Foster, 24 Vt. 542.
[2] McGill v. Ash, 7 Penn. St. R. 397.
[3] Hunting v. Russell, 2 Cush. 145.
[4] Jackson v. Todd, 1 Dutcher, 121.
[5] Blackburn v. Baker, 1 Ala. 173.

cuted a release to B. of all right she might have to his share, and B. conveyed to D. his share, and also his interest in his mother's share. In 1843, D. conveyed to E., who entered upon the land assigned to the widow, claiming to be tenant in common with her. In an action of trespass *quare clausum fregit* brought by the widow against E., it was held that she was entitled to recover.[1]

4. *Action by tenant in common against his cotenant.*

§ 945. In general, a tenant in common cannot maintain an action of trespass *quare clausum fregit* against his cotenant, for entering and occupying the whole, because he has a right to enter upon and occupy every part; and because the law regards him as entering and occupying for the benefit of his cotenants as well as himself.[2] * Any act of

[1] Brown v. Wheeler, 17 Conn. 345.

[2] Wilkins v. Burton, 5 Vt. 76; Jones v. Chiles, 8 Dana, 168; Owen v. Foster, 13 Vt. 263; M'Pherson v. Seguine, 3 Dev. 153; Booth v. Sherwood, 12 Minn. 426.

* In King v. Phillips, 1 Lans. 421, the court, with reference to the question as to whether one of several tenants in common of land can enter upon that part actually in the possession of his cotenant, either by force, or when the latter is temporarily absent, without any intention of abandoning the possession, said: "There is such a conflict of opinion on this question, that it would be of no service to enter into an examination of cases. Most of them may be reconciled by attending to different states of facts on which the adjudications were made. They may be divided into several classes. The first includes those in which the property owned in common is such as to admit of joint occupancy without unreasonable interference with the rights of each other. The second includes those cases in which there cannot be a joint occupancy consistent with the rights of either. The third includes those in which there has been an occupancy of part by one, with the assent, express or implied, of the others. In cases within the first class, each has a perfect right to enter and occupy, and the entry does not give a right of action to his cotenant, unless the latter is ousted or his property is put off the land. In cases within the second class, one tenant in common cannot enter and occupy, with or without force, so long as his cotenant is in the actual possession. While the right of entry may be said to exist in this case as fully as in the other, the law in order to prevent violence or disorder, requires that the right shall be enforced in a legal and peaceable manner. Hence, it gives the right to the one in the actual possession, to defend it by force. In cases within the third class, the tenant in possession will hold it until the right to occupy is terminated in a legal manner; and when that is done, the right of the other tenant to enter will depend on whether the case is brought within the first or the second of the classes above mentioned" (referring to Mumford v. Brown, 1 Wend. 52; Erwin v. Olmsted, 7 Cow. 229).

It is a general rule, that one tenant in common cannot, as against his cotenants, convey a part of the common property in severalty by metes and bounds, or even an undivided share of such part. The reason is obvious. His title is to an undivided share of the whole; and he is not authorized to carve out his own

the cotenant which might be referred to his right—as gathering crops, cutting down trees fit to be cut, or removing fences, would not be a ground for such an action, even on the part of him who sowed the crop, or erected the fence.[1] The remedy in such case, is by action to recover for his share of the proceeds.[2] * The plaintiff and defendant were tenants in common of a salmon fishery, each owning a moiety thereof. Both had placed nets for taking salmon on the common privilege; and the defendant entered and cut away, or cast off and sent adrift, the plaintiff's nets. It was held that although the defendant was guilty of a trespass, yet that the plaintiff could not maintain trespass *quare clausum* for the

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part, nor to convey in such a manner as to compel his cotenants to take their shares in several distinct parcels, such as he may please. The expression in some of the case, is, that one cotenant cannot convey in severalty, to the prejudice of his cotenants. But this assumes that a conveyance of part in severalty, without their assent, is of course to their prejudice. If their assent is manifested in a proper manner, there is no occasion for the application of the rule. Other cases say, that as against cotenants the deed is void (Great Falls Co. v. Worster, 15 N. Hamp. 412, per Parker, C. J.; citing Peabody v. Minot, 24 Pick. 329; Griswold v. Johnson, 5 Conn. 866; Smith v. Benson, 9 Vt. 138; 4 Kent's Com. 368).

[1] Waterman v. Soper, 1 Ld. Raym. 737; Martin v. Knowllys, 8 Term R. 145; Booth v. Adams, 11 Vt. 156; Keay v. Goodwin, 16 Mass. 4; Silloway v. Brown, 12 Allen, 30.

[2] Bigelow v. Jones, 10 Pick. 161; Barnes v. Bartlett, 15 Ib. 75; Badger v. Holmes, 6 Gray, 118, 119, and cases cited.

* A person, by his will, left certain land to his three sons, Leonard, Alpha, and Ira. The devise to Leonard and Alpha, was on condition that they should take Ira and carry on his share, and see that he had his support out of it during his natural life. Alpha conveyed to Leonard all of his share of the land, and Leonard sold to one Partridge, who entered and took possession. The Probate Court having afterwards set off Ira's share in severalty, he brought an action of trespass *quare clausum* against Partridge. It was held that, as there had not been shown any neglect on the part of the devisees, the action could not be maintained. Hatch v. Partridge, 8 Fost. 83, Gilchrist, C. J.: "Having, by the will, an interest in Ira's share during his life, and a right to the possession and profits of it, they could convey that interest, subject to whatever charge upon it was created by the will. They were bound only to support him, and it was a matter indifferent to him, and in no way affecting his interests, where they obtained the funds for that purpose. The will did not require that the specific crops obtained from his share should be appropriated to his support, for a portion of the produce must probably be sold in order that he might receive any benefit from it. As long as he is supported, every object contemplated by the will is attained, and it does not appear that the devisees have ever failed to support him. The will did not intend that Ira should be entitled to the possession of any part of the land, so long, at least, as the condition stated in the will is complied with. If he has no cause of complaint against his brothers, it is not a matter in which he has any interest, whether they or the defendants are in possession of the land."

injury. The court said, that as the objection was a technical one, and furnished no defense to the merits of the case, they had not been disposed to regard it with favor, but that upon consideration, they were of opinion that it was sustained by authority.[1] Where, however, one tenant in common occupies a particular part of the common property by the agreement of the other tenants in common, it is regarded as so far a severance in fact, as to permit him to maintain trespass against them for the same acts which would constitute trespass in a stranger.[2] *

§ 946. Where one tenant in common expels or ousts his cotenant from the premises, he will be liable in trespass therefor.[3] To constitute ouster, there need not have been a forcible ejection of the plaintiff, or a forcible hindrance of his entry. Denial of his right, with conduct showing the determination of the disseizor to resort to force if necessary, is sufficient.[4] † Where a party enters upon land of tenants in

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[1] Duncan v. Sylvester, 13 Maine, 417.

[2] 4 Kent's Com. 370; O'Hear v. De Goesbriand, 33 Vt. 593.

[3] Murray v. Hall, 7 C. B. 413, overruling the *dictum* of Littledale, J., in Cubbitt v. Porter, 8 B. & C. 269; Wilkinson v. Haygarth, 16 L. J. Q. B. 103; Stedman v. Smith, 8 El. & Bl. 6, 7; Erwin v. Olmsted, 7 Cow. 229; McGill v. Ash, 7 Barr, 397; Dubois v. Beaver, 25 N. Y. 123; Odiorne v. Lyford, 9 N. Hamp. 502; Great Falls Co. v. Worster, 15 Ib. 412; Thomas v. Pickering, 13 Maine, 353; Owen v. Foster, 13 Vt. 263; Munroe v. Luke, 1 Metc. 467, 472; Bennett v. Clemence, 6 Allen, 18, 19; Silloway v. Brown, 12 Ib. 30; Midford v. Hardison, 3 Murph. 164.

[4] Jefcoat v. Knotts, 13 Rich. 50; Carpentier v. Gardiner, 29 Cal. 160.

* In Massachusetts, proceedings in the Probate Court for the partition of land, under an agreement between the parties for a division, although not constituting a partition, are a license to each tenant in common to enter and occupy the part assigned to him by such intended partition, until the commencement of legal process for partition which will revoke the license. Pond v. Pond, 14 Mass. 403, was an action of trespass for cutting down and carrying away trees by the defendant, on land held by him in common with the plaintiff, contrary to the statute of 1785, ch. 62. The judge charged, that "although the proceedings in the probate office, and the agreement of the parties in relation thereto, did not amount to a legal partition of the estate, as was intended, yet they might be considered as a consent by each party that each might enter and occupy the part assigned to him by that division, and that those proceedings and agreement were a sufficient license and justification of the alleged trespass; but that the presentation by the plaintiff of his petition for a partition revoked the license, and that the acts proved to have been committed by the defendant subsequent thereto, were without justification."

† The entry and possession of one tenant in common is deemed the entry and

common, under a deed of one of the cotenants purporting to convey the whole, and claiming not as tenant in common, but as owner of the whole, he is to be deemed a stranger, and his acts amount to a disseizin of the other cotenant.[1] * A. and B. occupied adjoining land separated by a wall, of which they were tenants in common. There was a shed on B.'s land next to the wall, the roof of which rested on the top of the wall across its entire width. B. removed the coping stones from the wall, raised it, replaced the coping stones, built a wash-house next to the wall where the shed had been, the roof of the wash-house occupying the whole width of the top of the wall, and finally let a stone into the wall with an inscription that the wall and the land on which it

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possession of his cotenants until a notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others, when his possession will be regarded as adverse to his cotenants (Clymer's Lessee v. Dawkins, 3 How. U. S. 674; Thomas v. Hatch, 3 Sumner, 170; Cloud v. Webb, 4 Dev. 290).

If one tenant in common puts his cotenant out of possession, or prevents him from entering when an entry would be lawful, it is well settled that ejectment lies (King v. Phillips, 1 Lans. 421, citing Co. Litt. 199 *b*, 200; Comyn's Dig. Tit. Estates, R, 8; 1 Chit. Pl. 180). So he could, at common law, have trespass for the mesne profits (Goodtitle v. Tombs, 3 Wils. 118). It would seem that trespass may be maintained in any other case when one joint tenant is unlawfully put out of possession of the joint property by another.

Littleton, in his Tenures, § 322, says, if two have an estate in common for a term of years, and the one put the other out of possession, the injured party can maintain ejectment. But in the next section he states that, although ejectment will lie, trespass *quare clausum* will not. Coke, in commenting upon this section, says that if there be two tenants in common of land, and one take up and carry away the mete stones, the other may maintain trespass *vi et armis* for the injury. And if there be two tenants in common of a folding, and one of them disturb the other in erecting hurdles, he may maintain the same action for the disturbance. But he does not say that trespass *quare clausum* can be brought in either case (Coke, Litt. 200, *b*).

Where a partnership at will exists, the business being conducted on the premises of one of the partners, the partnership will be terminated by a notice of dissolution, and the owner of the premises can maintain trespass for a subsequent entry by the other on that part of his premises where the partnership business had been transacted (Benham v. Gray, 5 C. B. 138; 17 L. J. 50).

[1] Bigelow v. Jones, 10 Pick. 164; Kittridge v. Locks & Canals, 17 Ib. 246.

* No direct authority is cited for these decisions with reference to tenants in common. The cases cited (Warren v. Child, 11 Mass. 225; Proprietors v. Laboree, 2 Greenl. 275) only show that an entry under a deed which conveys no title is a disseizin of the owner. Still, the decisions seem to have the support of good sense, inasmuch as they hold that the party who denies the tenancy in common when he commits a wrong, shall not be permitted to assert it for the purpose of protecting himself against the consequences of his injustice. Erwin v. Olmstead, 7 Cow. 229, tends to support the same doctrine (Hatch v. Partridge, 35 N. Hamp. 148).

stood belonged to him. It was held that the foregoing constituted an actual ouster of A. from the possession of the wall, for which he might maintain an action of trespass against B.[1] *

§ 947. When one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured

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[1] Stedman v. Smith, 8 Ell. & B. 1.

* When an estate of homestead has been once acquired in land of a greater value than the limit of the homestead exemption, and the surplus has been alienated, and the deed delivered upon the premises, the owner of the homestead and the owner of the residue of the estate are tenants in common, and if the former keeps the latter out of the premises, he is liable therefore in an action of trespass *quare clausum fregit*, although the latter has never had any actual possession (Silloway v. Brown, 12 Allen, 30).

In Vermont, one tenant in common of land cannot maintain trespass *quare clausum fregit* against another tenant for entering upon the premises under a claim of exclusive title, and cutting and carrying away the timber. In Wait v. Richardson, 33 Vt. 190, in which this was held, it appeared that at the time of the alleged trespass the parties held title to the *locus in quo* in undivided moieties; that the plaintiff was in adverse possession, claiming the whole lot; that the defendant also claimed the whole lot, and that he entered upon his said lot, under his said claim, and cut and carried away all of the timber therefrom. The only question raised in the case was whether the plaintiff was entitled to maintain this form of action; and the court below, having held that he could not, and rendered judgment for the defendant, the Supreme Court, in affirming the judgment, said: "The mere entry upon the common land by one of the tenants, and cutting and carrying off the timber therefrom, is nowhere treated as giving to the other tenant the right to maintain an action of trespass of any kind, and least of all could it give the right to maintain trespass *quare clausum*. Superadd the fact which is shown in this case, that the plaintiff herself was all the while in possession of the property, claiming to hold it adversely to the defendant in exclusive ownership, and the entire lack of ground for maintaining this action, either upon principle or precedent, is very palpable" (referring to 1 Swift's Dig. 514).

Williams, J., in Kirby v. Mayo, 13 Vt. 103, stated in general terms an old and well established doctrine, that "the possession of a tenant in common, as well as that of a tenant at will, may become adverse, so that his cotenant or the landlord may treat him as a trespasser, and maintain an action against him as such." And in consequence of such adverse possession by the defendant in that case, the court held that the plaintiff had lost his right in common to the property in question. In Wait v. Richardson, *supra*, Barrett, J., referred to the foregoing as follows: "We think it clear that the learned judge did not intend, by using the word *trespasser*, to convey the idea that the party might be pursued by a technical action of trespass; and that he did not so mean, in saying that an action might be maintained against him as such trespasser. In our opinion, all that he meant was, that a tenant in common might be transcending his right as such tenant by the character of the possession he was holding, and therein, in the generic and untechnical sense of the term, be trespassing upon the right of his cotenant; as would be true in the case of an *ouster*. In such case, the party whose right was thus trespassed upon might maintain an action against his cotenant on account of such transcending of legal right. But we think it was not designed to indicate the form of action which would be proper under the rules of the law in such case."

party.[1]* There is a manifest distinction between the cases in which one tenant in common appropriates the proceeds, such as rents, profits or income of the estate, and where he practically destroys the estate itself, or some portion of it. In the latter, trespass may be maintained; in the former, it cannot. There are cases in the Year Books which show that one tenant in common of a dove house may maintain such an action against his cotenant for destroying the flight of doves, or one tenant in common of a park for destroying all the deer, or one tenant in common of land for destroying mete stones thereon.[2] Symonds v. Harris[3] was an action of trespass by a tenant in common against his cotenant for removing machinery from a mill. The property taken was machinery used in a sash and blind factory necessary to its operation. This machinery was attached to the mill by spikes, nails, bolts and screws, and was operated by belts running from the permanent horizontal shafting in the mill, which shafting was driven by a water wheel under the mill, and connected with the main shafting by suitable gearing. It was held that the machinery thus situated and connected constituted fixtures, and became a part of the mill or factory, and its unauthorized disseverance and removal, and the subsequent incorporation of it into another mill, the sole property of the defendant, was such a practical destruction

[1] Crabbe's Law of Real Prop. § 2318 b; Cubbitt v. Porter, 8 B. & C. 257; Dubois v. Beaver, 25 N. Y. 123; Critchfield v. Humbert, 39 Penn. St. R. 427.

[2] Co. Litt. 200. [3] 51 Maine, 14.

* As to what amounts to such a destruction of the common property as constitutes a severance of the tenancy in common, see Hinds v. Terry, Walker, 80; Maddox v. Goddard, 15 Maine, 221; McDonald v. Trafton, Ib. 225; Hubbard v. Hubbard, Ib. 198; Mills v. Richardson, 44 Ib. 79.

In Maine, by statute, ch. 129, § 7, a cotenant is made liable to treble damages for cutting down or carrying away any trees, timber, wood or underwood standing or lying on the lands held in common, while a petition is pending for a partition of the premises, even though the wrong-doer himself be the petitioner. "If the defendant had a right at common law to cut down and carry away trees or wood from the land held in common, without being a trespasser, that right was suspended by the statute during the pendency of the petition for partition. And the form of the action is to be adapted to the nature of the injury, which, in this case, related to the realty, and was produced by acts illegal and directly injurious. Trespass *quare clausum* appears to be the most appropriate action" (Maxwell v. Maxwell, 31 Maine, 184).

of the common property as entitled the plaintiff to recover. Property owned in common consisted of two shingle mills and a clapboard or siding mill, situate upon leased premises. The defendant became a tenant in common with the plaintiff, by purchase at a sheriff's sale of the interest of a former tenant in common. The defendant took out all the machinery, the engine, &c.—in short, removed all of the property except the frame—and in doing so reduced its value as a whole from one-third to one-half. He took the mills and put them up in a building of his own, upon his own land in another town, several miles distant from the place where the property, as a whole, had been previously enjoyed by the tenants in common. It was held that this was tantamount to the destruction of the common property. The character of the property had been changed from personal to real, and the plaintiff could not repossess himself of it without tearing it out of the building into which it had been fastened; and had he attempted to do this he would have been a trespasser.[1] The diversion of the water from a mill owned in common, and entitled to the natural flow of the stream, and the appropriation of such water to the sole use of a mill owned by one of the cotenants, would constitute such a destruction of the common property as would support an action of trespass.[2]

5. *Action by landlord against stranger.*

§ 948. The general rule is, that the landlord cannot maintain trespass against a stranger, for an entry upon the land while in the possession of a tenant, though the entry be made in the exercise of an alleged right of way, such an act during the existence of the tenancy not being necessarily injurious to the reversion.[3] Neither can he maintain an

[1] Benedict v. Howard, 31 Barb. 569. [2] Blanchard v. Baker, 8 Maine, 253.

[3] Harrison v. Blackburn, 17 J. Scott, N. S. 678; Robertson v. George, 7 N. Hamp. 306; Holmes v. Seely, 19 Wend. 507; Lienow v. Ritchie, 8 Pick. 235; Kretzer v. Wysong, 5 Gratt. 9; Reynolds v. Williams, 1 Texas, 311; Tilghman v. Cruson, 4 Harring. 341; Rousin v. Benton, 6 Mo. 592; Taylor v. Townsend, 8 Mass. 411; Campbell v. Arnold, 1 Johns. 511.

action for the obstruction of a public way leading to his property, unless he can show that the obstruction is of a permanent character, or that it would afford evidence against the existence of the right, if it were allowed to continue unopposed.[1] * So, a mere restriction upon the tenant not to cut timber, will give the landlord no right to maintain trespass, if it be cut by a stranger; because the tenant is deemed in possession of the land where it grows. A restriction is very different from a reservation or exception; the first being introduced to qualify the rights of the tenant, and the second, for the purpose of showing that the parties did not intend that the thing excepted should be included in the lease.[2]

§ 949. Although an action of trespass by the landlord against a stranger is sometimes permitted, when the land is occupied by a tenant at will; yet this is not the case, where there has not been a violation of any permanent right of the owner;[3] nor where the tenant at will is entitled to notice to quit, and the action is brought previous to the expiration of the time of such notice. In Little v. Palister,[4] the complaint was that the defendant with force and arms, broke and entered the plaintiff's close, and carried away fifty cords of

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[1] Dobson v. Blackmore, 9 Q. B. 1004; 16 L. J. Q. B. 233; Hopwood v. Schofield, 2 M. & Rob. 34; Kidgill v. Moor, 9 C. B. 379; Baxter v. Taylor, 1 Nev. & M. 13.

[2] Torrence v. Irwin, 2 Yeates, 210.

[3] Smith v. Fortiscue, 3 Jones Law, N. C. 65. [4] 3 Maine, 6; s. c. 4 Ib. 209.

* During the time the lessee for years is in possession, the lessor has no right of entry, and he is liable for trespasses on the land, in the same manner as any other person. The possession of a tenant, it is true, is, for some purposes, deemed the possession of the landlord. But in a case requiring the actual possession of the plaintiff to support his suit, it would partake too much of inconsistency, to say that the possession of a tenant for years is the possession of his landlord, when at the same time the landlord would subject himself to an action of trespass by an entry upon the land without permission from the tenant (Green, J., in Anderson v. Nesmith, 7 N. Hamp. 167).

In an action of trespass *quare clausum*, it was proved that the plaintiff leased the land by parol to A., who occupied and paid rent; that before the expiration of the term, A. allowed the defendant and B. to enter, and by the advice of the defendant, who said the land was owned by B., A. gave up possession to B., who exercised acts of ownership. The plaintiff by his agent afterward, and previous to the determination of the lease to A., entered, B. being then in possession. It was held that the action was maintainable (Tasker v. Ridgely, 4 Har. & McHen. 497).

wood, broke down the plaintiff's fence, subverted and broke down the plaintiff's grass, tore in pieces the buildings, and expelled from the dwelling-house a tenant of the plaintiff. No part of the alleged trespass was proved except the breaking and entering the close, or in other words going into it, and tearing or throwing down some parts of the fence on the land which had been built by a tenant at will at his own expense, and for his own use. It was held that the action could not be maintained.* French v. Fuller[1] was an action of trespass for breaking and entering the plaintiff's close. The plaintiff was lessor at will of the premises, which were occupied at the time of the alleged trespass by his tenant. It was claimed in behalf of the plaintiff, that when land is in the possession of a tenant at will, the rule requiring actual possession, in order to maintain trespass *quare clausum* was not applicable, as the possession of a tenant at will is the possession of his landlord. It was proved that the defendant had been on the premises at various times, exercising acts of ownership, such as demanding rent, and letting them to the tenants in possession. It was held that as no actual damage was done, the plaintiff could not maintain an action for the mere disturbance of the possession. In Woodman v. Francis,[2] which was an action of trespass *quare clausum fregit*, it was proved at the trial in the Superior Court, that

[1] 23 Pick. 104.

[2] 14 Allen, 198.

* In Little v. Palister, *supra*, the Supreme Court, in refusing a new trial, said: "McKenney, a tenant at will, had a right to erect such fences, and in such places on the land as suited his convenience; and of course he had a right to take them down and remove them from one place to another on the land, according to his own pleasure, and without consulting his landlord. It does not appear that the defendant destroyed or carried away, or in any manner appropriated the fence to his own use. What he did was an injury to McKenney, the lessee, for which he might recover damages; but it was no kind of prejudice to the plaintiff. It was the lessee's fence which was thrown down. This wrong might, and did injure his rights and impair his profits, by exposing his fields. But why should the plaintiff complain, or have reason to, any more than if the lessee himself had thrown down the fences, which he certainly might have lawfully done as often as his judgment or caprice should dictate? The nominal technical trespass committed by entering the close, was no injury to the plaintiff. The soil was not subverted or damaged, and though the grass might have been trodden down and injured, this grass was the property and part of the profits of the lessee. He only was injured. He only can claim damages for this particle of wrong."

during a part of the time to which the plaintiffs' allegations applied, the close described in the declaration was occupied by one Smith as a tenant at will, paying rent, and entitled to notice to quit. The judge charged the jury to find their verdict "irrespective of the evidence relied upon by the defendant to prove an occupation of the close by said Smith." The ruling made no distinction as to the different times at which the entering the close was committed; and there was nothing to show that the jury found the defendant guilty of anything but the tort of breaking and entering at a time when the plaintiffs were not in possession. It was held that for this reason there must be a new trial.* Inhabs. of Hingham v. Sprague[1] was an action of trespass *quare clausum* for entering the close of the plaintiffs and filling up a dock. The *locus in quo* was at the time of the trespass in the actual occupation of a third person, under a parol contract with the selectmen of the town, pursuant to a vote of the town authorizing them "to let the town wharf as heretofore." It was held that the lease by the selectmen created, at most, a tenancy at will only, and that the town might maintain the action.† Davis v. Nash[2] was an action for en-

[1] 15 Pick. 102.

[2] 32 Maine, 411.

* In Catlin v. Hayden, 1 Vt. 375, the plaintiff and one Tuttle were tenants in common of the premises. Tuttle agreed with one Wiggins that he should go on to the land, improve the same, and endeavor to prevent other people from trespassing thereon, and remain in possession until the dispute about said land, between the plaintiff and Tuttle, should be settled; and if, on such settlement, the land should fall to Tuttle, Wiggins should have the privilege of purchasing it. Wiggins entered under the foregoing contract, and continued making improvements on the land until after the commencement of the action. Judgment having been rendered in the county court for the defendant, under instructions of the judge that the plaintiff was not entitled to recover, the Supreme Court, per Hutchinson, J., in affirming the judgment, said: "During Wiggins' tenancy, so far from its being true that his possession was the possession of the plaintiff or Tuttle, they had no right to enter upon him at all without the half year's notice to quit; and such entry would be a trespass, for which he might sue. The possession of Wiggins was the possession of Tuttle and Catlin in its effect, in creating a title by fifteen years' possession; but not so, in dictating who may sue for a trespass upon the land. In the case before us, the tenancy was in fact continued by the mutual assent of parties; and until notice to quit, and the half year elapsed, Wiggins had as good a right to hold possession against his landlord (he committing no trespass to determine his will), as if he held a lease for years, that would expire at the end of said half year, after notice to quit."

† In Starr v. Jackson, 11 Mass. 519, the objection made to the verdict, which was for the plaintiff in the court below, was that the plaintiff, although owner of

tering on the plaintiff's land, which was in the possession of his tenant at will, and taking down part of a fence. The fence was erected by the direction of the plaintiff, and with

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the *locus in quo*, and of the buildings, fences, &c., standing thereon, could not maintain trespass for the injury done, because he was not in the actual possession at the time. Parker, C. J., in delivering the opinion of the Supreme Court, said: "There seems to be no doubt but that a tenant at will and his landlord may both maintain actions for injuries done to the soil, or to buildings upon it. They are both injured, but in different degrees; the tenant in the interruption to his estate and the diminution of his profits, and the landlord in the more permanent injury to his property. If a house, occupied by a tenant at will, or for years, should be demolished, or if the fruit or forest trees of a farm so occupied, should be cut down, it is obvious that the tenant ought not to recover in damages the value of the thing destroyed; and it is equally obvious that the landlord would be entitled, upon common principles of justice, to recover indemnification for the injury done to his freehold; and there would be no difficulty in separating the damages by the verdict of a jury, according to the respective interests of the several parties." The learned judge, after reviewing the early authorities, proceeded: "The whole doctrine to be gathered from all the authorities which have been cited, and others which seem to bear upon the point, amounts to this only—that possession of the *locus in quo* must be in the plaintiff in the action of trespass. And if it is right to consider the possession of a tenant as the possession of him who has the freehold, the old cases which explicitly allow this action to the lessor, do not, in any degree, controvert the doctrine. Perhaps some difficulty would exist technically in case of a trespass committed upon soil while in the actual possession of a lessee for years; because the lessor has not the right of entry, and therefore it may not be considered as his close which was broken and entered. And yet, even in such a case, for a kind of trespass which should be injurious principally to the lessor, such as cutting down the trees or overturning the buildings, as he would have a right to be indemnified by action, and as the act would be directly injurious to him, it would seem an unnecessary nicety to confine him to an action on the case. But where the occupant has only an estate at will, which may at any moment be terminated, and where the injury is of a sort to determine the estate, the very thing being destroyed which was the subject of it, it partakes too much of refinement to say that the close broken is not the close of the owner of the freehold, and that the injury done is not a trespass upon his property. A disseizee may maintain trespass for injurious acts subsequent to the disseizin, and acts done while he was out of possession after he has re-entered. Here he certainly had not the possession *in fact* at the time; but the injury was done to his property, and it was direct and immediate. It therefore had all the qualities of trespass. So, in the case of the destruction of a house occupied by a tenant at will, the injury is direct and immediate to the owner. It puts an end to the estate, and deprives him of the rents and profits by a forcible act. No one but himself can recover the value of the property destroyed; and there seems to be no reason why he shall not maintain an action so suitable to his purposes as trespass" (disapproving 1 Johns. 511; 3 Ib. 468).

In Massachusetts, since the decision of Starr v. Jackson, 11 Mass. 519, the law in respect to the rights of tenants at will has been materially changed. The Revised Statutes, ch. 60, § 26, provides that "all estates at will may be determined by either party by three months' notice in writing for that purpose, given to the other party." Since this change of the law, regulating the manner of determining estates at will, the possession of a tenant at will before notice, and for three months after, can in no sense be the possession of the landlord. The tenant has not only the possession, but also the right of possession, and in this respect he stands on the same footing as a tenant for a term certain.

his materials. The court, in holding that the plaintiff was entitled to recover, remarked that the fence "would become a fixture, and, being attached to the freehold, was a part of it as much so as a building upon the land constructed by him, and the taking of it down was an injury to the freehold."* In Pennsylvania, it has been held that the lessor of a tenant at will must have a property either absolute or temporary in the soil, and actual possession by entry, to be able to maintain an action of trespass,[1] there being no constructive possession in such a case; and it is declared that the owner of land can "in no case sustain an action for a trespass committed upon it, which is in the possession of another."[2] In New York, an early case, held the same general language.[3] †

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[1] Clark v. Smith, 25 Penn. St. R. 137.

[2] Greber v. Kleckner, 2 Barr, 291. [3] Campbell v. Arnold, 1 Johns. 511.

* In the case of a tenancy at will, the possession may be considered as in either the lessor or the lessee, and therefore either or both may have actions of trespass against a stranger for cutting timber or prostrating houses, and recover damages according to their several losses (Co. Litt. 57 *a*, note 2).

Rolle (Abr. Trespass, n. 3) says: "If a man subverts land which is under lease at will, the lessee may have one trespass against him, and shall have damages for the profits; and the lessor may have another trespass, and shall recover damages for the destruction of the land." Again (Ib. n. 4), he says: "If trees are cut upon the land of a tenant at will, by the custom, he may have an action of trespass, and the lord also another action;" and he adds: "The law is the same as to tenant for years." Rolle refers to the following decision in the Year Books: "If I lease land to a man at will, and a stranger comes upon the land and digs and subverts it, the tenant at will shall have an action of trespass, and I also another action of trespass; and so the trespasser shall be twice punished for the same trespass in different respects, viz., by the tenant for the damage done to him, inasmuch as he cannot have the profits of the land by reason of the subversion; and I shall receive my damages for the destruction of the land." Viner (Abr. Trespass, n. 3, 4) has introduced the same principle, referring to the same authority. Comyn (Dig. Tit. Trespass, v. 2) has adopted the same doctrine, referring to Rolle, and sanctioning the rule by a reason not to be found in Rolle, viz., that the possession of the lessee at will is the possession of the lessor. Hargrave and Butler, the editors of Coke upon Littleton, have the following note: "If a stranger cuts down trees on land leased, lessor and lessee may both have actions to recover their respective loss" (Co. Lit. 57 *a*, note 2). And Sergeant Williams, in his notes to Saunders' Reports (1 Saund. 322a, note 5), alludes to the same doctrine, and refers to the foregoing note of Hargrave and Butler (see *contra*, Chitty's Pl.; 1 Johns. 511; 3 Ib. 468).

† In Clark v. Smith, *supra*, Lewis, C. J., said: "Why should a lessor at will be made an exception to the rule? The only reasons assigned are, first, that the possession of the tenant is the possession of the landlord; and second, that the landlord's right to take immediate possession is equal to actual possession. There is nothing substantial in the first reason. The argument proves entirely too much. The possession of every tenant, whether for years or at will, is, by

§ 950. Where the injury is to the inheritance, and is one in which the actual possessor has no interest beyond the mere entry, the action must be brought by the reversioner.[1] If, however, a right or privilege annexed to the ownership of land has been obstructed by the wrongful act of the defendant, and the land is occupied by a lessee, damages may be recovered in respect of the injury to the possessory interest of the latter, and by the landlord or reversioner in respect of the permanent injury to the inheritance.[2] If, therefore, A. is seized in fee of the reversion of a close expectant upon a term for years, and B. is possessed of another close adjoining thereto, through which close there runs a rivulet, and B. stops it, and thereby the close of A. is surrounded so that the timber trees decay, A. in respect of the prejudice to the reversion, and the termor in respect of the injury to the possession and the loss of the shade, shelter, &c. of the trees, may each have an action, and satisfaction given to one is no bar to the other.[3] But the landlord of a tenant for years cannot maintain trespass against a stranger, though the act done be injurious to the reversion, his remedy being an action on the case.[4] *

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construction, the possession of the lessor; and therefore the landlord might upon this principle, maintain trespass in all cases, without regard to the actual possession of his tenant or the duration of his term. The second reason is equally objectionable, because it would sustain trespass at the suit of a disseizee and every other person who had a right of entry. Besides, the lessor at will has not the absolute right which has been supposed to dispossess his tenant without notice, and without giving him a reasonable time to take the emblements and remove his other property."

[1] Smith v. Felt, 50 Barb. 612.

[2] Holt N P. C. 543; Wood v. City of Williamsburgh, 46 Barb. 601; Cushing v. Kenfield, 5 Allen, 307.

[3] Bedingfield v. Onslow, 3 Lev. 209.

[4] 1 Arch. Ni. Pri. 302; 1 Hill Real Estate, 552, 553; 4 Kent Com. 119; Torrence v. Irwin, 2 Yeates, 210; Anderson v. Nesmith, 7 N. Hamp. 167.

* At common law, the remainder-man may maintain an action on the case in the nature of waste for an injury to his reversionary interest, while at the same time the tenant may sue for the injury to his possession (Com. Dig. 517, Tit. Waste, c. 4; Cruise's Dig. Tit. 18, c. 1, §§ 63, 20 and 54; Wash. on Real Prop. 116; 4 Kent's Com. 77; Jesser v. Gifford, 4 Burr. 2141; Bedingfield v. Onslow, *supra*; Randall v. Cleaveland, 6 Conn. 328; Chase v. Hazelton, 7 N. Hamp. 176; Wood v. Griffin, 46 N. Hamp. 230; Cook v. Champlain Trans. Co. 1 Denio, 91).

Where a grist mill and the land adjoining is rented for an indefinite time, the

§ 951. When trees are once severed, the tenant ceases to have any interest in or right to the trees, and they then become the absolute property of the reversioner, and this absolute ownership draws after it and with it the legal possession, so that he can maintain trespass for carrying them away and converting them. And even if the tenant himself had carried them away after they were cut, the reversioner could maintain trespass against him for such carrying away. *

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rent to be paid out of a portion of the proceeds of the mill, the owner has not such a possession as will enable him to maintain trespass against a third person for an injury to the dam (Miller v. Fulton, 4 Ham. 433).

The action for an injury to the reversion must be brought by the one who has the legal estate, and not by a person who has a mere equitable interest as *cestui que trust* (Vallance v. Savage, 7 Bing. 599). Where several persons are entitled to the reversion as joint tenants or tenants in common, they must all be joined as plaintiffs (Bac. Abr. Joint Tenants, K).

In an action by the remainder-man in fee for an injury to the inheritance by cutting timber, the tenant for life or years need not be made a party. In such case the plaintiff cannot recover for any damage the life tenant may have sustained, but a separate action must be brought therefor (Van Deusen v. Young, 29 N. Y. R. 9).

In New York, by section 8, of title 5, of chapter 1, of part 2, of the Revised Statutes, "A person seized of an estate in remainder or reversion may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding any intervening estate for life or years" (see Van Deusen v. Young, 29 Barb. 9).

In Livingston v. Mott, 2 Wend. 605, the question presented was whether a person acting by the permission of the tenant in possession, or holding under him and doing an injury to the estate of the reversioner, was liable to answer for damages to the reversioner in an action of trespass, and it was held that he was not.

In an action of trespass by the owner of land occupied by a tenant, against persons for removing the house on the land, proof that the tenant had liberty from the plaintiff to remove the house, and that the defendants were his servants, is a good defense (Lee v. Meeker, 2 Wis. 487).

* A reversioner cannot bring trespass against any one who enters upon his estate, plows it up, treads down the grass, or does any other injury to it. Every injury of this kind is done to the particular tenant, the lessee, the man in possession. It concerns not the reversioner who plows his land, who takes the fruit growing on it, or who does any other trespass on it. He has his rent, and the tenant being entitled to the use and possession of the land, can alone bring the action for all trespasses on it. True it is, if anything be done which comes under the denomination of waste, this goes to the destruction of the reversioner's estate, and this being an injury to him he can have redress, but it must be an action of waste, not trespass. This action may also be brought against the tenant, whether the waste be done by him or a stranger. If it be done by a stranger, the tenant has his remedy over against him. A reversioner may bring an action on the case in the nature of waste against a stranger for plowing up his ground and carrying away the turf thus obtained. The reason given in Randall v. Cleveland, 6 Conn. 328, is, that "unlike a bare wrongful entry on land, or mere outrage on the possession of the tenant, for which he might be compensated in an action of trespass, these are permanent injuries, and entitle the reversioner to

§ 952. Where a lease reserves a part of the crops in lieu of rent, the landlord may maintain trespass for an injury done to the crops before severance, either alone, or jointly with the tenant.[1]* It would seem that whenever the reser-

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damages. And these damages he is not bound to recover from the tenant, but may have his action against the wrong-doer himself."

[1] Moulton v. Robinson, 7 Fost. 550; Stewart v. Doughty, 9 Johns. 108.

* Moulton v. Robinson, *supra*, was an action of trespass for taking and carrying away hay belonging to the plaintiff; the hay having been taken by the defendant as sheriff on an execution against one Ladd. The hay was cut upon a farm occupied by Ladd under a lease from the plaintiff. The part of the lease relied upon by the plaintiff was as follows: "The produce to be divided when harvested, excepting the hay, which is to be used equally on said farm, and the proceeds or gain of the stock to be divided when disposed of." A verdict having been found for the defendant, the Supreme Court, in setting it aside, said: "Where it is expressly agreed, or necessarily implied from the nature of the contract, that the tenant shall not acquire any right to a portion of the produce of the land, or that he shall acquire merely some limited and qualified interest, we hold that the general property in the whole of the specified produce is reserved to, and remains in the lessor, or it accrues to him, as it comes into being, while the tenant at the same time holds or acquires certain special interests in it, or the general property of the share reserved remains in or accrues to him, subject to such special interests of the tenant as are necessary, if any, to enable him to execute his part of the contract, while the general property of the share not reserved to the landlord, becomes vested in the tenant by virtue of the implied grant of the profits ordinarily resulting from every letting to hire, subject to such special interest, if any, as may be reserved to the landlord. In our view, whenever, upon a lease of land, either for one crop, or one year, or for several years, the owner of the land is to receive a part of the productions of the land in lieu of rent, the contract operates and takes effect by way of reservation. The share reserved is always the property of the owner of the land, without severance or delivery, though both of these may be stipulated for. Where the agreement of the parties to the lease is, that the crops of hay and fodder which may be grown upon the land shall be consumed upon the farm, in feeding the stock kept upon it for the common benefit, the agreement being that the produce or income of the stock should be divided, the true construction of the agreement upon the principles we have stated would be, that the lessor accepts or reserves the hay out of the general grant of the profits implied upon the letting to hire; and instead of a general grant of the property, he substitutes a grant of a special and qualified interest, a right to use the same in one particular way for the common benefit of both parties." It was objected that separate actions of trespass were brought by both the landlord and tenant for a trespass to their joint property. The court said: "It is not seen that any objection exists to the right of the tenant to maintain trespass against a mere wrong-doer, since he has the actual possession jointly with and for his cotenant; and it is well settled that in actions *ex delicto*, if a party who ought to join, be omitted, the objection can only be taken by plea in abatement, or by apportionment of the damages on the trial; and there is a further answer, that the officer might lawfully take the property by virtue of an execution against one of tenants in common, and sell the interest of that one, and deliver the property to the purchaser, who would become a tenant in common with the other owner. The injury is not joint, when the share of one tenant in common is taken and sold; for as it respects that one, the justification is complete; and if it is not so, it is imperfect for some reason with which the other has no concern. The tenants in common do not suffer a joint injury, and they are not jointly interested in the damages to be recovered"

vation is of all the crops to the landlord, the entire property is always in him, and he alone can bring an action for any wrong done to them; the obligation of the tenant to cultivate and harvest being really in the nature of a contract for services.* Where the reservation is of an undivided share, the property of that share is always in the lessor by virtue of his reservation; while the property of the residue is always in the tenant by virtue of the implied grant of profits; and they are therefore tenants in common of the crop until a division, and upon the ordinary rules of law must join in any action for injuries to the joint property. Where the reservation is of the crops, or some part of them, to be used upon the land, the general property and right to them remain in the landlord. But during the continuance of the lease, the possession remains common, because they have a common interest in the cultivation and application of them, the tenant agreeing to cultivate, harvest, and use the crops for the common benefit of both; and as tenants in common they must ordinarily bring their action jointly.[1] † Where A.

(citing Wilson v. Gamble, 9 N. Hamp. 74; Pickering v. Pickering, 11 Ib. 141; Lathrop v. Arnold, 25 Maine, 136; Melville v. Brown, 15 Mass. 82).

The foregoing view of the rights of the parties to a lease, as drawn from a reasonable construction of the contract itself, was adopted by the Supreme Court of Maine, in Potter v. Cunningham, 34 Maine, 192, in accordance with the case of Kelly v. Weston, 20 Maine, 232, but substantially overruling Turner v. Bachelder, 17 Maine, 257, which was mainly decided upon the authority of Co. Litt. 142 *a*, before referred to. A similar view seems to be recognized in Vermont, in White v. Morton, 22 Vt. 15, and Hurd v. Darling, 14 Vt. 214. And a leaning toward the same view is apparent in the case of Putnam v. Wise, 1 Hill, 234, against the case of Stewart v. Doughty, 9 Johns. 108.

[1] Moulton v. Robinson, 7 Fost. 550; Hatch v. Hart, 40 N. Hamp. 93; Foote v. Colvin, 3 Johns. 216; Fiero v. Betts, 2 Barb. 633; Putnam v. Wise, *supra*; Caswell v. Districh, 15 Wend. 379; Cutting v. Cox, 19 Vt. 517.

* The lessor of land, who is the absolute owner of the premises leased, may stipulate in the lease that the crops grown on the premises by the lessee, shall remain the property of the lessor until the rent is paid; and such a provision is valid not only between the parties, but as to third persons also (Cooper v. Cole, 38 Vt. 185, and cases cited).

† The part of the profits of land reserved in a lease might, in the nature of things, admit of being regarded as rent, or as an exception from the grant of the profits ordinarily implied in a lease or letting to hire. But the result of one of these views would be essentially different from that of the other upon the rights of the parties, lessor and lessee, to the accruing profits anterior to the time when the lessor's share should be actually divided and set off to him. If the lessor's share should be regarded as rent, then the whole produce might perhaps be deemed the property of the tenant, and subject to his control, and conse-

rents land to B. at a specified sum per year, and B. agrees that A. shall have a lien on the crops raised on the land until the rent is paid, it is merely an executory contract, by which A. acquires neither a general nor a qualified property in the crops before they are raised and delivered to him by B., and until then he has no such constructive possession of them as will enable him to maintain trespass for taking them away.[1]

§ 953. If land be let upon shares for a single crop, it is not a lease of the land, and an action of trespass for breaking the close must be brought by the owner alone.[2] And if a farm is carried on at the halves, the owner of the land is not so far divested of the possession that he may not maintain trespass in his own name for an injury to the inheritance, such as digging stone or cutting timber.[3] When a tenant who works a farm on shares gives up the possession of the crops which he has under the lease, or consents to the sale of his interest therein, abandoning all claim thereto, the landlord may alone maintain an action of

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quently liable for his debts until the share of the lessor is set off and delivered to him. This would result from the general idea of the nature of rent as a compensation paid for the use of the property hired. To entitle the lessor's share of the profits to be regarded as rent, it seems necessary to consider the ordinary implied grant of the profits to exist in the case, and the crops, of course, to be the property of the tenant until he discharges his contract—that is, pays his rent by transferring a part to his landlord. If, on the contrary, the share of the landlord is considered as reserved or excepted, then the otherwise implied contract that the tenant should have the entire profits, is limited and restricted to a part only of the profits, instead of including the whole; and the right of the landlord to the share of the profits stipulated to be his, is unaffected by the contract of lease, and that share remains his during the whole time it is growing or accruing, in the same manner it would be if the tenant were merely his hired servant. The nature of the contract is much the same as if one of two tenants in common should hire his cotenant to carry on his half of the common property. Which of these views of the relative rights of the parties to contracts of this kind should be adopted in the absence of express decisions and authoritative declarations of the law, would be determined entirely by the consideration which was best calculated to carry into effect the intentions of the parties, and was most consistent with the general policy of the law (Moulton v. Robinson, *supra*).

A landlord may maintain trespass for trees or other property excepted in a lease; and any possession is sufficient against a wrong-doer (Van Rensselaer v. Van Rensselaer, 9 Johns. 377).

[1] Brainard v. Burton, 5 Vt. 97.

[2] Bradish v. Schenck, 8 Johns. 151.

[3] Cutting v. Cox, 19 Vt. 517.

trespass for an injury to them.[1] * Where, however, the interests of the landlord and tenant are separately affected by a trespass, separate actions may be maintained by them for the same injury.[2]

§ 954. When a tenant, by departing from his contract and putting the property to a different use, is guilty of such an abuse as forfeits his estate and revives the right of the general owner to immediate possession, the latter may maintain trespass for any interference with the property by a stranger after the tenancy is determined.[3] † In Campbell v.

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[1] Hatch v. Hart, 40 N. Hamp. 93.

[2] Briggs v. Bennett, 26 Vt. 146.

[3] Gilbert v. Kennedy, 22 Mich. 17.

* Where it is agreed in a lease that all the crops raised on the land during the term shall belong to the lessor until the rent is paid, the lessor may hold the crops against the creditors of the lessee. Smith v. Atkins, 18 Vt. 461, was an action of trespass for taking a quantity of hay. The hay was the produce of a farm which was rented by one Rice to Frink—"Rice to have complete and entire control and ownership over all the crops raised on the farm, as though he raised them himself, until the entire sum is paid each year." At the execution of the lease, Frink gave to Rice his note for the first year's rent. Rice transferred the note to the defendant, and also delivered to him the lease, to secure a debt which Rice owed to the defendant. It was held that the defendant was entitled to the produce of the farm during the first year, as security for the note, as against the plaintiff, who had attached the produce as the property of Frink, and had bought it at the sheriff's sale upon the execution in his suit. It was objected by the plaintiff, that the sale of the produce to the defendant was of property not *in esse*, and therefore void. The court said: "It is without doubt true, that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory—that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors. The leasing of land or domestic animals, or delivering to another property to trade with—the lessee having still an interest in the thing, but the general property remaining in the lessor—is not a sale of things not *in esse*, nor is it to be so esteemed, even where the lessor retains a lien for his rent upon the product of the land or the animals. It is argued that such contracts are so much against public policy that they ought not to be supported. But we think they are rather beneficial, and enable the poor man to obtain credit and the use of land when he could not otherwise do it, and that without detriment to the creditors. And we do not perceive how this will enable him to deceive any one, as the nature of his property may be as well ascertained in such case as in any other. So far as there is any principle of policy involved in questions of property, it is supposed to have reference to the security of property and credit to those who stand most in need of such protection, who are not generally of the same class of persons. The rule here adopted, we think, secures both far better than the opposite rule could."

† There is some discussion in the books as to how far certain equivocal acts of tenants, and of others in subordinate relation to the owner of the land, may be treated by him at his election as a disseizin. This is a concession made to the owner for the sake of the remedy, and to answer the purposes of justice. The

Proctor,[1] the tenant being a judgment debtor pointed out the land which he held at will to be levied on as his property, and otherwise assisted at the levy. Instead of notifying the officer and the judgment creditor that it was the property of another, and that he held it only at will, as his duty required, he, by this act, claimed the land as his own, and thus disclaimed his tenure. It was held that as this was a desertion of his duty as tenant and an act inconsistent with an estate at will, the tenancy at will was thereby determined, and that the owner of the land might have trespass against the judgment creditor for his entry thereon.

§ 955. If a person should lease his house for a term of years, and finding it unoccupied, should enter during the term and place his furniture in it, a stranger to the interests of the lessee could not enter and injure the furniture without being a trespasser, and the owner of the house having the actual, though not rightful possession of it, might maintain trespass *quare clausum* against such stranger. So where the owner of river flats subject to a lease entered into actual possession and erected a boom on them for catching and securing lumber, it was held that he might maintain such an action against one who, being a stranger to the title, destroyed his boom. But the income and profits of the flats would belong to the lessee and not to the plaintiff, and he would be entitled to recover only for the damage done to the boom, which was his own property.

6. *Action by landlord against tenant.*

§ 956. The owner of land, in the possession of a tenant at will, may maintain an action of trespass for a permanent injury to the freehold by the tenant; for the reason that the possession revests in the owner upon the commission of the

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subject is elaborately and learnedly discussed in Taylor v. Horde, 1 Burr. 60, and in 2 Smith's Leading Cases, Am. ed. 324, and notes.

[1] 6 Maine, 12.

tortious act which determines the lease.[1]* But it would be otherwise as to acts done by a tenant in lawful possession

[1] Ripley v. Yale, 16 Vt. 257; Daniels v. Pond, 21 Pick. 367.

* In Maine, an estate at will, existing by the statute, gives to the tenant rights for a period after a written notice to quit, of equal validity with those acquired under a written lease for a like period. Such rights will not be destroyed by the commission of waste by the tenant; and until such tenancy is terminated, trespass *quare clausum* will not lie by the owner against him (Young v. Young, 36 Maine, 133).

The rule that the tenant at will shall have reasonable notice of the determination of his estate, is founded on a principle of the common law, arising from the peculiar nature of such a tenure, and is indispensable in order to constitute him a trespasser by holding over (Rising v. Stannard, 17 Mass. 282, per Wilde, J.)

If a tenant at will commit voluntary waste, he forfeits all right to notice to quit, as he thereby determines his estate. Greenleaf says: "The general owner has a constructive possession as against his bailee or tenant, who, having a special property, has violated his trust by destroying that which was confided to him. Thus, if a tenant at will cuts down trees, the interest of the wrong-doer is thereby determined, and the possession by legal intendment immediately reverts to the owner; and proof of the wrongful act will maintain the allegation that the thing injured was in his possession (2 Greenlf. 661, § 615; 1 Co. Litt. 57 *a*; 5 Ib. 13; Countess of Salop v. Crompton, Cro. Eliz. 777, 784; Allen v. Carter, 8 Pick. 175; Lienow v. Ritchie, Ib. 235; Hingham v. Sprague, 15 Pick. 102; Daniels v. Pond, 21 Pick. 367; Phillips v. Covert, 7 Johns. 1; Erwin v. Olmsted, 7 Cow. 229; Campbell v. Proctor, 6 Greenl. 12; Starr v. Jackson, 11 Mass. 519; Bartlett v. Perkins, 13 Maine, 89; Davis v. Nash, 32 Maine, 411; Lyford v. Toothaker, 39 Maine, 28).

Comyn (Dig. Art. Trespass, b. 2) says: "The possession of a tenant at will who has committed voluntary waste, may be considered the actual possession of the landlord." If he cut down timber trees, or voluntarily pull down and prostrate houses, the lessor should have an action of trespass against him *quare clausum*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount to a determination of his will (1 Ins. 57 *a*; 5 Co. 13 *a*; Rolle Abr. 800; 6 Bac. Abr. Trespass, 593; 1 Wash. on Real Actions, 374, § 20). But it seems that the doctrine only applies to the case of a pure tenancy at will, where the lessor may enter at any moment; for where the premises have been leased for a number of years, for life, or for one year, or any definite part thereof, the lessor could not have trespass (Perry v. Carr, 4 N. Hamp. 118; Lienow v. Ritchie, 8 Pick. 235; Anderson v. Nesmith, 7 N. Hamp. 167; Russell v. Fabyan, 34 N. H. 235, and cases there cited). The question was suggested, but not settled, in Robertson v. George, 7 N. H. 306, as the facts and decision of that case were based on other grounds.

Like principles apply to injuries to the freehold committed by the mortgagor while in possession, and a like remedy accrues to the mortgagee.

Blackstone defines waste as the "spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary, which is a crime of commission, as by pulling down a house, or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations; whatever does a lasting damage to the freehold or inheritance is waste" (2 Bl. Com. c. 18, s. 6).

Commissive waste consists in the doing by a tenant of some willful injury to the demised premises.

The doctrine of waste of the common law is not in its strictness applicable to the condition of things in this country. But the law remains with us, as in England, that such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is *waste*, for which an action will lie in equity for the

under the lease, upon and to the land during the time of his possession.[1] *

prevention of such injury by injunction before it is committed, or at law for the recovery of damages by the remainder-man, after the injury is done.

Waste may be committed by removing the glass of windows, although the tenant himself at his own cost put it in the windows, for it becomes parcel of the house (Addison on Torts, 3d ed. p. 227).

When the law defines waste to be whatever does a lasting damage to the freehold or inheritance, it does not mean that it is to be left to a jury to determine, according to the opinions of witnesses, whether the act complained of causes such damage. Certain acts are in contemplation of law *per se* injurious to the freehold; and the only subject of inquiry for the jury is, whether such acts have been committed. The law of England, which deems it waste to cut timber, and also to convert woodland into meadow or pasture or arable land, has been modified to some extent in the State of New York in relation to wild and uncleared lands leased for agricultural purposes (Jackson v. Brownson, 7 Johns. 227; McGregor v. Brown, 10 N. Y. 114; McCay v. Wait, 51 Barb. 225; Kidd v. Dennison, 6 Ib. 9; and see Doe v. Wilson, 11 East, 56; Hickman v. Irvine, 3 Dana, 123).

Tenants are liable to the person having the immediate remainder or reversion for waste, whether committed by themselves or a stranger, or by a part of such tenants only. This liability rests upon the same principles of public policy that apply to the case of a common carrier; and as the tenant is in possession, and upon the spot, and authorized to bring suit against any who may violate his possession, it is assumed that it is his duty, and in his power, to protect the estate against everything but the act of God and public enemies (Wood v. Griffin, 46 N. H. 230, and cases cited).

In Livingston v. Haywood, 11 Johns. 429, it was held that the action of waste mentioned in the New York statute (3 R. S. 5th ed. p. 39), was given to the reversioner against the tenant, and the action of trespass against a stranger only; that under it trespass would not lie against the tenant, nor waste against a stranger. In Livingston v. Mott, 2 Wend. 605, it was held that the under tenant of the lessee was not a stranger, so as to subject him to an action of trespass by the reversioner; that being in under the lessee, he was entitled to the same protection that the lessee would be, if the action had been against him.

The New York Revised Statutes (5th ed. vol. 3, p. 35, sects. 7, 8, 9) provide that "wherever there is a tenancy at will or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read. At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant, without any further or other notice to quit."

In an action of trespass, the court will not grant an order to stay waste (Leeds v. Doughty, 6 Halst. 193).

[1] Chadbourne v. Straw, 22 Maine, 450; Rev. Sts. of Maine, ch. 145, §§ 23, 47.

* The proprietor of land agreed to grant to the defendant leases of certain houses he had undertaken to build thereon, the defendant to hold the land and premises for eighty years, yielding therefor 400*l.* a year rent, and to build a wall all along the west side of the land, the landlord to have a right of way over the streets between the houses. The defendant entered, paid rent, built houses, and obtained leases of the houses as fast as they were built. It was held that he was in possession of the soil between the houses, and that the landlord could not maintain trespass against him for erecting a wall on the west side of the land

§ 957. Where the premises are cultivated on shares, an action of trespass cannot be maintained by the landlord against the tenant for taking away the crops of which the tenant is in possession, which have not been divided.[1] If it be stipulated, either expressly or by reasonable implication, that the lessor shall have the general property in the crops, and that they shall be consumed on the farm; or if the same stipulation is made with regard to other property put on the farm, or raised there, and the tenant, in violation of such stipulation, sells the same, and suffers the property to be removed, his right and interest therein are determined, and the lessor may recover for it in trespass against all consenting to or aiding in the removal.[2]

§ 958. A tenant cannot lawfully change the nature of premises demised to him, without the consent of the landlord, although such change may greatly enhance the value of them.[3] If he make any substantial alteration in the form and arrangement of the house, it is no longer the same house, and it is no answer to an action to say, that the tenant might, before the expiration of the lease, restore the premises to their original condition.[4] But where a tenant opened a new door, by which the house was in no respect injured, it was held to be a question for the jury, whether or not the reversioner was entitled to damages.[5] A tenant for life of farming land is entitled to cut down and use so much of the standing timber on the farm as may be necessary for fuel and for making and repairing fences and buildings; and if the land is wild and uncultivated, he may cut down so much of

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across the end of one of the streets (Alexander v. Bonnin, 4 Bing. N. C. 799; 6 Scott, 611; 1 Arn. 337).

Where land is occupied under a defective written lease, without the consent of the owner, the remedy is trespass *quare clausum* (Anderson v. Critcher, 11 Gill & Johns. 450).

[1] Briggs v. Thompson, 9 Penn. St. R. 338; see *post*, § 967.

[2] Gray v. Stevens, 28 Vt. 1; Lewis v. Lyman, 22 Pick. 437.

[3] Smyth v. Carter, 18 Beav. 78.

[4] Provost &c. of Queen's College v. Hallett, 14 East, 489.

[5] Young v. Spencer, 10 B. & C. 145.

the timber as may be proper for the purposes of cultivation, but he may not remove it so as to materially lessen the value of the inheritance.[1] *

§ 959. If the lessor except the trees on the demised premises, they do not pass with the land, and he may enter, cut and carry them away; and he can maintain trespass against the tenant or any other person for cutting them; for by the reservation of the trees the land in which they grow is reserved also, and the lessor in possession.[2] Where there is any doubt about the meaning of an exception in a lease, the words, being considered those of the lessor, are construed favorably for the lessee.[3] † Where the lessor of a farm reserved

[1] Jackson v. Brownson, 7 Johns. 227; Van Deusen v. Young, 29 N. Y. 9.

[2] Bac. Abr. Trespass, c. 3; Bro. Trespass, Pl. 55; 1 Archb. N. P. 302; Glenham v. Hanby, 1 Ld. Raym. 739.

[3] Bullen v. Denning, 5 Barn. & Cres. 842; Cardigan v. Armitage, 2 Ib. 197.

* In a lease of certain premises, with the privilege of taking "all the rocks and stones on my land," the lessee is not liable for digging to any extent for rocks, provided he does not wantonly, under a bare pretense, dig the land to the injury of the lessor (Leonard agst. Judd, Brayt. 230).

† In Van Rensselaer v. Van Rensselaer, 9 Johns. 377, the facts were as follows: Stephen Van Rensselaer gave a permanent lease to three persons of the name of Slingerland of a farm, excepting the mill seats with the privileges necessary for the same. Afterwards, Stephen Van Rensselaer, by an agreement in writing, conveyed to Robert Van Rensselaer the privilege to erect a dam and saw mill within the bounds of the farm. Maria Van Rensselaer, the mother of Robert, had purchased the title of the Slingerlands, and he was in possession of the farm under her when he entered into the aforesaid agreement with Stephen. Subsequently, Maria Van Rensselaer sold and released the farm, as described in the original lease, to Philip Van Rensselaer. About this time, the dam was carried away by a freshet, and the mill was not afterwards used by Robert. Robert having quitted the possession, Philip tore down the mill, and Robert thereupon brought an action of trespass *quare clausum fregit* against him, which, it was held at the Circuit, might be maintained. The Supreme Court, in denying a motion for a new trial, said: "By the original lease from Stephen Van Rensselaer to the Slingerlands, he reserved to himself the mill seats, with the privileges necessary therefor; consequently, the mill seat and ground sufficient for the use of the mills never passed to them. The agreement between Stephen Van Rensselaer and the plaintiff vested the latter with all the rights of the former until the plaintiff was paid a reasonable compensation for erecting the saw mill and dam; but, at all events, it rendered the plaintiff a tenant at will. The sale by Maria Van Rensselaer to the defendant, being only co-extensive with the right held by the Slingerlands, did not, and could not, pass that part of the premises on which the saw mill and dam were erected, because they were never granted to the Slingerlands. When Stephen Van Rensselaer gave the plaintiff a right to enter and hold the interest reserved out of the Slingerlands' lease, the entry and erection of a mill-dam and saw mill was a complete severance of the freehold, and it became a distinct and independent close. The circumstance of the dam's being carried away, and the nonuser of the mill thereafter, did not give to those

one chamber or bedroom in the house thereon, it was held that this gave him no right to the door yard, other than that of a passage or way to and from the room reserved, and that he was not justified in going through the yard with a horse and wagon and removing a clothes line which the tenant had placed there for the purpose of drying her clothes.[1] In a lease for years of land was the following: "All of the timber in the southeast corner, of about five acres, suitable and proper for fuel, to be left and not cleared." It was held that the foregoing clause was not an exception, but an agreement between the parties. The lessee was bound by the agreement, but it did not limit the extent of the grant. The whole lot, with all the timber upon it, passed by the demise. Without the clause, the law would have imposed the duty of preserving a portion of the timber, and it might have been proper to save it in different parts of the lot, and to an extent either greater or less than five acres in the whole, as the rules of good husbandry should decide. But the parties having settled that matter by contract, saying where and to what extent the timber should be preserved, the case stood as though there had been no such clause in the lease, and the law had decided that the timber on the five acres should not be cut. In either event, the interest in the trees, for all

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vested with the right of the Slingerlands any interest whatever, either in the dam or mill; but in point of law, the possession of them resided in the tenant of S. Van Rensselaer, who did no act destructive of that tenancy. In point of fact, the defendant had not the possession of the mill or dam until he entered and did the acts complained of as trespasses. The fallacy of the argument of the defendant's counsel relative to the possession, is founded on the supposition that the defendant's occupancy of the farm was necessarily an occupation of the mill dam. This is wholly incorrect if they were distinct and independent hereditaments. That they were so, results from the reservation in the lease and the actual entry under it. The plaintiff having erected the mill and dam under authority from Stephen Van Rensselaer, in whom the right resided, his tenancy never having been determined, on what principle can the defendant, who appears without color of right, appropriate to himself the plaintiff's property? Admitting that the possession of the mill and dam was vacant, it nevertheless was the close of him who had the right, and for violating that right trespass is the appropriate remedy" (citing 1 Chitty, 174).

In Van Rensselaer v. Van Rensselaer, *supra*, the court remarked that the jury did right in giving the plaintiff the value of the mill and dam, and might have gone higher.

[1] Fort v. Brown, 46 Barb. 366.

the purposes of shade or fruit, would pass with the land to the lessee; but the general property in the trees would remain in the lessor. And if the tenant improperly cut the timber, his interest in it would thereby be determined, and the landlord would be entitled to an action of waste or an action on the contract for the injury done to the land, or an action of trespass or trover for the wood which was severed from the freehold.

§ 960. Where a tenant holds over, the landlord has the option to treat him as a tenant for another year upon the same terms as the former lease, so far as applicable, or as a trespasser.[1] * In Diller v. Roberts[2] it was contended for the defendant that, upon the plaintiff's holding over after the first year, the law implied an agreement that he should pay the same rent and at the same time which he had agreed to pay the first year. Such, undoubtedly, is the general rule. In Phillips v. Monges[3] the court said that when a landlord suffers the tenant to remain in possession after the expiration of the tenancy, and receives rent from him, a new tenancy from year to year is established; and if no new agreement be entered into, the law will presume it from the silence of the parties; and the tenant holds the premises subject to all such covenants contained in the original lease as apply to his present situation. A person who enters upon land under an agreement with the husband of the tenant for life, and holds over after her death, is, as to the remainder-man, a mere trespasser.[4] If, however, an estate at will be determined by an

[1] Hemphill v. Flynn, 2 Penn. St. R. 144; Danforth v. Sargeant, 14 Mass. 491.
[2] 18 Serg. & R. 63. [3] 4 Whart. 229.
[4] Williams v. Caston, 1 Strobh. 130.

* "The tenant knows the time when his lease will determine. It is his duty to move out by that time, and surrender the premises to the landlord; and if he does not, it seems reasonable to consider his conduct as evidence of his assent to continue tenant for another year, which is the time the law ordinarily implies. If he do not remove, the landlord may be materially injured. He is prevented from providing another tenant, and is left at the mercy of one who stays or goes, as it suits him. It is but just, therefore, that the landlord should be at liberty to take him at his offer, and consider his remaining as an assent on his part to continue, and that such an agreement is implied by the law" (Sergeant, J., Hemphill v. Flynn, *supra*).

event not within the knowledge of the tenant, his holding over will not amount to a trespass. If, for example, the estate at will is determined by the death of the lessor in a distant country, or by his conveyance of the land, of which the tenant can by no possibility have notice at the time of such death or conveyance, it would not be contended that the tenant, by holding over, became a trespasser.[1] * It has been held that if a lease be fraudulently altered by the lessee in a material part after its execution, he thereby forfeits all future right under the lease; and that, if the lessor is afterward forcibly restrained by the lessee from exercising acts of owner-

[1] Rising v. Stannard, 17 Mass. 282.

* In Massachusetts, it has been determined in several cases, since the passing of the Revised Statutes, that a tenant at sufferance is not entitled to notice to quit, but is a mere holder without right. If, therefore, he has notice of the determination of his estate at will, and sufficient time to remove from the premises, and he again enters, he is a trespasser (Kinsley v. Ames, 2 Metc. 29; Hollis v. Pool, 3 Metc. 350; Benedict v. Morse, 10 Metc. 223). In Kelly v. Waite, 12 Metc. 300, the owner of certain land leased it verbally to the defendant for the season, and afterwards leased it in writing to one Dow for the same term. Dow thereupon entered, ordered away the defendant's servants, who were at work there, and gave notice to them of his lease. The defendant subsequently re-entered, and carried away the hay and grass which Dow had sold to the plaintiff. The judge instructed the jury that, unless the defendant had abandoned his lease, or surrendered his interest, on notice of the lease to Dow—that is, unless by some act or declaration he yielded and submitted to that title—he was entitled to a verdict. It was held that the instruction should have been that, on the execution and delivery of the lease to Dow, and his entry under it, the defendant became tenant at sufferance; and that if he had notice of the lease to Dow, and afterwards returned and took the hay and grass, he was a trespasser, and the plaintiff was entitled to a verdict. Shaw, C. J., in delivering the opinion of the Supreme Court, said: "If there was any question whether the defendant had notice of the lease to Dow, the evidence showing that Dow entered upon the land, ordered away the defendant's servants, who were at work there, and gave notice to them of his lease, should have been left to the jury. But the instruction went upon the assumption that, although the defendant had notice of Dow's lease, yet, if he did not consent to it, and voluntarily abandon the premises, he was entitled to a verdict. It assumes that the defendant, under his parol demise, had a right to the possession for the year or the season, of which he could not be divested except by his own act or consent. If there be any supposed hardship in the case, it results from the express provision of law, that a letting by parol for a term of time shall have the force and effect of a tenancy at will only, and the rule of the common law that the lessor may determine the tenancy at his will, and that a conveyance or lease of the premises to another is, in law, a determination of the lease at will."

In California, it has been held that the assignment by a tenant of the lease to his landlord, and a written agreement executed by both, declaring the lease canceled, will not abrogate the relation of landlord and tenant until there is a surrender of the premises by the tenant; but that the tenant will be deemed guilty of an unlawful detainer from the time of his receiving a demand in writing to surrender the premises (Kower v. Gluck, 33 Cal. 401).

ship upon the premises, he may maintain therefor an action of trespass *quare clausum fregit*.[1] *

§ 961. A lessor who has entered at the expiration of the term may sue in trespass persons claiming under the late tenant, as well as the late tenant himself.[2] And where the premises have been sublet, although the subtenant holds over against the will of the tenant, yet the landlord can recover against the tenant, as damages, the value of the premises for the time he is kept out of possession, and the costs of ejecting the under-tenant.[3] With reference to what constitutes a resuming of possession on the part of the landlord, in Dorrell v. Johnson,[4] which was an action of trespass *quare clausum fregit*, it appeared that the plaintiff had demised the estate for one year, ending on April 1st, to one of the defendants, under whom the other defendants justified. It was conceded by the defendants that when there was a demise for a fixed term, no notice to quit was necessary on the part of the lessor; but they claimed that, although a tenant thus holding over was a wrong-doer, still he was a tenant at sufferance, and not a trespasser. Taking this to be so, the question was presented whether enough was shown to have been done by the plaintiff to revest the actual possession in her, so that the tenant could not claim to hold by her sufferance and permission. The proof on this point was, that the agent of the plaintiff went on the land and cut trees for the plaintiff after the expiration of the term. It was held that this was suffi-

[1] Bliss v. McIntyre, 18 Vt. 466.

[2] Hey v. Moorhouse, 8 Scott, 156; 6 Bing. N. C. 52.

[3] Bramley v. Chesterton, 2 C. B. N. S. 605; Henderson v. Squire, L. R. 4 Q. B. 170.

[4] 17 Pick. 263.

* In Chesley v. Frost, 1 N. H. 145, it was held that if a grantee in possession fraudulently make a material alteration in a deed, he cannot avail himself of such deed in evidence, nor supply it by parol proof—limiting its effect prospectively, so as not to divest an estate already vested. In Withers v. Atkinson, 1 Watts, 236, such an alteration was held to destroy the deed, as to the party altering it, and to deprive him of all benefit from the covenants, treating it as in the case in New Hampshire. And in Lewis v. Payn, 8 Cow. 71, it was said that if a party have no other evidence except an altered deed, he cannot recover thereon, having, by his own act, destroyed the evidence of his demand.

cient to show that the plaintiff regained the lawful possession of the estate, and was entitled to maintain trespass for any injury to the soil; and that though it was not quiet and peaceable and exclusive possession, yet it was a sufficient answer that it was lawful and rightful.

§ 962. The well settled rule of law by which a tenant who has entered into possession under a lease is estopped to deny the lessor's title at the time of making the lease, as against the lessor, his heirs and assigns, is founded on the injustice of allowing a person who has obtained possession by admitting the title of another to deny that title, and, in case of failure in proof of it, keep the premises himself. The rule holds good where the actual title of the lessor is that of a mere tenant at will, and applies in every form of action by which the lessor may seek to assert the rights reserved or promised to him in his lease.[1] But it is equally well settled that the tenant is not estopped to deny that since his own entry into possession his lessor's title has expired, either by its own limitation, by the act of the lessor, or by eviction by title paramount; and that when the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title.[2]

§ 963. A tenant at will, by claiming to hold in his own right, and apprising the landlord of such claim, may so far throw off his tenancy as to commence a possession adverse to his landlord. This doctrine, if not expressly recognized by the ancient authorities, is certainly sustained by the recent American decisions. With proper qualifications, it is a doctrine well suited to the genius of our institutions and to the rapidly improving condition of real estate in this country. The operation of the principle is simply to impose upon the

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[1] Heath v. Williams, 25 Maine, 209; Coburn v. Palmer, 8 Cush. 124; Towne v. Butterfield, 97 Mass. 105.

[2] England v. Slade, 4 Term R. 682; Doe v. Edwards, 5 B. & Ad. 1065; Doe v. Barton, 11 Ad. & El. 307; Mountnoy v. Collier, 1 El. & Bl. 630; London & Northwestern R. R. Co. v. West Lan. R. 2 C. P. 555; Despard v. Walbridge, 15 N. Y. 374; Hilbourn v. Fogg, 99 Mass. 11.

landlord the necessity of protecting his interests, after learning the hostile claims of his tenant, by that measure of diligence which the statute of limitations has prescribed. For other purposes, the original relation between the parties has its legal effect upon their respective rights. The tenant is still restrained from disputing the title under which he entered; nor can he augment the burden of proof upon the other side by denying his tenancy.[1] *

§ 964. Although a tenant, after his tenancy is dissolved and he has quit possession, has a right to reasonable ingress upon the land in order to remove his goods, yet if the entry be accompanied by violence to the owner of the property, it becomes a trespass *ab initio*, and an action will lie for the damage resulting therefrom.[2]

7. *Action by tenant against stranger.*

§ 965. Since a person in the actual possession of land,

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[1] Willison v. Watkins, 3 Peters, 43; Bowker v. Walker, 1 Vt. 18; Tuttle v. Reynolds, Ib. 80; Greeno v. Munson, 9 Ib. 37; North v. Barnum, 10 Ib. 223; Hall v. Dewey, Ib. 593.

[2] 2 Blk. Com. 147; Comyn's Dig. Estates, H, 9 Comyn's L. & T. 356; Ellis v. Page, 1 Pick. 49; Barrett v. White, 3 N. Hamp. 227; State v. Moore, 12 Ib. 42; Ferrin v. Symonds, 11 Ib. 363; Daniels v. Brown, 34 Ib. 454.

* Where a landlord requested another to deliver a message to his tenant to call and make arrangements about the rent, and the tenant declared to such messenger that he would not pay rent, and claimed to own the premises, it was held that unless knowledge of such claim was brought home to the landlord, the declaration of the tenant was not constructive notice to the landlord (Hall v. Dewey, *supra*).

Where a tenant incloses a portion of land which does not belong to his landlord, and occupies it for upwards of twenty years, with, and as parcel of the demised premises, the presumption at the expiration of the lease is, that the encroachment was held by the defendant as part of the demised premises, and he is not at liberty to turn round and say that it does not belong to his landlord (Andrews v. Hales, 22 L. J. N. S. Q. B. 409; 17 Jur. 621; 2 El. & Bl. 349).

Where the tenant of a mortgagor bought the mortgage, and notified the mortgagor that he had done so, it was held that his possession was thereafter adverse, and enabled him to maintain an action for trespasses on the land (Pierce v. Brown, 24 Vt. 165). Isham, J.: "Under the decisions in England and this State, we have no doubt that if the plaintiff first entered into possession of these premises under the mortgagor as his tenant, still he might repudiate that tenancy by purchasing the Austin mortgage as being an older and better title, and protect himself in his possession of the premises from any claims of his former landlord. And whenever, by purchasing such title, he is entitled to the right of possession, it would be an idle ceremony to require the tenant to surrender up his possession, and then resort to his action of ejectment, when its only effect can be to put the plaintiff in the same situation he now occupies."

however defeasible his title, may maintain an action for a trespass committed thereon by any other than the party who has the right of entry, it follows that the action will lie at the suit of a tenant, whether he be a lessee for years, at will, or at sufferance, or even a tenant by the curtesy.[1] Where, however, the interest of a tenant for life ceases before the expiration of the term of letting, by the death of his landlord, the tenant will not be presumed to have continued in possession after such death, and in the absence of any subsequent entry, or any act done by him, he has not a sufficient possession of the land, either actual or constructive, to entitle him to maintain trespass.[2]

§ 966. If trees are cut by a stranger upon land in the possession of a tenant, he may have an action of trespass therefor,[3] and for the cutting and carrying away of grass, the action can only be maintained by him.[4] But where the owner of a farm who lives upon it makes an agreement with a person to cultivate and sow the land with grain on shares, the latter cannot maintain trespass, nor can he join with the owner and occupier of the farm in trespass *quare clausum fregit* for any injury done to the crop, for the reason that he is not in possession of the land.[5] *

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[1] 2 Roll. Abr. 551, Pl. 6; Geary v. Barecroft, 1 Sid. 346; Brown agst. Bates, Brayt. 230; Clark v. Welton, 1 Root, 299.

[2] Brown v. Notley, 18 L. J. 89. [3] Hayward v. Sedgley, 14 Maine, 439.

[4] Bartlett v. Perkins, 18 Maine, 87; Davis v. Nash, 32 Ib. 411; Lyford v. Toothaker, 39 Ib. 28.

[5] Hare v. Celey, Cro. Eliz. 148; s. c. Gouldsb. 77; Greber v. Kleckner, 2 Penn. St. R. 289.

* In Wood v. Griffin, 46 N. Hamp. 230, the question was whether in an action of trespass *quare clausum fregit* by the tenant against a stranger he can recover damages for the injury to his possession, and also for the injury to the inheritance, without there having been any recovery against him by the remainder-man or reversioner, or any satisfaction made by him in any form. It was held that the plaintiffs were not entitled to damages for an injury to the inheritance until they had first satisfied the landlord. The court said: "It is clear, from the adjudged cases, that the claims of the tenant and reversioner can be separated; that they are in fact distinct, and that each may maintain a suit for the injury done to him, and that both may be pending at the same time. How then can the tenant include in his damages the injury to the reversion? If he can in any case, how is the defendant to avail himself of the fact that another action is pending by him in remainder or reversion? Again, there is no necessity for arming the tenant with such power. If he is entitled to recover for the

8. *Action by tenant against landlord.*

§ 967. The tenant may maintain an action of trespass against the landlord or his assigns for breaking and entering his close.[1] Where A. allowed B. gratuitously to occupy a building on his land, and wishing to get rid of him took off the roof, it was held that B. could maintain trespass against A. for injury thereby caused to B.'s property in the building.[2] If the land is let to be cultivated on shares, and the landlord removes the crops, the tenant may bring trespass against him therefor.[3] A. let a farm to B. for six years, from May 1st, 1805, B. stipulating to render to A. one half of all the wheat, rye, corn, and other grain raised on the farm in each year in the bushel after deducting the seed; and it was

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injury to the inheritance, whether he has satisfied the reversioner or not, his recovery must be a bar to a suit by the landlord, and still the trespasser might avail himself, by way of defense, of a license or admission by the tenant which might in effect defeat the landlord's claim against such trespasser; and besides, the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his inability to obtain from the tenant himself the fruits of the suit against such third person. The fact that the tenant is answerable for the injury does not, we think, furnish an adequate reason for sanctioning such doctrines. Where waste is committed by cutting down timber trees by a stranger, the property in them at once passes to the landlord. If the tenant has been compelled to satisfy the landlord for the injury by a third person, he may have his remedy over, but until then we think he must be confined to damages for the injury to the possession. This case is unlike the cases of goods in the hands of carriers, factors, wharfingers and other agents, who are responsible for them to their principals, because of the different rules which apply to lands and goods. In the case of lands in the possession of a tenant, his interest and the interest of the landlord are distinctly marked and easily separated, and for injuries to either there are appropriate and distinct remedies, while in respect to goods there is, in general, no such distinction. And such is the effect given by the law to the fact of possession, that either trespass or trover may be maintained against one who wrongfully deprives another of such possession without any injury as to the ultimate title. But beyond this the authorities, so far as we have any, are opposed to the claim of the tenant to recover damages for an injury to the inheritance until he has first satisfied the landlord; and there is nothing in the state of the law in respect to suits by agents, carriers, and others in possession of goods, that would induce us to extend it to a case like the present."

An execution issued on a judgment rendered upon summary process instituted by A. against D. to obtain the possession of a leased tenement, requiring the officer to put out D. *and all others*, will be inoperative as against those not holding under or deriving title from A. or D., and if the officer enforce the process against such others he will be deemed a trespasser (Colt v. Eves, 12 Conn. 243).

[1] Roll. Abr. 561; Wilber v. Paine, 1 Ham. 251.

[2] Caldwell v. Julian, 2 Rep. Con. Ct. 294.

[3] Blake v. Coats, 3 Iowa, 548; Hatchell v. Kimbrough, 4 Jones, N. C. 163; *ante*, § 957.

agreed that either party might determine the rights of the other on a previous six months' notice, and in case A. gave such notice, he was to indemnify B. for preparing the ground for the seed, and for extra labor. B. entered in May, 1805, and remained on the farm until the latter part of February, 1809, when he left by reason of a written notice from A., to quit in six months thereafter. The autumn previous to B.'s quitting, he sowed on the farm wheat and rye. In January, 1809, all of the right and title of B. to the wheat and rye were sold by the sheriff to D. under a judgment in C.'s favor against B. rendered in December, 1808. In the summer of 1809, while D. was engaged in harvesting the wheat and rye, A. entered the field and drove him out, and carried away the wheat and rye. It was held that an action of trespass might be maintained by D. against A. therefor.[1] * A. let land to B. to raise corn thereon, the rent to be paid in money, or half the crop, as A. should elect. Before the corn was ripe, A. assigned his interest therein to C. who, without notice to B. of election, and without any division of the field or crop, turned his hogs into the field. It was held that B. might maintain trespass *quare clausum* against C.[2] By agreement between a lessor and lessee, the lessee was to carry the farm on well, secure the hay in good season and order, and one half the hay was to be eaten by the stock on the farm,

[1] Stewart v. Doughty, 9 Johns. 108.

[2] Lathrop v. Rogers, 1 Carter, 554; s. c. 1 Smith, Ind. 347.

* In the above case, Chief Justice Kent, who delivered the opinion of the court, after discussing the general right of the plaintiff to maintain the action, said: "The next question is whether the plaintiff is entitled to recover the whole or only a moiety of the crop. This will depend on the question whose property the grain was before a moiety was delivered to the lessor. An interest in the soil passed, and the lessee would have been entitled to an action of trespass for any unlawful entry upon it. The proportion of the productions of the farm, which the tenant was yearly to render, was a payment of rent in kind. They were not tenants in common in the crops and productions raised. The interest and property in the crops was exclusively in the tenant until he had separated and delivered to the lessor his proportion. It might as well be said that the lessor would have been tenant in common in the crop, though he was to receive only every tenth bushel of grain as a rent. The interest in the whole crop therefore passed to the plaintiff. The only remaining question is whether the plaintiff is entitled to an action of trespass *quare clausum fregit* for the loss of the crop. As he had an exclusive interest, I think the action will lie" (citing Crosby v. Wadsworth, 6 East, 602; Whipple v. Foot, 2 Johns. 418).

and the other half to be equally divided between the contracting parties. It was held that the lessee was owner of the entire product until there was a division of the hay as stipulated in the agreement; that until then, the lessor could not take any portion of the hay as his own, but that his rights and remedies were upon the stipulations in the lease, and that the contract, until executed, gave the lessor no claim *in rem* upon the hay or other crops.[1] *

§ 968. A tenant at will who is not in rightful possession cannot maintain trespass *quare clausum* against his landlord. Where a bond was given to make title to land, it was held that as the obligee, who went into possession under a parol agreement that he was to occupy until the money became due, was but a tenant at will to the obligor, he could not maintain such an action against the latter, or one deriving

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[1] Symonds v. Hall, 37 Maine, 354; and see Bailey v. Fillebrown, 9 Ib. 12; Dockham v. Parker, Ib. 137; Turner v. Bachelder, 17 Ib. 257; Garland v. Hilborn, 23 Ib. 442; Butterfield v. Baker, 5 Pick. 522.

* The tenant, where there is no positive agreement dispensing with the engagement to cultivate the farm in a husbandlike manner, is bound to expend the hay and other like produce upon it as the means of preserving and continuing its capacity of production (Perry v. Carr, 44 N. Hamp. 118; Moulton v. Robinson, 27 Ib. 561).

Coke (Co. Litt. 142 *a*), says: "But a man, upon his feoffment or conveyance, cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant." It would seem that from the rule thus laid down, and repeated in later books, have arisen the decisions in England and this country which hold that the landlord has no interest in the hay or other crop which the tenant has agreed to expend on the farm, and no remedy if the tenant fails to perform his agreement, except upon his covenant.

When a tenant, holding for an uncertain time, sows the land, he is entitled to the crop as emblements (Davis v. Brocklebank, 9 N. Hamp. 73, per Richardson, C. J.; citing Graves v. Weld, 5 Barn. & Adol. 105; Ellis v. Paige, 2 Pick. 71).

Where the owner of land agreed with another by parol to clear and sow it, for which the latter was to have the crop, and the land was sold before the crop was harvested, the grantee having notice of the contract; it was held that the grantee was bound by the agreement, and that the person who sowed the land had a right to enter thereon and take the crop (Davis v. Brocklebank, *supra*).

By the common law of Pennsylvania, the tenant of a farm under a lease from year to year for agricultural purposes, is entitled to the way going crop, in view of which such letting must be presumed to have been made, if nothing be said to the contrary. This implication cannot be rebutted by proof of bad husbandry, or a trespass by the landlord justified by an alleged breach of contract. If there have been bad husbandry, the redress for that is by suit, and not by confiscation of the tenant's rights (Clark v. Harvey, 54 Penn. St. R. 142).

title from him.[1] But it is otherwise when the tenant at will is entitled to notice to quit, which has not been given.*

[1] Richardson v. Thornton, 7 Jones L. N. C. 458.

* Dickinson v. Goodspeed, 8 Cush. 119, was an action of trespass *quare clausum fregit* by a tenant at will against his lessor. It appeared that the wife of the defendant, with a person hired for the purpose, entered the house occupied by the plaintiff, and cut off and carried away a pump. At the trial in the Common Pleas, the judge ruled that if, at the time of the alleged trespass, the plaintiff was the defendant's tenant at will, he could not maintain the action; and the jury accordingly found for the defendant. The Supreme Court, per Shaw, C. J., in setting aside the verdict, said: "As between landlord and tenant at will, the landlord still remaining the owner, it is not competent for him to enter upon the premises without the notice to quit provided by the statute, and thereby presently determine the estate at will. The consequence is, that without such notice to quit, and before the term for which it was given has expired, the lessee at will has a lawful and exclusive possession, not only as against a stranger, but also against the lessor at will. This principle, of course, does not affect the landlord's right of entry where the tenant determines the estate by an actual abandonment of the possession, by an alienation, by forfeiture for waste, or other act which determines the estate at will by operation of law. As the defendant had given the plaintiff no notice to quit, the court are of opinion that the defendant had no right of entry, that the wife could not justify the act of entering and cutting off the pump, and that the action of trespass well lies" (citing Howard v. Merriam, 5 Cush. 563; Rev. Sts. of Mass. c. 60, § 26).

In Livingston v. Tanner (14 N. Y. R. 64), the question was whether a tenant for life or lives, who continued in possession without the consent of the landlord after the determination of the life estate, was entitled to a notice to quit before an action could be brought against him to recover possession of the premises. It was held that as the tenant in such case became a trespasser by the express terms of the statute, he was not entitled to notice before action. The statute referred to in Livingston agst. Tanner, *supra* (N. Y. Rev. Sts. 5th ed. v. 3, p. 39, § 7), provides that, "any person who, as guardian or trustee for an infant, and every husband seized in right of his wife only, and every other person having an estate determinable upon any life or lives, who after the determination of such particular estate, without the express consent of the party immediately entitled after such determination, shall hold over and continue in possession of any lands, tenements or hereditaments, shall be adjudged to be a trespasser." The statute further provides that the person so entitled may recover in damages against every such person so holding over, the full value of the profits received during such wrongful possession. In the foregoing case, it was contended on the part of the defendant, that the only object of this provision of the statute was to give the party immediately entitled after the determination, a right of action to recover for the use and occupation subsequent to such determination, which he had not at common law, and not to change the nature or character of the occupancy, from a tenancy at sufferance into a trespass. Johnson, J., in delivering the opinion of the New York Court of Appeals, remarked that this could scarcely be so, "because had that been the object, the remedy would have been extended to every case of a tenancy at sufferance created by holding over, without reference to the character of the estate determined. The common law gave no right of action in any case, against a tenant at sufferance to recover for use and occupation. And it is unreasonable to suppose that had the object been simply to enable the party entitled, to recover rents and profits, the remedy would have been confined to the single case of holding over after the determination of a life estate. In respect to the two other cases mentioned in the section, that of a guardian or trustee holding for an infant, and a husband seized in right of his wife only, neither of these persons holding over after the determination of their respective estates became tenants at sufferance at common law. They were

And although notice to quit may have been duly served on the tenant, yet if the landlord grossly abuses his authority, he will be liable as a trespasser. Whitney v. Swett[1] was an action of trespass for breaking and entering the plaintiff's house, removing his furniture, and keeping the plaintiff and his family from the house. It appeared that the plaintiff was a tenant at will of the defendant, and that having been duly notified to quit, the defendant entered the house and removed the furniture, the plaintiff and his family being at the time absent. The evidence tended to show that the furniture was removed in an improper manner—as that the carpets were torn up without removing the nails, and that the goods were deposited in an unsuitable place—as beds upon the ground. The judge before whom the cause was tried instructed the jury that they were to take into consideration the damage done to the property by its removal; that in addition to this, they might consider the trouble and inconvenience sustained by the plaintiff by the necessity of finding another place to deposit it, and another place of residence; that they should consider the whole case, and award to the plaintiff such sum in damages as, under the circumstances, they thought the defendant ought to pay, and the plaintiff ought to receive. A verdict having been found for the plaintiff, the Supreme Court, in refusing to disturb it, remarked, that "if the evidence was credited by the jury, the defendant was a trespasser without any legal justification,

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mere intruders, abaters, and trespassers. At common law, there was a material distinction between the cases of a person coming to an estate by act of the party and afterward holding over; and by act of the law, and then holding over. In the first case, which included an estate determinable upon any life or lives, he was regarded as a tenant at sufferance. In the other, to which belong guardians or trustees holding for infants, and husbands seized in right of their wives only, they were trespassers, and the relation of landlord and tenant never in any sense existed. In respect to guardians or trustees of infants and husbands thus seized, therefore, the statute is only declaratory of the common law; while in respect to persons having estates determinable upon any life or lives, its effect must inevitably be to change the common law character of the holding over in their case, and render it tortious, precisely like that of an intruder or abator at common law" (referring to 4 Kent's Com. 115; Cruise's Dig. tit. 9, c. 2; Co. Litt. 57; 1 Bouv. Law Dict. 525).

[1] 2 Fost. 10.

and the rule of damages given to the jury was the only one which ought to govern them."

§ 969. At common law, the owner can enter upon a tenant at sufferance, and dispossess him by force, and reap the crops, and thus determine the tenancy; and the tenant has no remedy by action. This is upon the general principle that when one has no interest or property in the soil, and no exclusive possession, trespass *quare clausum fregit* cannot be maintained.[1] * Where a bill of exceptions stated that the plaintiff was either a tenant at will or at sufferance of one of the defendants, it was held that it was a material fact, which ought to have been determined definitely at the trial; for the reason that if the plaintiff was tenant at sufferance, he could not maintain the action.[2] When the owner of premises occupied by a tenant at will sells and conveys them, the occupant becomes tenant at sufferance only, and cannot maintain trespass against the grantee in the deed, or one acting under his authority, for attempting to eject the occupant from the premises; the determination of an estate at will by an alienation by the owner of the reversion, being one of the legal incidents of such an estate to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit.[3] †

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[1] Co. Litt. 57 *b*; 2 Blk. Com. 150; Cruise's Dig. tit. 9, ch. 2; 4 Kent Com. 116, 117; Wilde v. Cantillon, 1 Johns. Cas. 123; Hyatt v. Wood, 4 Johns. 150; Jackson v. Parkhurst, 5 Ib. 128; Jackson v. McLeod, 12 Ib. 182; Livingston agst. Tanner, 14 N. Y. 64; Esty v. Baker, 50 Maine, 325.

[2] Moore v. Mason, 1 Allen, 406; Meader v. Stone, 7 Metc. 147.

[3] Curtis v. Galvin, 1 Allen, 215.

* At common law, a tenant at sufferance was regarded as one holding over by wrong after the determination of his interest, having no estate, but a naked possession only, and standing in no privity to the landlord. A person in possession was not entitled to notice to quit, unless there was either privity of contract or of estate between him and the landlord. The wrongful holding was, however, by the laches of the landlord, and the tenant was not liable for rent, because it was the folly of the owner to suffer him to continue in possession, after the determination of the preceding estate. Nor could the owner, before entry, maintain an action of trespass against such a tenant.

† The plaintiff was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent. The company having ceased to collect toll at the particular spot, the plaintiff was dismissed from their employ, and received

§ 970. When a tenancy has been legally terminated, the landlord may enter peacably upon the premises and remove the tenant therefrom, using such force as would sustain the plea of *molliter manus imposuit.* Although the owner has a right to go into the house with suitable assistants, and peacably and quietly remove the tenant's goods to a near and convenient distance for his use doing no unnecessary damage;[1] yet even this power is liable to abuse and must, therefore, be strictly pursued.[2] It was held in a recent case in Massachusetts that a landlord was not liable for peaceably entering the premises after the determination of the tenancy, during the temporary absence of the tenant and his family, setting the furniture out of doors, and preventing them from entering the house, although the furniture, during the ensuing night, was damaged by rain.[3] *

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notice to leave the house, which he promised to do. It was held that this did not constitute the plaintiff a tenant of the company, and therefore that he could not maintain trespass against their agent for pulling down the toll-house (Hunt v. Colson, 3 M. & Scott, 790).

An interference by the owner of premises with the possession of the undertenant without right, does not constitute a defense to a claim for rent made against such undertenant by the intermediate landlord. Such interference is a trespass for which an action is maintainable against the chief landlord; but the intermediate landlord is not liable for such acts (Luckey v. Frantzkee, 1 E. D. Smith, 47). Damages for a willful trespass committed by the landlord upon the demised premises, cannot be set off against rent due. Nor can such damages, not constituting a breach of the contract declared on, be proved for the purpose of recoupment (Levy v. Bend, 1 E. D. Smith, 169).

Where A. rented a house to B., which was subsequently torn down by C., it was held that B. could not maintain an action against A. for the trespass (Stevenson v. Lick, 1 Cal. 128).

If a lessor denies the right of the lessee, and refuses to permit him to occupy, the lessee is not obliged to take proceedings in ejectment, but may bring an action for damages. In Trull agst. Granger, 8 N. Y. R. 115, where this question arose in the New York Court of Appeals, the court said: "Under the Code, there can be no embarrassment as to the form of the action. And whether it is brought upon the agreement, express or implied, or in tort, for the violation of the duty arising from the relation of landlord and tenant established by the lease is immaterial. In either case, the damages should be the same, and in neither should the lessor be permitted wrongfully to withhold possession of the demised premises, and then insist that the lessee should turn him out by an ejectment, as the only remedy.

[1] Stearns v. Sampson, 59 Maine, 568.

[2] Barrett v. White, 3 N. Hamp. 210; State v. Moore, 12 Ib. 42; Whitney v. Swett, 2 Fost. 10.

[3] Clark v. Keliher, 107 Mass. 406.

* In Curl v. Lowell, 19 Pick. 25, which was an action of trespass *quare clausum*, the defendant pleaded that he was seized in fee of the premises, and

§ 971. But if the tenant should be thrust out with violence, or without allowing him a reasonable time to remove, it would be such a violation of his right as to entitle him to an action of trespass therefor.[1] In Ellis v. Paige,[2] one of the questions presented was whether, when an estate is determined by the lessor, the lessee is obliged immediately to quit or may be forcibly expelled. The judges were all of opinion that the law did not impose on the lessee such hard terms, but that he was entitled to a reasonable time to remove his family and property. In England, no civil action can be maintained against a landlord for regaining with force the possession of demised premises after the expiration of the term, unless there is an excess of force, and then only for such excess. In Turner v. Meymott,[3] the defendant, a landlord, on the determination of a tenancy at will, broke into the house with a crow-bar, and resumed possession, the tenant being absent, but having left furniture in the house. A verdict for the plaintiff was set aside, on the ground that if the defendant had committed a wrong he was only liable

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that they were held by the plaintiff as tenant at will; that afterwards, on the 13th of August, "he terminated the tenancy by giving the plaintiff notice to quit, and on the 22d of the same August made an open and peaceable entry thereon, and revested in himself the possession thereof; and that, on the 30th of August, after having allowed the plaintiff a reasonable time to quit the premises, the defendant peaceably and quietly entered in and upon the premises, and doing no unnecessary damage to the plaintiff's goods and effects, removed the goods and effects from the premises." It was objected that the defendant's entry on the premises, without expelling the plaintiff, did not revest the possession. The court said: "That the defendant had a right to enter and determine the tenancy at any time, by the principles of the common law, cannot be questioned; for this was in terms, and by express agreement of the plaintiff, a tenancy at will in the strictest sense, and in such case no notice to quit is necessary. The defendant, by the principles of the common law, might at any time enter and determine the tenancy, although a reasonable time should be allowed the plaintiff to remove, before the defendant could rightfully expel him. If, therefore, there had been no notice to quit on the 13th of August, the entry was lawful, and, consequently, by operation of law, the possession was revested in him. The expulsion of the plaintiff was not necessary, and, indeed, would not be justified if there had not been a notice to quit previously in pursuance of the statute. If that notice terminated the tenancy at will, then the plaintiff was tenant at sufferance, and the defendant might, after entry, maintain trespass against him. So that it seems very clear that the defendant, by his entry, became lawfully possessed of the premises, and the issue is maintained in his favor."

[1] Davis v. Thompson, 1 Shepl. 209; Moore v. Boyd, 24 Maine, 242; Brock v. Berry, 31 Ib. 293.

[2] 1 Pick. 43.

[3] 1 Bing. 158.

to indictment. In Harvey v. Brydges,[1] Parke, B., said: "Where a breach of the peace has been committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed.[2] The law is the same in several of the States.[3]* In Illinois it has been held that an action of trespass *quare clausum fregit* cannot be maintained for injuries done by a landlord to the person and property of his tenant who holds over after the expiration of the term, if the entry of the land-

[1] 14 M. & W. 437.

[2] See Patrick v. Colerick, 3 M. & W. 483; Davis v. Burrell, 10 C. B. 821; Blades v. Higgs, 10 C. B. N. S. 713; Pollen v. Brewer, 7 Ib. 371; Davison v. Wilson, 11 Ad. & E. N. S. 890; Burling v. Read, Ib. 904; Taunton v. Costar, 7 Term R. 431.

[3] Brown v. Cram, 1 N. Hamp. 169; Kingsbury v. Pond, 3 Ib. 511; Ferrin v. Symonds, 11 Ib. 365; Sterling v. Warden, 51 Ib. 217; Meader v. Stone, 7 Metc. 147; Miner v. Stevens, 1 Cush. 485; Mugford v. Richardson, 6 Allen, 76; Winter v. Stevens, 9 Ib. 526; Merriam v. Willis, 10 Ib. 118; Pratt v. Farrar, Ib. 519; Hilbourne v. Fogg, 99 Mass. 11; Morrill v. De la Granja, Ib. 383; Livingston v. Tanner, 14 N. Y. 64; The People v. Field, 52 Barb. 198; Kellam v. Janson, 17 Penn. St. R. 467; Zell v. Ream, 31 Ib. 304; Todd v. Jackson, 2 Dutcher, 525; Walton v. File, 1 Dev. & Bat. 567; Johnson v. Hannahan, 1 Strobh. 313; Tribble v. Frame, 7 J. J. Marsh. 599; Krevet v. Meyer, 24 Mo. 107; Fuhr v. Dean, 26 Ib. 116; Bowler v. Eldredge, 18 Conn. 1.

* In Sampson v. Henry, 13 Pick. 36, the court said: "The jury should have been instructed that, although the writ of attachment gave him no such right, yet as the plaintiff's lease had expired at the time of the entry, and the house belonged to the defendant, the plaintiff could not maintain trespass *quare clausum* for the forcible entry; and that, although the defendant could not justify the personal injury, yet the plaintiff was not entitled to recover any damages for the injury to the house. That this is the law in respect to forcible entries upon land seems to be well settled, and we do not find that any different principle is recognized in respect to the breaking into a dwelling-house. The defendant may be indicted for the forcible entry and breaking into the house, but the plea of *liberum tenementum* would be a good justification to the charge for breaking the house. We think, however, that this might be proved and considered by way of aggravation of damages for the personal injury, if it had been so laid in the writ. But this injury is complained of as a distinct trespass, and in this form the action cannot be maintained for the forcible entry."

lord is permitted by the covenants of the lease;[1] but that if the tenant, having removed everything in his house at the expiration of his lease, should keep the key and continue to claim possession, and the landlord, without any recovery in forcible detainer, should force the door of his vacant house, the owner would be liable as a trespasser to nominal damages.[2] In Massachusetts, where, upon the neglect of a tenant at will to pay his rent, the landlord gave him the notice to quit required by law, and afterward entered the house with force, and took away the windows and inside doors, it was held that he was not liable to an action of trespass *quare clausum fregit* at the suit of the tenant.[3] In Com. v. Haley,[4] the following instruction to the jury in the court below was held correct: "That a landlord had a right to resume possession of the premises without process, if he could do so without a breach of the peace; that his right to take out the windows and doors, and to remove the tenant's property, depended on the contingency of his being able to do so without opposition or resistance; that on being resisted, and finding that he could not remove the furniture or door without a breach of the peace, it became his duty immediately to desist from the attempt; and that he had no right to eject the tenant by actual force, although regular notice had been given." In New York, it has been said that if by surrender, or by reason of the non-payment of rent, or for other reason, the term of letting has ended, or the tenancy ceased, the landlord should resort to the remedy given him by statute,*

[1] Page v. De Puy, 40 Ill. 506.

[2] Reeder v. Purdy, 41 Ill. 279.

[3] Meader v. Stone, 7 Metc. 147.

[4] 4 Allen, 318.

* A judge who issues a warrant under a statute authorizing summary proceedings to dispossess tenants holding over, without having jurisdiction of the proceedings, is a trespasser, and an action of trespass may be maintained against him by the person dispossessed, although such person acquired possession wrongfully. In Evertson v. Sutton, 5 Wend. 281, one Jerome being the owner of certain land on which the plaintiff had mortgages, agreed with the plaintiff in July, 1826, to put him in possession of the premises within forty-five days, the occupancy thereof to be deemed equivalent to the interest on the mortgages. The forty-five days having expired, the plaintiff dispossessed Jerome under summary proceedings authorized by the statute against tenants holding over. Jerome was present at the proceedings, demanded a jury, and a verdict was rendered against him, whereupon possession of the premises was delivered to the plaintiff,

instead of an arbitrary removal of the tenant's goods and family by force without process.[1] The receiving of rent by the landlord after the occurrence of a cause of forfeiture, and a subsequent forcible interference with the possession of the tenant, will render the landlord liable as a trespasser.[2] *

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who placed them in charge of one Terry. Afterwards, Jerome brought summary proceedings before another judge of the same county, the above named defendant, against Terry, and through the management of Jerome, Terry having notice of but an hour and a half in which to appear before the judge, the case was called and judgment given in favor of Jerome. The affidavit upon which the defendant issued the summons was not given in evidence. It appeared that it was made by Jerome; and the attorney, who drew it according to Jerome's dictation, testified that he at the time considered it defective. The circuit judge instructed the jury, that although the plaintiff acquired no right to the premises through the proceedings instituted by him, yet that his possession was sufficient to throw the burden of proof upon the defendant, and that as he had not produced the affidavit of Jerome, or shown that it was such as gave him jurisdiction to proceed against Terry, he must be deemed a trespasser. A verdict was found for the plaintiff for $200 damages, and the Supreme Court refused to disturb it.

[1] Flaherty v. Andrews, 2 E. D. Smith, 529.

[2] Jolly v. Single, 16 Wis. 280.

* A tenant at will who is in the rightful possession of a dwelling-house, cannot be summarily removed therefrom by a writ of replevin. In Smith v. Grant, 56 Maine, 255, the owner of the house and lot in question gave notice to her tenant to quit. He did not, and she instituted a process of forcible entry and detainer before a magistrate. This case was tried, and judgment rendered against her and in favor of the tenant, the present plaintiff. Two days afterward, the owner executed a bill of sale to Ray, one of the defendants, of the house, "with the right to occupy the same where it now is, to the ground, including the underpinning, and also the right to remove the same." Ray, on the same day, notified the plaintiff in writing of his purchase, and requested him to quit, which he refused to do. On the same day, Ray sued out a writ of replevin "for the house," and put it into the hands of the other defendant, sheriff of the county, for service, and directed him to replevy the house, which he accordingly did, and removed the plaintiff, his family, and furniture, and put Ray into possession. The plaintiff thereupon brought an action of trespass *quare clausum* for the entry and removal against the sheriff, and Ray, who assisted him. The judge before whom the trial was had, instructed the jury, that if they should find that the premises in question were real estate, and that the plaintiff had exclusive possession thereof when the writ of replevin was served, the writ afforded the defendant no protection for ejecting the plaintiff and his goods. The Supreme Court said: "It is very clear that if the plaintiff had rights as a tenant in possession, those rights could not be affected by the sale of the building, so far as to justify a forcible removal, without sufficient notice. A sale may operate to terminate a tenancy at will, when it is of the whole estate, and of the fee of the land and in the premises. It is unnecessary to consider the effect as between the grantor and grantee, or vendor and vendee of the sale of a house alone, annexed to the freehold as this was. Assuming that it made it personal property, yet if another person was a tenant in possession, his rights cannot be lost or changed by this change of the nature of the property, from real to personal. If a man owns a house, which by reason of its having been built on the land of another, by his consent, is regarded in law as personal property, and leases it to another, the relation of landlord and tenant, and all the legal rights and duties of such relation, exist and must be performed. In such a case, could the landlord, if he claimed that the tenancy at will was ended, sue out a writ of replevin, and cause

§ 972. Where the tenant in possession has been dispossessed through judgment by default in ejectment, and the judgment and execution are afterward set aside, and he is restored to the possession, he may maintain trespass *quare clausum fregit* for an intermediate injury to the premises, against the lessor of the plaintiff, and those acting under him, but not against a stranger who came into possession *bona fide* and by title from the lessor.[1]

§ 973. Where a landlord, in order to make a distress for rent, breaks open an outer door, or gets in through the window, and then breaks the door open, and seizes the goods in the house, he is a trespasser and liable for all the damage sustained by the tenant. So, if a distress has been lawfully effected in the first instance, but the landlord abuses the distress by using or working horses or animals distrained, he becomes, at common law, a trespasser *ab initio*.[2] If a distress be made before the rent has become due, the tenant may resist the entry and seizure by force; and, after the seizure has been made, he may rescue his goods at any time before they are impounded, but not afterward.[3] A landlord who has accepted the rent in arrear and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained, al-

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it to be served by turning out the tenant and his goods and furniture? If he could do this, it would be a new mode of proceeding, and would supersede all the provisions of law in relation to forcible entry and detainer and the notice required, and enable a dissatisfied lessor to adopt a remarkably summary mode of ejectment, without resort to any of the modes pointed out in the statute or common law. Where property, when leased, was real estate, the same result might be obtained by pursuing the course apparently adopted in this case, viz.: sell out the building to the foundation, calling that personal property, leaving the foundation, cellar, &c., the real estate of the original owners. Whether real estate can thus be parceled out, by a common bill of sale, so that a house fixed to the freehold, and part of it, can be thus divided and held permanently, while remaining thus fixed, part personal and part real estate, might deserve consideration, if necessary to the determination of the case. It is not the case where such a building is sold to be immediately removed, and it is so removed. A dwelling-house fixed like this, when sold by a bill of sale, was as much real estate as the soil on which it rests."

[1] Bacon v. Sheppard, 6 Halst. 197.

[2] Attack v. Bramwell, 32 L. J. Q. B. 146; Oxley v. Watts, 1 Term R. 12; Six Carpenters' Case, 8 Co. 146 *a*.

[3] Gilbert on Distress, 61.

though his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover.[1] *

§ 974. When the landlord and owner in fee, claiming that the term has expired, enters without process and without force, during the temporary absence of the tenant, and the tenant soon after attempts to oust him by violence, the landlord may lawfully resort to force to maintain his possession. In Sage v. Harpending,[2] which was an action for assault and battery alleged to have been committed by a landlord on his tenant, in entering and forcibly keeping the tenant out of the premises. The court said: "The defendant, when he entered, was not guilty of assault or breach of the peace. Even if it be assumed that he was a trespasser, his position was very different from that of a mere stranger. He owned the premises in fee, and claimed to be entitled to the possession. Under these circumstances, the plaintiff had no right to take the law into his own hands, and attempt to dislodge the defendant by force, although his intrusion

[1] West v. Nibbs, 4 C. B. 172; 17 L. J. 150.

[2] 49 Barb. 166; s. c. 34 How. 1.

* Where there is a lease of a room "and of a right of common passage along an entry leading to and from said room, and out through the yard to the public street," the landlord cannot distrain goods kept in the entry or common passage (Winslow v. Henry, 5 Hill, 481).

The 10th section of the act of New York, Sess. 36, ch. 63, concerning distresses, protected a landlord distraining the property of a third person by mistake from being deemed a trespasser *ab initio*, and made him liable only for the special injury.

In Frisbee v. Thayer, 25 Wend. 396, the question arose under the statute authorizing a landlord to pursue and distrain goods removed from the demised premises, except where the goods had been sold before seizure in good faith, &c. The tenant had mortgaged the goods, and the mortgagee had removed them before they were seized by the distress warrant. It was held that the goods could not be distrained; that the mortgage was valid between the parties as to the landlord, unless fraudulent in fact; that the property did not belong to the tenant, and that the statute making mortgages void as to creditors and subsequent purchasers, was not applicable. Belknap v. Hastings, 1 Denio, 190, was a case of distress for rent; and it was held that persons justifying under a distress warrant are not in a condition to impeach a conveyance made by the tenant, on the ground of fraud against creditors. To enable a landlord to take such objection, he must, like any other creditor, obtain judgment and issue execution. The landlord in these cases had proceeded under the statute relating to a distress warrant for rent, and the cases were not embraced by the statute. He could no more distrain as a creditor than any other creditor could issue execution without a judgment (see Hall v. Stryker, 27 N. Y. 596).

was but recent. The defendant being in the actual possession, had a right to maintain it, and to use force, if necessary, for that purpose."[1]

§ 975. There is sometimes a nice distinction between a trespass and an eviction. Any trespass upon premises demised is a disturbance of the beneficial enjoyment. But something more than a mere trespass is essential to constitute an eviction, however much the act or successive acts of trespass may obstruct the tenant in the beneficial enjoyment, or diminish the consideration of the contract.[2]* To work a

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[1] Parsons v. Brown, 15 Barb. 590.

[2] The Mayor of N. Y. v. Mabie, 3 Kern. 151; s. c. 2 Duer, 401; Howard v. Doolittle, 3 Duer, 464; Lloyd v. Tomkies, 1 Term R. 671; Levy v. Bend, 1 E. D. Smith, 169; Elliott v. Aiken, 45 N. Hamp. 30; Hunt v. Cope, Cowp. 242; Allen v. Pell, 4 Wend. 505; Palmer v. Wetmore, 2 Sandf. 316.

* In Pendleton v. Dyett, 4 Cowen, 581; s. c. 8 Ib. 727, the defendant, in order to maintain the plea that the plaintiff had expelled him from the possession, offered to prove upon the trial that the plaintiff introduced into the part of the house which he occupied lewd women and prostitutes at various times, keeping them all night for the purpose of prostitution; that he was in the habit of introducing other men, who, with himself, kept company with the women, and who together kept up such noise and disturbance throughout the night, using obscene and indecent language, so as to disturb the rest of persons sleeping in the part of the house demised to the defendant, in consequence of which the defendant was compelled to leave the house before the rent became due for which the action was brought. It was held by the Supreme Court that the evidence was properly excluded; that there could be no eviction without actual entry and expulsion; that the matter complained of simply amounted to a nuisance which the defendant could have abated by applying to the police; that he was under no necessity to abandon the premises; and that, therefore, his abandonment was no answer to the covenant for the payment of rent. The Court of Errors, in reversing the foregoing decision, determined that proof of an actual entry was not essential to establish an eviction, but that, without an actual entry upon the premises, the landlord might be guilty of acts which, by compelling the tenant to quit the premises, would amount to an eviction.

Where a landlord rented part of a house to one tenant, and then a part of the same house to another, and the former occupied the portion let to him and appropriated it to the purposes of prostitution, the landlord having no reason to suspect that the premises were to be so used, it was held that this did not constitute an eviction of the latter (Gilhooly v. Washington, 3 Sandf. 330). The court said: "This doctrine has never been applied to a case where the plaintiff himself has not been instrumental in producing the state of things set up as an eviction. We do not see on what principle the rule can be applied where the landlord lets, in good faith, the part of the tenement whence the annoyance proceeds, and without any reason to suspect the purposes for which the premises are to be used. It is said, however, that it was the duty of the landlord, upon ascertaining the character of the persons occupying his premises, and the uses to which they were perverted, to cause those tenants to be turned out, and thus to terminate the lease to them, under the remedy afforded him by the statute, which provides that whenever the lessee of any dwelling-house shall be convicted of keeping the same as a bawdy house, the lease for the letting of the same shall thereupon

suspension of the obligations of the tenant under the lease, while his rights under it remain in full force, there must be an exclusion of the occupant from some portion of the premises demised, or a substantial and effectual deprivation of the beneficial enjoyment of the property, in whole or in part.[1] In Briggs v. Hall,[2] the landlord entered upon a farm, which he had demised to the tenant, and mowed the meadow land. This was held to amount to an eviction, because the principal enjoyment and possession of meadow land is the taking and using the hay, and the man who does this is, to every rational purpose, the possessor. This was an extreme case; but it shows that there must be a change of possession, or there is no eviction. The piling of wood on the premises by the landlord, after notice from the tenant to discontinue the practice, would at most be a mere trespass.[3] And the same was held where the tenant complained that a large quantity of water was thrown out of the rear windows of the adjoining house, wantonly, maliciously, and negligently, by the landlord and his servant, so as to run into and upon the premises leased by the defendant, whereby his property there deposited, consisting of fruits and other articles, was injured and destroyed to the amount of one hundred and fifty dollars.[4] *

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beeome void, and the landlord may enter and obtain possession, in the same manner as against a tenant holding over. The remedy conferred by the statute is not, however, to be set on foot by the landlord merely. Any person may institute a complaint against persons of such a disorderly character, and procure their conviction. If the occupants of the basement in question had been convicted, we do not say that the plaintiff would not have been obliged to resort to his remedy, and remove them from the premises. But it was not more his duty than that of the defendant to proceed to have them indicted, or to resort to the remedy against them on the ground of nuisance" (affi'd 4 N. Y. 217).

[1] Harrison's Case, Clayt. 34; Roper v. Lloyd, 1 Th. Jones, 148; Bushell v. Lechmore, 1 Ld. Raym. 369; Bennett v. Bittle, 4 Rawle, 339; Campbell v. Shields, 11 How. 565; Cram v. Dresser, 2 Sandf. 120; Mortimer v. Brunner, 6 Bosw. 653; Vanderpool v. Smith, 1 Daly, 311; Vermilyea v. Austin, 2 E. D. Smith, 204.

[2] 4 Leigh. 484.

[3] Lounsbery v. Snyder, 31 N. Y. 514.

[4] Edgerton v. Page, 1 Hilt. 320; s. c. 20 N. Y. 281.

* The New York Court of Errors, in establishing the doctrine of constructive eviction, made no change in the law. This was the view taken by Nelson, J., in Ogilvie v. Hull, 5 Hill, 52, and by Bronson, J., in Gilhooly v. Washington, 4 N. Y. 217. It was entirely consistent with the existing law to hold that a landlord

9. *Actions by and against corporations.*

§ 976. An action can be maintained by a corporation legally existing, for any invasion of its rights in real estate, in the same manner that it could be done by an individual.[1] A gas company authorized to set up and establish lamp posts along the streets of a city, have sufficient title and possession to maintain an action of trespass for an injury to them.[2] And where land is conveyed to a town for a school, an action of trespass for encroachments thereon may be maintained

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who compelled a tenant to abandon the premises demised, by acts which rendered the further occupation of them impossible, inconvenient, or useless, evicted the tenant as fully, to all intents and purposes, as if he had gone upon the premises and ejected him from the possession by force.

In Jackson v. Eddy, 12 Mo. 209, the tenant occupied the store and cellar of a building, the upper part of which was occupied by the landlord as a grocery, and the dripping from the salt, tar, &c., in the loft or floor occupied by the landlord, passed through the floor into the store occupied by the tenant, upon his sugar hogsheads, brooms, &c. The tenant complained, and the landlord tried to prevent further injury by sprinkling sawdust on the floor above, which only stopped the leakage temporarily. The tenant left before the commencement of the last quarter, and sent the key to the landlord, who refused to receive it. The court said: "If the lessor, by any wrongful act, disturbs that possession which he should protect and defend, he thereby forfeits his right, and the lessee may abandon the possession of the premises leased."

Cohen v. Dupont, 1 Sandf. 260, was an action by a landlord against his tenant for rent. The defendant occupied the second floor of the plaintiff's house, as a dentist. The calls upon him were numerous, and either because the plaintiff's family were disturbed by the constant ringing of the door bell, or from mischievous or malicious motives, some of the plaintiff's family resorted to the expedient of muffling the bell. This was done frequently, and was continued after the tenant remonstrated with the plaintiff against it, and after the latter, by the exercise of his authority, should have stopped it effectually. The consequence of this conduct was that persons coming to visit the tenant, as a dentist, would pull at the bell, and wait from fifteen to twenty minutes before effecting an entrance, and sometimes were compelled to leave without succeeding in getting into the house; and, if persisted in, the effect of such conduct would be seriously to impair, if not to destroy, the tenant's professional business. In addition to this, a variety of minor offenses were committed by the plaintiff's family. They littered the stair carpet with nut shells, dirt, and other filth, with the sweepings from the story above, and with water spilled upon it, and placed snow balls in the window sill to drip upon the carpet. On one occasion a placard was put on the stairway, to call attention, by his name, to the filthy condition of the tenant's stairs. Impertinent and insulting language was addressed by the plaintiff's family to persons visiting the tenant on business; and loud singing and like noises were made on the stairway, calculated to disturb such persons. The defendant and his family were repeatedly subjected to insulting language, to hearing obscene noises at their door, and to a variety of similar annoyances. It was held that the foregoing constituted an eviction.

[1] Cox v. Walker, 26 Maine, 504; Greenville &c. R. R. Co. v. Partlow, 14 Rich. 237.

[2] Roche v. Milwaukee Gas Co. 5 Wis. 55.

by the town.[1] * In Connecticut, it was held that an act of the legislature empowering part of a society to meet, choose officers, levy taxes, and repair their meeting house, enabled them to bring an action of trespass for the destruction of the meeting house after they had repaired it.[2] In Massachusetts, where a parish was proved to have had the actual possession of a lot of land on which the meeting house stood, together with such part of the land as had been used with it for horse sheds and other purposes, and which might from these and similar circumstances be reasonably presumed to have been annexed to, and become parcel of it, it was held that it had an actual possession sufficient to enable it to maintain trespass against a stranger.[3] In the same State, where the grantees named in a deed of land were organized as proprietors, held meetings, chose officers, had a treasurer, and claimed the land as proprietors, and thereby became under the statute a corporate body authorized to settle, manage and improve their common lands for the use of such persons as should be pew holders in the meeting house to be erected thereon, it was held that although the legal title was not in the religious society, yet that they were to be considered as the *cestuis que trust*, and being in possession, might maintain trespass against persons who set up their individual claim against the will of the corporation formed to manage the property for the common good, according to the original intent of the associated grantees; and that it was not competent for an individual proprietor to maintain an action of trespass in his own name, or in any way to obstruct the regular proceedings of the corporation as to the management or improvement of the common property.[4] Ellicottville Plank-road Co. v. Buffalo R. R. Co.,[5] was an action for a trespass committed by the defendants in enter-

[1] Castleton v. Langdon, 19 Vt. 210. [2] Tilden v. Metcalf, 2 Day, 259.

[3] First Parish in Shrewsbury v. Smith, 14 Pick. 297.

[4] Second Cong. Soc. in North Bridgewater v. Waring, 24 Pick. 304.

[5] 20 Barb. 644.

* As the inhabitants of a school district have no estate in any form in the property belonging to the district, the district alone can bring trespass *quare clausum fregit* (Chaplin v. Hill, 24 Vt. 528).

ing upon the plank-road, tearing up the plank, and grading and depositing materials for the railroad within the bounds of the plank-road, and for an injunction to restrain the defendants from proceeding with the construction of their railroad on and across the plank-road, until they had procured the damages to be assessed and paid. It was proved that the plank-road company was duly incorporated and organized, and that they built their road; that prior to the alleged trespasses by the defendants, the plank-road company had, in accordance with the statute, procured their road to be inspected, and had erected toll gates thereon, and were in the actual use, occupation and enjoyment of the same. It was held that the plaintiffs had shown a sufficient possession to enable them to maintain the action.

§ 977. The old doctrine, always admitted to be questionable, that trespass would not lie against a corporation aggregate is exploded by the modern authorities.[1] An action may be maintained against a town or city to recover damages for a trespass committed by any of its agents or officers acting under its authority, or in pursuance of directions given them, upon the property or estate of another.[2] A corporation is liable in tort for the tortious acts of its agents and servants acting in the ordinary service of the corporation without any order or authority under its common seal.[3] In an action against the London General Omnibus Company for interfering with the rights of the plaintiff by driving their omnibuses in such a manner as to molest him in the use of the highway, it was held that as the company was incorporated for the purpose of driving omnibuses, and the whole of the wrongful acts charged in the declaration were acts connected with the driving of their vehicles along

[1] Kyd on Corp. 223; Dater v. The Troy Turnpike & R. R. Co. 2 Hill, 629; *ante*, §§ 51, 532.

[2] Thayer v. Boston, 19 Pick. 516; Baker v. Boston, 12 Ib. 184; Hildreth v. City of Lowell, 11 Gray, 345; Stetson v. Faxon, 19 Pick. 154; Green v. Portland, 32 Maine, 483; Peck v. Ellsworth, 36 Ib. 393; Allen v. Decatur, 23 Ill. 332.

[3] Maund v. Monm. Canal Co. 4 M. & Gr. 452.

the public highway, and were consequently within the object of their incorporation, an action of damages would lie against them. The court remarked that it thought it extremely important where such companies have in fact intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award.[1]

10. *Action where the land is held in trust.*

§ 978. Where land is held in trust, the trustee can maintain an action of trespass.[2] But if the *cestui que trust* is in actual possession, he should be the plaintiff.[3] * Land having

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[1] Green v. Lond. Gen. Omnibus Co. 29 L. J. C. P. 13.

[2] Carrine v. Westerfield, 3 A. K. Marsh. 331.

[3] Cox v. Walker, 26 Maine, 504.

* In New York, where land is bought with the money of another, the vendee takes as trustee of the creditors of the person paying the money. Such an implied trust is not within the statute of frauds, and may be proved by parol, and the land may be seized and sold on an execution under a judgment against the one who advanced the purchase money. Foote v. Colvin, 3 Johns. 216, was an action of trespass for taking and carrying away sheaves of rye and wheat from the field. It appeared in evidence that the grain was sown by Litchfield, one of the plaintiffs, in 1805, on land which in 1804 had been sold and conveyed to Foote, the other plaintiff, under an agreement that the crop was to be divided between them in certain proportions in the field. It was proved that James Litchfield, the father of one of the plaintiffs, resided on the land when the grain was sown, and that when it was cut one Brett lived on it as a tenant under Foote. The defendant offered to prove that the land in question was purchased by Foote with the money of James Litchfield in order to avoid a judgment obtained against the latter in July, 1803, by one Hunt; that James Litchfield occupied until after the grain was sown, and that he then absconded; that Foote then rented the land to Brett; that Litchfield, the other plaintiff, was under age, and lived and worked with his father, James Litchfield, and that the agreement between him and Foote in relation to the crop was made with the privity of James Litchfield and for the fraudulent purpose of protecting it from the judgment in favor of Hunt; that in June, 1806, the right, title and interest of James Litchfield in the land was sold under an execution on that judgment to the defendant Colvin, who peaceably entered upon the land and cut and carried away the grain. The foregoing evidence being rejected by the judge at the circuit, a verdict was found for the plaintiff. The Supreme Court, in granting a new trial, said: "The evidence offered and overruled would, we are to presume, have established the fact that the farm was purchased with James Litchfield's money, and that Foote was the mere pipe of conveyance. This proof would consequently have shown an estate in James Litchfield, liable to be sold on execution under the 4th section of the act concerning uses. Indeed, without the aid of that statute, I consider James Litchfield, if he advanced the purchase

been devised in remainder to a *feme sole*, after her marriage the intervening life estate was conveyed to her sole use. Upon the insolvency of her husband she filed a bill, and an interlocutory decree was entered declaring that her right to the land ought to be vested in a trustee, followed by a final decree appointing a trustee "to take charge of the complainant's property," without regularly investing him with the legal title. * The wife then took possession, and it was held that her possession was the possession of her trustee, and that he might maintain trespass, that being essential to the performance of his trust.[1] †

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money, as having an interest liable to be sold on execution. This evidence, then, was improperly overruled. It follows that Foote being a trustee for James Litchfield, and it being a resulting trust susceptible of parol proof, and the interest of Litchfield being vendible under execution, Colvin as a purchaser at the sheriff's sale acquired all Foote's right both to the land and the crop. Foote then ceased to have any interest, and in this point of view the proof would have shown that the plaintiffs had not a joint interest in the rye. This was proper evidence under the general issue."

The following is the provision of the New York Revised Statutes, 5th ed. vol. 3, p. 15:

§ 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

§ 52. Every such conveyance shall be presumed fraudulent as against the creditors at that time of the person paying the consideration, and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands.

In Ambrose v. Ambrose, 1 P. Wms. 323, Lord Hardwicke is reported to have said that "it plainly appearing upon the evidence on both sides that the consideration money of this purchase was the proper money of A., had it not been for the statute of frauds, this would have made a resulting trust." The cases in 2 Vent. 361 and 1 Vern. 367, consider such trusts as saved by the statute without any deed declaring them, it being required that the proof should be clear that the purchase money was really the property of him who claims the estate. To the same effect are 3 Woodeson, 439, and 21 Vin. 497, in the notes.

[1] Rogers v. White, 1 Sneed, 68.

* Under a deed in trust, the legal estate is in the trustee, and if there be several trustees it is not in the power of one or more to exclude from the possession of the land conveyed another trustee. An attempt to do so would be inconsistent with rights which the law secures by such a deed. A lease given by a part of the trustees will confer no power superior to that possessed by the lessors, and possession taken under the lease cannot in the least abridge the right of possession of other trustees. The latter, although a minority, will be equally entitled to possession with those who constitute the majority, without being guilty of a trespass (Cox v. Walker, 26 Maine, 504; Porter v. Hooper, 13 Maine, 28; Trustees of Meth. Ep. Church in Pultney v. Stewart, 27 Barb. 553; Walker v. Fawcett, 7 Ired. 44.

† In Rhode Island, where the interest of the husband in his wife's land, no

11. *Action by executors and administrators.*

§ 979. As the right to the possession of the land of a testator belongs to his heirs or devisees, an executor who has no interest in the land but the power to sell, cannot maintain an action for trespasses committed thereon subsequent to the death of the testator.[1] In Lyman v. Webber,[2] the action was brought to recover damages which it was claimed the plaintiff, as administrator, had sustained by reason of the act of the defendant in wrongfully setting fire to a quantity of timber, brush, &c., which had been cut on certain premises of which it was alleged the plaintiff, as administrator of the intestate, was seized and possessed. The declaration seemed to be partly in trespass and partly in case. But the court remarked that it was not essential that they should decide to which class of actions it was to be referred, as in either point of view the facts would not sustain the action. Where, how-

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trustee of the same having been appointed under the "Act concerning the property of married women," is sold under a decree against him for the enforcement of a mechanic's lien, the purchaser may maintain trespass and ejectment against the husband to recover possession (Martin v. Pepall, 6 R. I. 92). "The effect of all this is to pass to the plaintiffs neither more nor less than might have passed by a lease from the defendant to the plaintiffs. It is a statute conveyance of the same right and interest. When conveyed, it remains in their hands defeasible in the same manner and by the exercise of the same powers as would defeat the husband's right unconveyed; and the plaintiffs, though they may be put in possession of the premises, are liable the next instant, upon notice from the wife, to pay the rent to her, or, upon the appointment of a trustee, may be compelled to yield up possession to him for the sole use of the wife. Nevertheless, we see no reason why they should be debarred from the recovery of a defeasible interest more than of one which is indefeasible. It is theirs until the true intent of the act renders it necessary that it should be avoided" (Ib. Brayton, J.)

Where a debtor, after his land is attached and before execution levied on it, sells the land *bona fide*, and after such sale and before the levy a trespasser cuts and carries away trees from the land and pays the grantee therefor, the grantee does not thereby become chargeable in a process commenced by the creditor after the levy in which the grantee is summoned as the trustee of the debtor (Chase v. Bradley, 26 Maine, 531). Shepley, J.: "The creditor must bring his action for money had and received to his use against the receiver of them, if he would obtain them. The law permits a debtor to convey his estate under attachment, and the purchaser to acquire a good title against all other rights than those secured by the attachment. Any such proceeds of property obtained from the estate after such a conveyance, made *bona fide*, and for a valuable consideration, cannot be the property of the debtor and grantor, or goods and effects of his in the hands of the purchaser. If it be admitted to be a fraud upon the law to cut and carry away timber trees from the land attached, it is not perceived how the debtor who had thus conveyed the lands subsequent to the attachment could, by the purchaser's committing a fraud upon another, acquire property to the proceeds derived from them."

[1] Aubuchon v. Lory, 23 Mo. 99. [2] 17 Vt. 489.

ever, a will gave to the executors very broad authority to manage as well as dispose of all the real estate, and to retain two-thirds of the proceeds thereof until the children of the testator severally arrived at the age of twenty-one, it was held that the executors acquired the right to maintain an action of trespass for any illegal entry upon the land of which the testator died seized and possessed.[1] *

[1] Dascomb v. Davis, 5 Metc. 335. See *ante*, §§ 53, 533.

* Under the statute of 4 Edw. it was held that trespass could not be maintained by an executor for cutting down trees, though it would lie for taking and carrying away the same trees (Williams v. Breedon, 1 Bos. & Pull. 329; Emerson v. Emerson, 1 Ventr. 187; Le Mason v. Dixon, W. Jones, 174). In Massachusetts, under the statute, an action of trespass may be maintained by an executor for an injury to the land done in the lifetime of the testator (Wilbur v. Gilmore, 21 Pick. 250). And in the same State, it has been held that the administrator of a mortgagee of land who has obtained judgment and possession under it for foreclosure, may maintain an action of trespass against one of the heirs at law of the mortgagee for entering thereon and cutting and carrying away wood and timber. In Palmer, Admr. v. Stevens, 11 Cush. 147, the objection raised to the action was that the relation of the parties, as respected the real estate, would not permit it, because the plaintiff, as administrator, was seized of the mortgaged premises in trust for those heirs at law of the mortgagee, who would, by the statute of distributions, have been entitled to the money had the premises been redeemed, and that, being thus holden in trust for the heirs, they could not be liable as trespassers. The court said: "The authority of such administrator over mortgages of real estate in which the intestate was mortgagee, and the nature of his interest, is regulated by Rev. Sts. ch. 65, §§ 11–15. But these provisions do not authorize the individual who may be the heir at law, on the final distribution of the assets of the intestate, to interfere with the possession of the administrator, much less to take and convert the property to his own use. During the three years' possession to foreclose the mortgage, the possession is wholly in the administrator. If the estate is redeemed, the money is paid to him, and he is to account for it as personal estate. It is only in cases where the land shall not be redeemed, or where it may not have been sold by him for the payment of debts or legacies, or charges of administration, that it is to be assigned and distributed among the same persons and in the same proportions as the personal estate of the intestate. In the mean time, his relation to it is the same as to personal estate. The right of possession is exclusively with him, and not in the heirs at law, and any interference by them would subject them to an action by him."

In New Hampshire, as the statute does not take away from the heirs of a person deceased the right of possession to land until a decree that the estate be administered as insolvent, the administrator previous to such decree has no right of possession, and consequently cannot maintain trespass *quare clausum fregit* for acts done upon the land of the intestate after the intestate's death. Upon the latter event, the real estate descends to the heirs subject to the statutory liability to sale for the payment of debts, and to the administrator's right to take the rents and profits if the estate should be insolvent. As they can maintain trespass *quare clausum* before entry, there is no necessity for the maintenance of the action by the administrator (Lane v. Thompson, 43 N. Hamp. 326; referring to Rev. Sts. of N. Hamp. ch. 159, § 10; Ib. ch. 161, § 19; and citing Bean v. Moulton, 5 N. Hamp. 451; Dexter v. Sullivan, 34 Ib. 480; Bergin v. McFarland, 26 Ib. 537; Kelley v. Kelley, 41 Ib. 502; Cutts v. Spring, 15 Mass. 135; 2 Hill on Torts, 3, 4; Barnstable v. Thacher, 3 Metc. 239; Webb v. Fox, 7 T. R. 396; Presnell v. Ramsour, 8 Ired. 505).

12. *Action by heir or devisee.*

§ 980. By the common law, an heir or devisee cannot maintain trespass until he has entered and taken actual possession. But if he enters after the injury is committed, he may maintain an action for a trespass committed before his entry, and after the death of his ancestor or devisor. In such case, his entry gives him, in law, a possession by relation from the death of the devisor or ancestor.[1] In Vermont it was held that, although the heir as such could not, before a division, maintain trespass *quare clausum fregit* where he had no possession, yet that if all the heirs had conveyed to the plaintiff by deed, and two years had elapsed without any interference of the administrator, it would be presumed that the administrator's lien upon the land had been satisfied as against the defendant, who was a stranger to the title.[2] *

In New Hampshire, where an executor or administrator levies on land to satisfy a debt due to the estate of a person deceased, he may maintain trespass for an unlawful entry upon the land, and if there are several executors or administrators, all must join in the action (Smith v. Smith, 11 N. Hamp. 459).

In Pennsylvania, actions for trespass to land survive against executors and administrators (McCallion v. Gegan, 1 Penn. Leg. Gaz. R. 414).

[1] Com. Dig. Trespass, B, 3; 1 Chit. Pl. 177; Barnett v. Earl of Guildford, 11 Exch. 19; 24 L. J. Exch. 281.

[2] Hubbard v. Ricart, 3 Vt. 207.

* An action for damage of a continuing nature to land which comes into the possession of the heir at law by descent, must be brought by him. Where, therefore, "one John Rolf built a house so near to the house of Richard Rolf that the eaves of his said house did overhang the house of Richard, and pour water thereon, and afterwards both John and Richard died, and their respective houses descended to their respective sons and heirs at law, and the heir of John, on request made to him by the heir of Richard, did not reform the wrong, whereupon the latter brought an action against the heir of John, who did demur in law, it was adjudged that the action was maintainable, because the defendant did not, on request, reform the nuisance which his father had made, but suffered it to continue to the prejudice and damage of the plaintiff, son and heir to him to whom the wrong was done" (2 Hen. 413; 31 Ed. 3; Voucher, 272, cited Penruddock's Case, 5 Co. 101*a*; Gillon v. Boddington, 1 C. & P. 541.

Formerly, when the damage done to land was not of a continuing nature, but accrued wholly in the lifetime of the testator, the heir at law, devisee, or remainder-man could not sue in respect of it; neither could the personal representative, by reason of the old maxim of the common law, *actio personalis moritur cum persona*. Accordingly, if trespassers entered upon the land and cut down trees, or gathered, carried away, and sold growing crops and fruit, or set fire to buildings, and caused them to be utterly consumed, the heir could not sue, because the damage was sustained in the lifetime of the ancestor, and the personal representatives could not recover the damages that had been sustained, because they were personal to the deceased, and the remedy died with him (Adam v. Bristol, 2 Ad. & E. 389; Raymond v. Fitch, 2 C. M. & R. 597). In England this defect is supplied by 3 & 4 Wm. 4, c. 42, s. 2.

CHAPTER VI.

REMEDY FOR TRESPASS TO REAL ESTATE.

1. Jurisdiction of court where the title to land is in question.
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20. When new assignment unnecessary.
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34. When the verdict should be entered distributively.
35. Effect of recovery in relation to title.
36. Effect of recovery as a bar to another action.
37. Injunction to stay trespass.

1. *Jurisdiction of court where the title to land is in question.*

§ 981. In most if not all of the States, justices of the peace have no jurisdiction to try questions involving a disputed title to land.* Title to land has several stages or

* In Maine, actions of trespass *quare clausum*, when the title to real estate is pleaded by the defendant, are not triable before a justice of the peace. The process in such case becomes a mode merely of originating the action in the District

degrees, viz.: 1st. Mere possession or actual occupancy without pretense of right; 2d. The right of possession which one man may have while another has the possession in fact; and 3d. The mere right of property which may exist without possession or the right of possession. These being united constitute what Blackstone calls a complete legal title.[1]

Court, and is, as to every intent and purpose, as if originated therein (Baker v. Whittemore, 22 Maine, 556; but where no claim of title is put in, and the magistrate hears the case upon the merits, the defendant cannot afterward, upon appeal, file a statement of soil and freehold, or give any evidence tending to bring the title to real estate in question (Fillebrown v. Webber, 14 Maine, 441). In Massachusetts, a justice of the peace has no power to try the title to real estate, and the prohibition of the statute extends to an easement on the land of another (Strout v. Berry, 7 Mass. 385). No real action, therefore, can be brought before a justice. But as trespass *quare clausum fregit* does not necessarily bring in question the title, it may be commenced before a justice when the damages claimed do not exceed his jurisdiction. But if the defendant plead soil and freehold in himself or another, this involves the title to real estate, and ousts the justice of his jurisdiction. His only remaining power over the action is to require and take a recognizance of the defendant to enter the action in the Court of Common Pleas. The action, when entered in that court, is to be treated in many respects like an original action. And an appeal lies from that court to the Supreme Court the same as if the action had, in the first place, been brought in the Common Pleas (Rev. Sts. of Mass. ch. 85; Spear v. Bicknell, 5 Mass. 125; Blood v. Kemp, 4 Pick. 172; Magoun v. Lapham, 19 Ib. 419; Kelly v. Taylor, 17 Ib. 218). The statute of Massachusetts of 1783, ch. 42, applies to all cases of trespass. It has been justly said, that "In trespass *de bonis asportatis*, or in an action for assault and battery, an inquiry into the title of real estate may be necessary in order to ascertain the rights of parties, and, in such cases, it is as important that the jurisdiction of justices should be excluded as in actions of trespass *quare clausum*" (Blood v. Kemp, *supra*).

In Massachusetts, the justice's jurisdiction is not divested as soon as a plea of soil and freehold is filed. He still retains the power to act on a motion to waive the plea or amend it, or to amend the declaration or to new assign. And if to the new assignment, which is, in substance, only an amendment of the declaration, the defendant pleads the general issue, he cannot, within the meaning of the statute, be said to "plead the title of himself or any other person in justification," and the justice should proceed to try the case. But if the pleadings, as definitely fixed by the parties, result in a claim of title by the defendant, the justice can only require and take a recognizance, or on failure of the defendant to recognize, render judgment against him. The Court of Common Please cannot allow any amendment or alteration of the pleadings which shall change the nature of the issue. The trial must proceed on the plea of soil and freehold, which removed the case from before the justice. Should the Common Pleas allow the plea of soil and freehold to be withdrawn, and the general issue to be pleaded, that would remove the only foundation of its own jurisdiction. Nor can it accomplish the same object by receiving a new assignment. For if the plaintiff new assigns, it follows of course and of right that the defendant may plead anew. If the plaintiff declares in such form that the plea of soil and freehold renders a new assignment necessary, the only place where he can avail himself of it is in the justice's court, before a recognizance is entered into. And there is no objection to an amendment of the declaration or a new assignment at any time before the cause is removed to the Common Pleas (Magoun v. Lapham, *supra*, per Morton, J.)

[1] 2 Blk. Com. 199.

The term "title," as used in the statute of New York relative to the civil jurisdiction of justices of the peace, signifies the right of possession. The mere question of possession is not, however, a question of title within the meaning of the statute. Where, in an action of trespass, the defendant offered to show that he was in the actual possession of the *locus in quo* at the time of the alleged trespass, and that he had been in possession for a long time, it was held that the proposed evidence did not draw the title in question.[1] In an action brought before a justice of the peace for breaking and entering the plaintiff's close and prostrating her fence, the defendant pleaded that he was seized and possessed of a close adjoining the plaintiff's close, and that he entered into his said close, and there erected a fence, as was lawful for him to do, which was the same trespass charged. It was held that this did not constitute a plea of title so as to deprive the justice of jurisdiction.[2] *

§ 982. Since a person cannot maintain an action for a trespass upon land unless he was in possession when the injury was committed, he must give evidence of possession; and the defendant may controvert this evidence, and show that he or some other person was in the actual possession at the time. Accordingly, when deeds or other muniments of title are introduced before a justice incidentally, to establish some collateral fact not involving any title to or interest in lands, he is entitled to receive them like other evidence.[3] †

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[1] Ehle v. Quackenboss, 6 Hill, 537; Lynch v. Rosseter, 6 Pick. 419, *contra*.

[2] Wood v. Prescott, 2 Mass. 174.

[3] Nichols v. Bain, 42 Barb. 353; Main v. Cooper, 25 N. Y. 184.

* Where the answer to a complaint before a justice alleging a trespass upon the plaintiff's close admitted, in substance, that the premises were the close of the plaintiff, but claimed the right to enter upon the same for the purpose of changing the course of a stream, it was held that it did not set forth any matter showing that title to real property would come in question (Bowyer v. Schofield, 1 Abb. Ct. App. Dec. 177).

An action by the grantee of a farm for the removal of manure from it by one who, previous to the conveyance of the farm, had bought the manure of the grantor, does not involve the question of title to real estate so as to oust a justice of the peace of jurisdiction (French v. Freeman, 43 Vt. 93).

† The rule laid down by the English Court of Queen's Bench is, that on informations before justices of the peace, if the title to property comes in question,

But neither party can resort to evidence to prove the title of the land in him, for the purpose of showing a constructive possession, if the other party objects and disputes the title.[1]*

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as the justices are not competent to try questions of title, they ought not to convict, and if they do, their conviction will be set aside. But for this purpose it is requisite that the title to the property should really come in question, and not be the claim of a right which can by no possibility exist (Paley on Convictions, 4th ed. pp. 41, 117; Hudson v. McRae, 4 B. & S. 585).

Upon an information, under the statute, for a trespass in search of game on land in the occupation of the lord of the manor, the defendant asserted that the land was not, as alleged by the informant, common or waste land within the manor, but was land vested in the inhabitant householders of certain parishes under an inclosure award, and claimed a prescriptive right to kill game on the land, but did not show that he was an inhabitant householder of either of those parishes. The justices convicted the defendant, and in a case stated, set out the evidence upon which they decided that the land was waste or common of the manor, and found that the defendant had no ground for believing that he had the right of shooting over it. It was held that the jurisdiction of the justices was not ousted by the claim of a prescriptive right to kill game on the land, there being no color for such a claim, nor by the assertion that the land was not in the occupation of the lord of the manor, but was vested in other persons, as the claim of title to oust the jurisdiction of the justices must be a claim of title in the party charged, and not in a third person (Cornwell v. Sanders, 3 B. & S. 207).

Upon an information under the statute (24 & 25 Vict. ch. 96, § 24) against the defendant, for attempting to take, otherwise than by angling, fish in a river in which the prosecutor had a private right of fishery, the prosecutor proved the purchase by him of the manor of S., with the fishery appurtenant thereto, and gave other evidence in support of his right. The defendant having proved that the river was a tidal navigable river, and that it had been fished in for forty years without interruption, it was held that the justices were thereby ousted of their jurisdiction (The Queen v. Stimpson, 4 B. & S. 307).

Justices have no power to entertain a complaint for an alleged trespass in pursuit of game under the 1 & 2 Wm. 4, ch. 32, § 30, where the defendant sets up a *bona fide* claim of right, and of this the justices are the judges (Legg v. Pardoe, 9 C. B. N. S. 289).

[1] Fredonia, &c. Plank R. Co. v. Wait, 27 Barb. 214; Osborne v. Butcher, 2 Dutcher, 308.

* In New York, if the defendant intends to raise the question of title, he must set forth in his answer the matter showing that the title will come in question, and give an undertaking. If he do not do this, the justice has jurisdiction of the cause, and the defendant is precluded from drawing the title in question (N. Y. Code, secs. 55 to 62, inclusive). Although it appear on the trial from the plaintiff's own showing that the title to real property comes in question, yet the justice is not required to dismiss the action unless the title is disputed by the defendant (Code, § 59; Bowyer v. Schofield, 1 Abb. Ct. App. Dec. 177; Koon v. Mazuzan, 6 Hill, 44; Browne v. Scofield, 8 Barb. 239; Adams v. Rivers, 11 Ib. 390). In Minnesota, to oust the justice of jurisdiction, the title must be disputed on the evidence (Goenen v. Schroeder, 8 Minn. 387).

In Pennsylvania, under the act of 1810, to oust the justice of jurisdiction, it is not enough merely to allege a claim of title—it must appear that such claim may be a defense (Heritage v. Wilfong, 58 Penn. St. R. 137). The act of Pennsylvania of 1814 gives justices jurisdiction in all actions of trespass for injury to real estate, excluding only those cases in which the title to land comes in question. And in order to determine whether the fact be so, the defendant may interpose his oath, and stop the proceedings at any time before trial. The justice has authority to hear and determine the cause, unless the defendant makes the

Whether the title of real estate is in question in an action of trespass, is sometimes to be determined from the pleadings and sometimes from the course of the trial. In the latter case, it is not enough to put the title in question in such action, that the plaintiff may be required, under the circumstances of his case, to produce evidence of title in order to establish the possession, which is essential to this form of action; or that, when introduced, the defendant makes it a question to the jury whether the evidence is true, or to the court, whether, if true, it shows title in the plaintiff. All this may be done, without the defendant's setting up a title or claim in opposition to the plaintiff, and supporting it by evidence in conflict with his. This view is supported by the provisions of the statutes which regulate proceedings in trespass before justices of the peace, prohibiting the defendant in such action from offering evidence under the general issue that may bring the title in question, which has never been construed as compelling the defendant to admit the plaintiff's title, when the circumstances of his case require proof of title to maintain the action, but as leaving him at liberty to question the title as shown by the plaintiff, though not to rebut it by countervailing proof.*

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fact which ousts his jurisdiction appear in the mode pointed out by the act. It is too late to make the objection after the case comes into the Common Pleas by appeal (Lauchner v. Rex, 20 Penn. St. R. 464).

In West Virginia, the Code provides that if it shall appear on the trial that the title to real estate is in question between the parties, and that the relation of landlord and tenant does not exist between them, the justice is required to dismiss the action, with costs (Belcher v. Gaston, 4 W. Va. R. 639).

In California, to oust the justice of jurisdiction, the right of possession of real property must be involved in the action. The plaintiff's right to the possession is not involved unless the defendant tenders an issue upon that fact (Pollock v. Cummings, 38 Cal. 683).

* In New Hampshire, by the rule established in Forsaith v. Clogston, 3 N. Hamp. 401, and ever since recognized in that State as the true rule upon the subject, a conflict of claim sustained by evidence on the part of the defendant, would seem to be necessary to bring the title in question, when not put in issue by the pleadings. And see Bachelder v. Green, 38 N. Hamp. 265.

An action to recover the plaintiff's share of the cost of constructing a division fence involves the title to land (Foster v. Bennett, 33 Vt. 66). In Murray v. Van Derlyn, 24 Wis. 67, the question was whether, in an action of trespass before a justice of the peace, an answer setting up that the defendant was the owner of a lot adjoining that of the plaintiff on which the alleged trespass was alleged to have been committed, and that the alleged trespass consisted in taking away the

§ 983. The question of highway or no highway, is one of title to land which cannot be tried before a justice of the peace.[1] This was held in a case in which the complaint was for obstructing a street, and the defendant by his answer denied that there was any such street.[2]* Ashbough v. Walter[3] was an action of trespass brought before a justice of the peace, for breaking and entering the close of the plaintiff, and taking down and removing a portion of his fences. The defendant answered, denying the trespass, and also gave notice that he would prove that the *locus in quo* was a public highway; that he was overseer of roads for the district in which the highway was situated, and had been ordered by the supervisor of the town to remove the fences and open it to the public, which he accordingly did. The defendant also gave notice, that he would prove that the plaintiff had previously brought in a justice's court an action of trespass against one Bailey, a former overseer of highways for the same district, for the removal by Bailey of the plaintiff's fences from the same highway, and that Bailey justified on the ground that the premises in question were a public highway, and judgment was rendered that no cause of action existed. Upon the trial the defendant was permitted, against the objections of the plaintiff, to prove that the premises in dispute were a highway, and that he was

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division fence between the lots, and that the fence belonged to the defendant, and that he had a right to take it away, raised a question of title which deprived the justice of jurisdiction, and it was held that it did.

Where the defendant is a lessee, whether or not the plaintiff has succeeded to the rights of the original lessor is not a question involving a title to land (Winterfield v. Stauss, 24 Wis. 394).

In Indiana, justices of the peace have jurisdiction in actions to recover the possession of real estate only where the relation of landlord and tenant exists; or where there has been an unlawful or forcible entry into lands, and either a peaceable or forcible detainer thereof; or where, having peaceably obtained possession, one unlawfully and forcibly keeps the same (Short v. Bridwell, 15 Ind. 211).

[1] Randall v. Crandall, 6 Hill, 342; Little v. Denn, 34 N. Y. 452; Manny v. Smith, 10 Wis. 511; State v. Doane, 14 Ib. 483; Soule v. The State, 19 Ib. 593.

[2] Barteau v. The City of Appleton, 23 Wis. 414. [3] 24 Wis. 466.

* In Vermont, it has been held that an action for obstructing a public pent road to the damage of the plaintiff, does not so involve the question of title to land but that a justice of the peace has jurisdiction to try it (Bell v. Prouty, 43 Vt. 279).

justified in removing the fences for that reason. The defendant was likewise permitted to give in evidence the Bailey judgment. It was held however, that the justice erred.

§ 984. The plea of right of way raises a question of title in the easement claimed; and easements are real estate at common law.[1] And to maintain an action for the obstruction of a private way in such a manner as to deprive the plaintiff of his enjoyment of it, the plaintiff must prove not only the obstruction, but his right to use the way without obstruction. This is an incorporeal hereditament—a thing lying not in livery, but only in grant, a right that may be enjoyed without the exclusive possession of the land. To establish this right, the party must exhibit documents showing a grant, or give evidence of such continued enjoyment as implies a grant, which is proof of title.[2] Striker v. Mott[3] was an action brought before a justice of the peace for trespass on land. On the part of the plaintiff it was contended that as the plea set up a right of way, it put in question the title to the premises on which the trespass was alleged to have been committed, and formed an issue which the justice, even with the consent of the parties, could not try. On the other hand it was insisted that the consent of the plaintiff took away the error, if there was any; and, moreover, that the right of way was a mere easement, and did not controvert the plaintiff's title to the premises used as a way. It was held that the claim to a right of way involved the title to the premises over which the alleged road passed, and that as the title was put in issue by the pleadings, the justice was thereby ousted of his jurisdiction, and the consent of the parties that the justice might go on and try the issue did not restore it to him.* But a right of way admitted or not denied, does not

[1] 2 Blk. Com. 20; Bartlett v. Prescott, 41 N. Hamp. 493; Alleman v. Dey, 49 Barb. 641.

[2] Osborne v. Butcher, 2 Dutcher, 308. [3] 6 Wend. 465.

* In Palmer v. Palmer (6 Conn. 409), which was an action on the case for the obstruction of a way, where the defendant pleaded title to the *locus in quo* in himself, Hosmer, Ch. J., in delivering the opinion of the Supreme Court, said that the title of land was not in question, but that it was a controversy respecting a

raise a question of title. Where, therefore, the defendant by his demurrer admitted that a right of way existed as alleged in the complaint, it was held that the issue thus formed, was one over which the justice had jurisdiction.[1]

2. *Action where laid.*

§ 985. The action must be laid in the county in which the *locus in quo* is situated at the date of the alleged trespass,[2] although the defendant resides in a different county.[3] * If that part of the county is erected into a different county after the trespass, and before the action is brought, the venue must be laid in the old county.[4] Under the statute of Massachusetts, which provides that personal actions with certain

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franchise only. On the other hand, in Dunton v. Mead (Ib. 418), where, to an action of trespass *quare clausum fregit*, the defendant pleaded a right of way over the premises, it was held that the title to land was drawn in question.

In Vermont it was held that a justice of the peace had jurisdiction of an action on the case against a town for injuries sustained in consequence of the insufficiency of a highway, unless the defendant put in issue by his plea the right of way (Whitman v. Pownal, 19 Vt. 223).

In Striker v. Mott, *supra*, it was maintained by counsel that if the court below (a justice of the peace) proceeded to try the issue involving the title to land, and acted without jurisdiction, the judgment was void, and could not be enforced, and that therefore there was no necessity for reversing it. But it was held that there was no way by which the plaintiff could prevent the judgment being carried into effect against him, except by reversal. In a cause commenced in a justice's court and removed to the Common Pleas by plea of title to land, the plaintiff's proof must be confined to his declaration (Houghtaling v. Houghtaling, 5 Barb. 379). In New Hampshire the special provision of the statute (Rev. Sts. c. 175), allowing the entry and prosecution in the Court of Common Pleas of actions originally commenced before a justice, is confined to actions of trespass (Davis v. Morse, 1 Fost. 345).

[1] Stoppenbach v. Zohrlaut, 21 Wis. 385.

[2] Chapman v. Morgan, 2 Greene Iowa R. 374; Prichard v. Campbell, 5 Ind. 494.

[3] Barnes v. Davis, 2 Clarke Iowa R. 160.

[4] Champion v. Doughty, 3 Harr. 3.

* An action cannot be maintained for a trespass upon land lying in another State (Hurd v. Miller, 2 Hilton, 540). Trespass will not lie in England for entering a house in Canada (Doulson v. Mathews, 4 T. R. 503).

Actions of trespass other than for injury to land are transitory. An action for breaking into a storehouse, and seizing and destroying goods, was held transitory as well as local (McKenna v. Fisk, 1 How. U. S. 241; s. c. 17 Pet. 245).

In Alabama, under the code, the complaint need not aver that the land on which the alleged trespass was committed is in the county in which the action is brought (Pike v. Elliott, 36 Ala. 69).

In Indiana, it is provided by statute that an action for injury to real estate shall be brought in the county where the land is situated (Loeb v. Mathis, 37 Ind. 306).

specified exceptions may be commenced by trustee process, an action of trespass *quare clausum fregit* may be brought in the county where the trustees reside or have their usual places of business, although that is not the county where the land lies.[1] It seems that in that State "the practical inconveniences which result from bringing actions of trespass upon real estate in counties where the parties do not reside, and remote it may be from the close in question, have existed for a long time, and if they have attracted the attention of the legislature, have not been considered serious enough to counterbalance the benefit afforded by the use of the trustee process, or require removal by an amendment of the law."[2]

3. *Parties plaintiff.*

§ 986. It is error to join as party plaintiff a person who has no cause of action.[3] Where the action is brought by the owner of the land, one who occupies part of the premises by permission, without the payment of rent, and without any right of property, ought not to be joined.[4] An action of trespass against a railroad company for taking land without the consent of, or compensation to the owner, must be brought by him, and not by a subsequent purchaser.[5] So likewise in case of an assignment of a mortgage, if the injury to the land was prior to the assignment the assignee cannot sue, but if it was subsequent he is the proper plaintiff.[6]

4. *General requisites of declaration.*

§ 987. The action is brought to recover damages for an injury to the plaintiff's possession of real estate. The substance of the declaration is, that the defendant has forcibly and wrongfully invaded land in the possession of the plaint-

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[1] Way v. Dame, 11 Allen, 357. [2] Ib. Colt, J.

[3] Murray v. Webster, 5 N. Hamp. 391; Grozier v. Atwood, 4 Pick. 234; Steel v. Western, 7 J. B. Moore, 29; 1 Chit. Pl. 54.

[4] Ogden v. Gibbons, 2 South. 518; but see s. c. Ib. 853.

[5] Centr. R. R. Co. v. Hetfield, 5 Dutcher, 206.

[6] Jones v. Costigan, 12 Wis. 677.

iff. Though the title or right of property in the *locus* may, and often does, come in controversy, yet the gist of the action is always the injury done to the plaintiff's possession, actual or constructive.[1] *

§ 988. The declaration ought to distinctly allege every fact essential to the statement of a cause of action. In Hall's Case,[2] which was a summary process before a magistrate, charging the defendant with entering on land not his own, and cutting and carrying away trees, the want of an averment in the complaint, that the trees were cut by the defendant, without the license or consent of the owner, was held to be fatal, on the ground that every material fact constituting the guilt of the defendant must be distinctly alleged.

§ 989. The plaintiff need only allege such facts as, if uncontradicted, would entitle him to recover. It is competent, for instance, for him to aver the breaking and entering of his close by certain animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff; and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do that or similar mischief. The breaking and entering the close in such action is the substantive allegation, and the rest is laid as matter of aggravation only.[3] † So, likewise, in an action for

[1] 1 Chit. Pl. 188-195; 2 Greenlf. Ev. § 614; Palmer v. Tuttle, 39 N. Hamp. 486.

[2] 5 Maine, 409.

[3] Van Leuven v. Lyke, 1 N. Y. 515; Dunckle v. Kocker, 11 Barb. 387; Loeb v. Mathis, 37 Ind. 306.

* In New York, the substantial rules governing the rights of action, and their statement in the pleadings, still generally prevail under the Code (Nostrand v. Durland, 21 Barb. 478).

† Where a person broke another's freehold, and depastured the same, it was held that the owner of the pasture could not, of his own mere motion, waive the tort, and sue in assumpsit. To authorize this, there must have been what would amount to the consent of both parties that it should be considered as matter resting in contract (Stearns v. Dillingham, 22 Vt. 624; s. p. Hassam v. Hassam, Ib. 516).

Stearns v. Dillingham, *supra*, was book account. The plaintiff's sheep from

injury done to the plaintiff by the horse of the defendant, it need not be alleged that the horse was vicious and accustomed to attack and injure mankind; the vice of the animal being an essential fact only when but for it the conduct of the owner would be free from fault.[1] An allegation that a railroad company entered on land of which the plaintiff was possessed and seized in fee, constructed its road thereon, and ran trains of cars over the same, to the damage of the plaintiff, sets forth a good cause of action in trespass; it being a matter of defense if the entry was made with the consent of the plaintiff.[2] But a declaration which does not allege upon whose land the trespass was committed, nor that it was done upon any, will be bad.[3] Under a statute against the "worrying" of sheep, a declaration in trespass charging that the defendant "drove, chased, and hurried" the plaintiff's sheep was held sufficient.[4] And where a declaration stated that the defendant struck the plaintiff's cow divers blows whereof she died, and it was proved that the defendant had beaten the cow unmercifully, and that the plaintiff to shorten her miseries put her to death, it was held to be no variance after verdict.[5] The allegation in a declaration in trespass for killing cattle, that they were "his cattle," is a sufficient averment of property in the plaintiff.[6] But an allegation of injury to cattle is not supported by proof of injury to mules.[7] When the action is for damage done to cattle, the averment

time to time broke into the defendant's lot, through the plaintiff's fence. Word was sent to him to take care of them; but he did not, and the sheep continued to break in, and the defendant continued to turn them out, as well after the word was sent as before, though he made no more personal complaint to the plaintiff about them. When word was sent to the plaintiff to take care of his sheep, he sent no word back to the defendant, but simply remarked that he did not know what he should do with them, and that he expected he should have to pay the defendant for the running of his sheep in the pasture. It was held that these facts did not show any assent to make the pasturing of the sheep matter of contract; but that the expression that the plaintiff expected he should have to pay, might well refer to the plaintiff's liability as a *tort-feasor*.

[1] Dickson v. McCoy, 39 N. Y. 400.

[2] Pomeroy v. Chicago &c. R. R. Co. 16 Wis. 640.

[3] Voorheis v. Perrine, 1 Harr. 359. [4] Dorr v. Loucks, 2 Mich. N. P. 182.

[5] Hancock v. Southall, 4 D. & R. 202.

[6] Heath v. Conway, 1 Bibb, 398; Smith v. Hancock, 4 Ib. 222.

[7] Brown v. Bailey, 4 Ala. 413.

of value is not material; and if it were otherwise, the omission would only be taken notice of on special demurrer. In Massachusetts, such a defect is cured by the statute, which provides that no writ shall be quashed for any circumstantial error, when the person and case may be rightly understood by the court.[1]

5. *Joinder of counts.*

§ 990. Causes of action for trespass *quare clausum*, and *de bonis asportatis*, not being inconsistent, may be united.[2] A count for tearing down and carrying away the plaintiff's lime kiln, may be joined with a count for breaking and entering his close.[3] Where the action embraced both trespass and trover, the plaintiff was held entitled to recover upon proof of either cause of action.[4] But a count in trespass for entering rooms and taking goods, was not allowed to be joined with a count for taking goods of the like quantity as, and for a distress for rent falsely pretended to be due.[5] Nor can a count in trespass for the penalty given by statute for the willful cutting down of trees, be united with a count for breaking and entering the plaintiff's close, or with a count for taking and carrying away personal property.[6] And if the alleged trespass consists of a single act, it cannot be made the subject of distinct and separate grounds of recovery. In Frost v. Duncan,[7] which was an action for wrongfully entering upon the plaintiff's land, cutting down trees growing thereon, burning the same into coal, and converting the coal to the defendant's use, the land being at the time in the actual possession of the defendants who claimed it under a deed executed several years previous, plaintiff's counsel contended that the wood and timber, after it had been sev-

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[1] Bean v. Green, 4 Cush. 279; Rev. Sts. of Mass. ch. 100, § 21.

[2] Carter v. Wallace, 2 Texas, 206; McClees v. Sikes, 1 Jones, N. C. 310; Floyd v. Floyd, 4 Rich. 23.

[3] Heimer v. Wilcox, 1 Carter, Ind. 29.

[4] Carter v. Wallace, *supra*.

[5] Hoare v. Lee, 5. C. B. 754.

[6] Morrison v. Bedell, 2 Fost. 234.

[7] 19 Barb. 560.

ered, became the personal property of the plaintiff; that it was then constructively in his possession, and he could maintain an action for its subsequent conversion. It was held that although he might have recovered against any one excepting those who had severed the trees from the freehold, yet that as the action was against them, and the complaint alleged a single grievance, commencing with the entry upon the land, and the prostration of the trees, and ending with their being changed into coal, and conversion to the defendant's use, and the transactions were therefore continuous, they could not be severed so as to give separate actions governed by different principles.

6. *Technical averments.*

§ 991. The omission of allegations in the declaration, which though customary are merely formal, will be disregarded.* A count in trespass to land, omitted several technical expressions which are usually introduced; such as, that the acts were done with force and arms, and against the peace, and that the defendant broke and entered the plaintiff's close. It was held that the omission of the first two of these phrases was a mere formal defect, of which advantage could only be taken by special demurrer; and as to the other, that there was no rule or decision which required the injury to be described exclusively by those very terms, but that any other language which imported a forcible and unlawful entry upon the land, was sufficient.[1] † The averment that the de-

[1] Griffin v. Gilbert, 28 Conn. 493.

* Where the name of the county was stated in the margin, and the close was described as situated in that county, it was held that the venue was well laid (Rucker v. M'Neely, 4 Blackf. 179).

† Where the plaintiff alleged that the defendants cut and carried away valuable trees, growing on the land of the plaintiff, of the value, &c., it was held not to be in form an action of trespass (Kline v. Mann, 29 Iowa, 112). A complaint by an executor for going on to land of the testator and cutting and carrying away timber, must allege that the will has been proved, and that the *locus in quo* is devised by it (Pott v. Pennington, 16 Minn. 509). Where the action is for breaking the plaintiff's close, and taking away his grain, grass, &c., he need not allege the quantity and value of each article (Van Dyke v. Dodd, 1 Halst. 129; Newcomb v. Ramer, 2 Johns. 421, note).

In Maine, it is provided by the Revised Statutes, ch. 115, § 13, that in all

fendant committed the trespass *vi et armis*, only means that he entered with some kind of force, and does not necessarily imply a breach of the peace,[1] or even a literal forcible breaking and entering.[2] The word "close" in a declaration in trespass, includes the subsoil as well as the surface.[3] Where the action is for disturbing the plaintiff in the profits of a fair, by erecting a toll booth, the plaintiff need not aver *quare clausum fregit*.[4]

§ 992. If the declaration in an action for cutting timber follows the words of the statute, it sufficiently avers that the timber was cut willfully and knowingly.[5] Where a declaration for cutting down and carrying away a tree from the plaintiff's land, commenced in the form of a declaration in trespass upon the freehold, concluded: "against the peace and contrary to the statute in such case made and provided, the plaintiff is entitled to recover of the defendant treble the value of said tree, amounting in the whole to the sum of, &c.;" it was held that it would be deemed a count for the penalty prescribed by the statute, and not a count in trespass at common law.[6] Care ought, however, to be taken to follow as closely as possible the general mode of averment indicated by the statute. An allegation, that H. entered the plaintiff's house and took and carried away the plaintiff's goods, when in fact H. did not visit the premises, is not so good a compliance with the rule of pleading established by the New York Code,[7] which directs "a statement of facts constituting the cause of action in ordinary and concise language, in such a manner as to enable a person of common understanding to know what is intended," as an allegation averring what is true, viz., that the defendant H. instigated,

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actions of trespass and trespass on the case, the declaration shall be equally good whether it is in the form of trespass or trespass on the case.

[1] Harvey v. Bridges, 3 Dowl. & L. 55; 14 Mees. & W. 437.

[2] Ibid.

[3] Cox v. Glue, 12 Jur. 185; 17 L. J. 162.

[4] Smith v. Pearce, Woodf. L. & T. 542.

[5] Gebhart v. Adams, 23 Ill. 397.

[6] Keyes v. Prescott, 32 Vt. 86.

[7] § 142, sub. 2.

requested and employed the other defendants to do the acts complained of.[1] *

§ 993. The omission of averments material to a recovery will of course be fatal. A declaration reciting that the defendant had been summoned to answer the plaintiff in an action of trespass, charged that the defendant, with force and arms, broke and entered a fishery, to wit, the sole and exclusive fishery of the plaintiff in a certain part of a river then flowing and being over the soil of one F., and there fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of plaintiff, there found and being in the said fishery, chased and disturbed: conclusion, *contra pacem.* It was held, on motion in arrest of judgment, after verdict for the plaintiff, that the declaration was shaped in trespass; that trespass lay for breaking and entering the several fishery of A. on the soil of B.; but that the words "sole and exclusive fishery" were not equivalent to "several fishery;" and that no cause for an action of trespass appeared.[2] Trespass for breaking and entering the dwelling-house of the plaintiff, and taking away certain goods therein, not alleging them to be the plaintiff's goods. Plea, not guilty. The judge, at the trial, having directed the jury to find a verdict for the plaintiff, with nominal damages for the trespass to the house, it was held that the plaintiff was not entitled to damages also for the value of the goods, as they were not alleged to be the property of the plaintiff.[3]

7. *Allegation of time.*

§ 994. In an action of trespass charging only a single act, the allegation of time was never required to be stated with accuracy, the plaintiff being at liberty to prove any one

[1] Ives v. Humphreys, 1 E. D. Smith, 196.

[2] Holford v. Bailey, 8 Q. B. 1000. [3] Pritchard v. Long, 9 Mees. & W. 666.

* In Indiana, in an information for trespass to land, it was averred that the wrong was committed "without the consent of A.," who owned the land, "or his agent." Held, a sufficient averment that the act was "without a license from competent authority," under the statute (State v. Marlett, 26 Ind. 198).

act of trespass committed at any time before the commencement of the action, either before or after the day laid in the declaration.[1] * Where there are several distinct entries of the same close, upon the same day, for the same general purpose, which may each be technically termed a breaking, and where the object is to try some question of right, the usual course is to bring but one suit, counting on one breaking and entering, and claiming and proving all the damage sustained at all the several entries. It is not customary to charge a trespass with a *continuando* from one hour or period in a day to some other hour or period of the same day, nor does the law favor the bringing of a multiplicity of suits, especially small ones of trifling amount, where one would as well settle all the questions of right, and the plaintiff could as well recover all his actual damage in one suit as in two or ten.[2] A declaration in trespass stated that the defendant on the 6th of March broke and entered the dwelling-house and premises of the plaintiff, and remained therein a long space of time, to wit, eight days. It was held that evidence might be given of an entry on the first day named, and also on a subsequent day, although the defendant had, after the first entry, left the premises without intending to return.[3]

8. *Averment of possession.*

§ 995. Where there is no averment that the plaintiff, at the time of the alleged trespass, had the actual possession of the land, or that being then disseized he has since regained possession by entry, or has obtained a judgment awarding it to him, there is no sufficient allegation to entitle the plaintiff

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[1] *Ante*, §§ 73, 96.

[2] Cheswell v. Chapman, 42 N. Hamp. 47.

[3] Percival v. Stamp, 23 L. J. N. S. Exch. 25; 9 Exch. 167.

* Knapp v. Slocomb, 9 Gray, 73, was an action for breaking and entering the plaintiff's close, and removing a stone wall and stakes. It was objected that evidence of the time of committing the alleged trespass was not admissible, because there was no averment of time in the declaration. The court, in overruling the objection, remarked, that one of the main purposes of the practice act of Massachusetts was to dispense with all useless and immaterial averments which under the old rules of pleading were deemed essential (and see Gebhart v. Adams, 23 Ill. 397).

to recover.[1] But an allegation that "the defendant broke and entered the plaintiff's close" is a sufficient averment of possession.[2] And possession in the plaintiff will sufficiently appear from an allegation of title in him. For, if the land is vacant and in the actual possession of no one, the title will, in judgment of law, draw after it the possession. Where, however, the complaint shows that before and at the time the plaintiff acquired title the land was in the actual possession of the defendant, and has so remained ever since, the plaintiff thereby deprives himself of the benefit of his allegation of title.[3] *

9. *Description of premises.*

§ 996. At common law, it is not necessary for the plaintiff, in declaring, to describe his close by boundaries or abuttals, or even by name. If he declare generally, and the defendant plead the general issue, he may give evidence of a trespass in any part of the township wherein his close is alleged to be located;[4] and it is not necessary that he should prove himself to have been entitled to the whole of the close described.[5] But the plaintiff must confine his testimony to some one close, and not undertake to prove a trespass on two different closes.[6] †

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[1] Cowenhoven v. City of Brooklyn, 38 Barb. 9.

[2] Finch v. Alston, 2 Stew. & Port. 83; Gray v. Cooper, Wright R. 500.

[3] Cowenhoven v. City of Brooklyn, *supra*.

[4] Com. Dig. Trespass, 3 M. 5; Martin v. Kesterton, 2 W. Bl. 1089; Goodright v. Rich, 7 T. R. 335; Green v. Jones, 1 Wms. Saund. 299 *b*, note 6; Noyes v. Colby, 30 N. H. 143; Palmer v. Tuttle, 39 N. Hamp. 486.

[5] Winkworth v. Man, Yelv. 114; s. c. Cro. Jac. 183; 1 Brownlow, 210; Noy, 125; Wood v. Budden, Hobart, 119 *a*; Stevens v. Whistler, 11 East, 51; Peaslee v. Wadleigh, 5 N. H. 322; Wheeler v. Rowell, 7 Ib. 515; Knowles v. Dow, 20 Ib. 135; Durgin v. Leighton, 10 Mass. 56.

[6] Mudie v. Bell, 3 C. & P. 331; Elliot v. Shepherd, 25 Maine, 371.

* In trespass for cutting down and carrying away trees, the declaration need not allege that the land where the trees grew belonged to the plaintiff (Gronour v. Daniels, 7 Blackf. 108). In Kansas, in an action for trespass to land, the petition need not allege that the plaintiff was in possession at the time of the alleged wrong (Fitzpatrick v. Gebhart, 7 Kansas, 35).

† In an action of trespass the following description of the premises was held sufficient: "The close of the plaintiff, situate, lying, and being in St. Albans" (Rice agst. Hathaway, Brayt. 231).

§ 997. The above mentioned common law rule has been abrogated in England,[1] and now the close or place in which the trespass was committed must be designated in the declaration, by name or abuttals or other description; upon failure of which the defendant may demur specially. If in a declaration in trespass *quare clausum fregit*, the plaintiff's close is described by abuttals; plea seizin in fee in the defendant, and issue thereon; the plaintiff is entitled to recover for a trespass done in a close in his lawful possession answering to the description in the declaration, although the defendant also has a close answering to the same description. So, although the abuttals are stated with such generality that the declaration would have been bad on special demurrer, and it is only by reason of such generality of description that the plaintiff's close comes within the description. As where the *locus in quo* is described as abutting in the direction of the four cardinal points toward certain closes, and the plaintiff proves a trespass on a close of a triangular shape abutting toward such closes.[2] The owner of a close, called Hall Close, removed an old fence, and added to his close a small slip of land adjoining a public road. In an action for an alleged trespass committed upon the slip of land a year after the inclosure, the plaintiff in his declaration described the *locus in quo* as Hall Close. It was held well described.[3] And where the declaration stated that the defendants A. H. and C. broke a close of the plaintiff abutting on a close of the said defendants, and it appeared that the plaintiff's close abutted on a close of the defendant A., it was held an ambiguity and not a variance.[4]*

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[1] Rules of Hilary Term, adopted in 1834.

[2] Lempriere v. Humphrey, 4 Nev. & M. 638; 3 Ad. & E. 181; 1 Har. & W. 170.

[3] Brownlow v. Tomlinson, 1 Scott N. R. 426; 1 Man. & G. 484; 8 Dowl. P. C. 837; 4 Jur. 580.

[4] Walford v. Anthony, 8 Bing. 75; 1 M. & Scott, 120.

* In an action of trespass against excise officers for a seizure, it appeared that the plaintiffs slept at different houses away from their places of business, but that a servant slept on the premises of the latter. *Semble*, that the place of business

Although it be required that the declaration shall inform the defendant of the place in which he is alleged to have committed the trespass; yet the plaintiff will not be defeated by a minute variance in one of several particulars in the description of the abuttals. But he must show that the close in which the trespass was committed is faithfully described in substance, so as to give the defendant full information. The rule was held not to have been complied with where the *locus in quo* was described in the declaration as abutting landward and toward the north in parts respectively on five places successively named, and seaward on low-water mark; and it appeared that the *locus in quo* was in contact with only one of the five places named, and was separated from the other four, which lay landward and toward the north, by a strip of land, being the fifth place named.[1]

§ 998. Statutory regulations on the subject exist in many of the States.* When a description of the *locus in quo* is required by statute, or, if not required, when it is voluntarily given by the plaintiff, it must be proved as laid. But there need not be perfect accuracy in stating lines, points of compass, or other matters descriptive of the boundaries and abuttals given. All the boundaries that are given must be proved. The description of the boundaries in the declaration will be sufficient if it shows with reasonable certainty what boundaries are meant. If the proof shows different boundaries from those laid in the declaration, this being matter of description, it will be a fatal variance, because it shows that the close described in the declaration is not that in which the plaintiff attempts to prove the trespass. Where the declaration described the premises as bounded north on the land of an adjoining owner, it was held sufficient to

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may be properly described in the declaration as a dwelling-house of the plaintiffs (Johnson v. Lord, M. & M. 444).

[1] Webber v. Richards, 1 Ad. & E. N. S. 439; 1 Gale & D. 114.

* In Indiana and Alabama, it is a sufficient description of the *locus in quo* to state the county in which the trespass was committed (Shipler v. Isenhower, 27 Ind. 36; Jean v. Sandiford, 39 Ala. 317).

prove that the adjoining land was in any degree north.[1] In Hall v. Mayo,[2] the difficulty was not so much in proving that the boundaries of the plaintiff's estate corresponded with the description in his declaration and in the records as in running the lines upon the land. The court remarked that if the plaintiff had by his declaration substantially informed the defendant of the close in which it was contended that the trespass had been committed, as it afterwards appeared in evidence, and proved to the satisfaction of the jury that the defendant had committed a trespass within that close, his inability to prove with substantial accuracy how far beyond the place of the trespass his title extended, could not defeat his right to recover damages for the trespass actually proved. It was, therefore, held that the judge before whom the trial was had erred in instructing the jury that if they were unable to determine with substantial accuracy the position upon the surface of the earth of the line in controversy, the plaintiff could not recover, as well as in refusing to instruct them, as requested by the plaintiff, that if they found that the line of the plaintiff's ownership included the place of the alleged trespass their verdict should be for him. In Forbush v. Lombard,[3] the close in which the trespasses were alleged to have been committed was described in the declaration as bounded on two sides by highways, on another side by a river, and on the remaining side by another lot of land. Previous to the trial of the case in the Common Pleas, and before pleading, the defendant moved to dismiss the writ on the ground that the *locus in quo* was not described with sufficient certainty in compliance with the statute providing that "in actions of trespass *quare clausum fregit* the close or place of the alleged trespass shall be designated in the writ and declaration by name or abuttals or other proper description." It was held that the foregoing description, for the purposes of the present action,

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[1] Rollins v. Varney, 2 Fost. 99.

[2] 97 Mass. 416.

[3] 13 Metc. 109.

was sufficiently certain, although for obvious reasons in a writ of entry brought for the purpose of settling a disputed line the demanded premises must be described by reference to known and visible monuments, and not by a general reference to the line of dispute; but that the reasons on which this rule of pleading was founded did not apply to an action of trespass by which the title to the *locus* could not be definitely settled, and in which damages only could be recovered. In Palmer v. Tuttle,[1] the plaintiff described the place of the alleged trespass as bounded westerly by land occupied by two of the defendants. It was held that this description was *prima facie* sufficiently definite and certain, on the principle that that is certain which may be made so, the limits of the occupation of the two defendants being matter of evidence.* The terms "dwelling-house of the plaintiff in his occupation," were held a good description by name, under a statute which provided that, in actions of tort for breaking and entering the plaintiff's close, the place of the alleged trespass should be designated in the plaintiff's declaration by name, abuttals, or other proper description.[2]

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[1] 39 N. Hamp. 486.

[2] Sawyer v. Ryan, 13 Metc. 144; Genl. Sts. of Mass. ch. 129, § 6; St. of 1839, ch. 151, § 3.

* In Palmer v. Tuttle, *supra*, the court said: "It has been alleged in argument that it would have been matter of great convenience to the defendants, if the plaintiff had so described his close, that they could at once have pleaded soil and freehold in some part thereof, and not guilty or other plea, as to the residue. We are unable to perceive why the defendants may not do so, as well under the present description as they could have done if the plaintiff's close had been described as the defendants say it should have been, by known and obvious monuments upon the ground. It is suggested that there is a dispute between the parties as to the true division line between the land of the plaintiff and that of the two defendants. If so, and the plaintiff had described the line to which he claims on that side, as indicated by monuments on the ground, the defendants could then only raise the question which it is alleged to be desirable for them to raise, by pointing out particularly and definitely that portion of the close described by the plaintiff, which they claim to own, and pleading soil and freehold as to that, and not guilty, or other plea, as to the residue. They may do the same thing now, and we are utterly unable to discover in what possible respect they are prejudiced by the method in which the plaintiff has described his close. Under any practicable method of describing it, it must have been incumbent on them, if they claimed soil and freehold in any portion of it, to define and set out in their plea, by distinct and definite description, that portion. They may do this as readily, and with as much facility, under the present declaration, as under any other."

10. *Matters of aggravation.*

§ 999. The plaintiff may allege matters of aggravation for the purpose of enhancing the damages. The spoliation or destruction of trees may be laid in the declaration as aggravating the damages, and a recovery had for their value, or to the extent of the injury done them.[1] Trespass for breaking and entering the plaintiff's dwelling-house may be well laid to have been done under a false charge and assertion that the plaintiff had stolen property in his house, by which he was injured in credit; for that is laid only as matter of aggravation; and the jury may give damages for the trespass as it is aggravated by such false charge.[2] Where a complaint alleges that the defendant with force and arms entered the plaintiff's dwelling-house, and then and there with force and arms assaulted, debauched, and carnally knew the daughter of the plaintiff, the gist of the action is the unlawful entry, the other allegations being consequential and in aggravation of damages.[3]

§ 1000. As the gist of the action for trespass on land is the breaking and entering, and the injury done thereon matter of aggravation merely, it is not a fatal objection that the latter is not well laid.[4]* But without averments of acts

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[1] Grout v. Knapp, 40 Vt. 163.

[2] Bracegirdle v. Orford, 2 M. & S. 77.

[3] Donohue v. Dyer, 23 Ind. 521.

[4] Rucker v. M'Neely, 4 Blackf. 179; Phelps v. Morse, 9 Gray, 207; Eames v. Prentice, 8 Cush. 337; Knapp v. Slocomb, 9 Gray, 75.

* In Griffin v. Gilbert, 28 Conn. 493, the count alleged that the plaintiff was in the lawful possession of the land on which the acts complained of were done; that those acts consisted of the wrongful and wanton plowing and digging of a ditch on the land, and digging and drawing a rock from the highway, and placing the same and a large quantity of stones upon the land, and that such acts were done wrongfully and wantonly. Storrs, C. J., in delivering the opinion of the court, said: "We cannot doubt that a declaration thus setting forth, not by way of inducement, but directly, and as matter of complaint, acts of such a character, should be deemed to describe a cause of action for those acts rather than for their consequences merely, and so to be a declaration in trespass rather than in case; and that a statement of those consequences should be viewed, not as a description of the cause of action upon which the plaintiff intends to rely as the principal ground of recovery, but as a statement of the result of the acts constituting such cause of action, and introduced only for the purpose of laying the foundation for a recovery of damages for those results for which otherwise the pleader might suppose no recovery could be had in the action."

done after the entry in aggravation of the principal injury, the plaintiff will not be entitled to damages for their commission; because they do not necessarily flow from the wrongful entry. They are, therefore, substantial facts to be distinctly averred.[1] Where the declaration is so framed that it is doubtful whether additional averments were intended as an allegation of a distinct wrong, or as a mere matter of aggravation, the defendant in his plea may regard it as the latter.[2]*

11. *Objections to declaration, how made.*

§ 1001. Under the old system of pleading, where several tenants in common bring an action of trespass, the omission to join one of them can only be taken advantage of by pleading it in abatement; though the defendant can show on the trial that there are others interested in the claim, not by way of bar, but to limit the plaintiff's recovery to his aliquot part of the damages sustained.[3] The New York Code[4] has changed the former mode of taking advantage of a defect of parties; and now the defendant may have his remedy by demurrer, if the defect appear on the face of the complaint, or by answer, if it does not.[5] But this does not apply to

[1] Gilbert v. Thompson, 9 Cush. 348; Baldwin v. Western R. R. 4 Gray, 333; Knapp v. Slocomb, *supra*.

[2] Carpenter v. Barber, 44 Vt. 441.

[3] Wms. note to Cabell v. Vaughn, 1 Saund. 291; Brotherson v. Hodges, 6 Johns. 108; Bradish v. Schenck, 8 Ib. 151; Holly v. Brown, 14 Conn. 255.

[4] §§ 144, 148.

[5] Denison v. Denison, 9 How. Pr. R. 246; Osgood v. Whittlesey, 10 Abb. Pr. R. 134; aff'd 20 How. 72; Ingraham v. Baldwin, 12 Barb. 9; aff'd 9 N. Y. 45; Baggott v. Boulger, 2 Duer, 160; Zabriskie v. Smith, 3 Kern. 322.

* In an action of trespass it appeared that the plaintiff, by permission of the defendant, had placed a brass plate, with his name upon it, on the outer door of furnished lodgings which he had taken in the defendant's house; and the declaration, after alleging the breaking and entry into the apartments, alleged that during the time aforesaid, to wit, &c., the defendant removed and took a certain brass plate from the outer door of the dwelling-house, and kept it so removed, &c. The defendant pleaded *inter alia* that the plaintiff was not possessed of the brass plate. There was no evidence, and no point made at the trial, as to whether or not the plate was affixed to the door. It was held that the removal of it was sufficiently charged in the declaration as against the defendant, who had pleaded it as a distinct trespass, and not as an aggravation merely (Lane v. Dixon, 11 Jur. 89; 16 L. J. 129). Whether the action could have been maintained if it had been proved that the plate was affixed, *quære* (Ib.)

suits in justices' courts. In the latter, where the defect of parties appears on the face of the complaint, the defendant can raise the objection on a motion for a nonsuit.[1] In De Puy v. Strong,[2] the question was whether, when the defect of parties appeared on the face of the complaint, the defendant could omit to demur, and take advantage of it by answer. The action was for trespass on land. The complaint alleged that each of the plaintiffs was the owner in fee of a specified fractional part of the land on which the trespasses were committed, the sum of which parts was much less than the whole of the land; thereby admitting that there were other parties jointly interested with the plaintiffs in the claim sought to be recovered. It was held that the defendants were right in interposing a demurrer to the complaint, and that when it was overruled, they ought to have appealed, but that having omitted to do so, they had acquiesced in the judgment, and were concluded by it.

§ 1002. When in a declaration, in trespass *quare clausum fregit*, the *locus in quo* is described as abutting toward certain closes, the defendant may demur specially, or may obtain a judge's order for a more certain description of the close. But such defect cannot be taken advantage of at the trial of an issue raised upon a plea of seizin in fee or *liberum tenementum*. Nor could the objection have been taken, though the defendant had pleaded a denial of the plaintiff's possession of the alleged close.[3]

12. *Amendment of declaration.*

§ 1003. In an action of trespass upon real estate, it is competent to allow an amendment by adding a count for goods taken, alleged by way of aggravation. This presents the charges in distinct form, without adding any new cause

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[1] Tripp v. Riley, 15 Barb. 333; Rice v. Hollenbeck, 19 Ib. 664.

[2] 37 N. Y. 372.

[3] Lempriere v. Humphrey, 4 Nev. & Man. 638; 3 Ad. & E. 181; 1 Har. & W. 170.

of action. The pleadings of the defendant may then, if necessary, be shaped so as to be applicable to each count—the issues under each be understood—the findings of the jury be made a matter of record, and the legal results arising therefrom be distinctly known and established. It is believed, however, that no case can be found where to a declaration of trespass *quare clausum*, with an allegation of damages as aggravation entirely consequential, an amendment by the addition of a new count for such damages has been allowed.[1] In Massachusetts, where in an action of trespass *quare clausum fregit* brought before a justice of the peace, the cause was removed to the Common Pleas on a plea of title, it was held that the plaintiff might amend his declaration by alleging any other torts in the same close, or by giving a more accurate description of the close.[2] In Pennsylvania, the power of the courts to permit amendments extends to every informality which will affect the merits of the case, except that they cannot allow an entirely new cause of action to be introduced. But if the plaintiff adheres to the original cause of action, he may add a count substantially different from the declaration. In Knapp v. Hartung,[3] the declaration charged the defendant with entering the plaintiff's close, and cutting down, taking away, and converting oak, ash, beach, and chestnut trees. After the jury was sworn, the plaintiff was permitted, upon the payment of the costs, to file two additional counts, one charging the defendant with entering another close of the plaintiff, and taking therefrom and converting cord wood and railroad sills, the other with taking and converting white oak, hickory, and black oak logs; and it was held by the Supreme Court that the amendment was proper.*

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[1] Sawyer v. Goodwin, 34 Maine, 419, per Tenney, J.

[2] Cuminge v. Rawson, 7 Mass. 440. [3] 73 Penn. St. R. 290.

* A declaration in trespass, as originally drawn, alleged that the defendant, by reason of the cutting of divers trees upon the plaintiff's land, had become liable to certain penalties, which the plaintiff claimed a right to recover. An amended declaration charged the breaking and entering of the close and cutting the plaintiff's trees. It was held that the proposed amendment changed the

§ 1004. Where the omission of an averment will not destroy the plaintiff's right of action, it may be stricken out.[1] A declaration in trespass alleged that the defendant cut down and carried away spruce and maple trees, the number of them, and the quantity of wood made from them. It was held that as the statute did not require a description of the kind of trees, that averment might be stricken out of the declaration without impairing the plaintiff's right to recover.[2]

13. *Plea of the general issue.*

§ 1005. The general issue questions the fact of the trespass, and also the title, whether freehold or possessory. It is always competent for the defendant to put the plaintiff upon proof of his title under the general issue, however many special defenses he may set forth on the record.[3] Although there be a new assignment, the general issue remains an answer to the whole cause of action.[4] The defendant may plead the general issue as to the force, and a special justification as to the remainder of the charge against him.[5]*

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cause of action, and was therefore not admissible (Melvin v. Smith, 12 N. Hamp. 462).

[1] 1 Chit. Pl. 307, 372; Gwinet v. Phillips, 3 Term R. 643; Peppin v. Solomons, 5 Ib. 496; Williamson v. Allison, 2 East, 446.

[2] Maxwell v. Maxwell, 31 Maine, 184.

[3] Child v. Allen, 33 Vt. 476; Riley v. Denny, 2 Rich. 539.

[4] Stewart v. Henry, 5 Blackf. 445. [5] Hodges v. Raymond, 9 Mass. 316.

* In Maine, by the Rev. Sts. of 1857, ch. 82, § 18, "the general issue may be pleaded in all cases, and a brief statement of special matter of defense filed, or a special plea, or on leave, double pleas in bar may be filed." In Maxwell v. Potter, 47 Maine, 487, which was an action of trespass *quare clausum fregit*, as no special pleas were filed, but only a brief statement of special matter of defense, it was held at the trial in the court below, that the defendant must be considered as having elected to proceed to trial in the first of the alternative modes prescribed by § 18; that is, upon the general issue and a brief statement: and a verdict was found for the plaintiff, as upon the general issue. The defendant now moved that the verdict be set aside and a new trial granted, "because no issue, either in law or in fact, was ever tendered or joined by either of said parties before said verdict, or since." The court, in denying the motion, said: "The counsel for the plaintiff could not join any issue, because none had been tendered. It was the duty of the counsel for the defendant to tender such an issue as he should deem expedient for the preservation of the rights of his client. Neglecting to do his duty, he claims that the verdict be set aside, because there was no joinder of an issue not tendered. Usually, the party aggrieved moves to set aside a verdict because of some error on the part of the court, or some misconduct of the jury, or of the opposing counsel, by which he may have been, or

14. *When special plea required.*

§ 1006. When the act is *prima facie* a trespass, matter of justification, by virtue of any authority or easement, must be specially pleaded, or notice given of it.[1]* That the defendant went to demand a debt due him, amounts to a license in law, and must be pleaded.[2] A license to cut down and carry away trees must be specially pleaded;[3] otherwise, it will only go in mitigation of damages.[4] The cutting of the posts and rails of the plaintiff cannot be justified under the general issue, though erected upon the defendant's own land, no question being raised as to the property remaining in the plaintiff.[5] The plea that the close was not the close of the plaintiff, puts in issue the possession merely, not the right of possession of the plaintiff. If the defendant means to set up superior title in himself, or some person under whom he claims, he should plead in confession and avoidance.[6] Where a plea justifies the gist of the action, and the plaintiff seeks to show that the defendant had not the right

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thinks he may have been, prejudiced. Here, the defendant, without showing that he has been injured by the verdict, moves that it be set aside, because he neglected to do what the law requires of him. He seeks to take advantage of his own neglect. It would be a reproach to the law if he were permitted to do it. It would encourage negligence and reward inattention."

[1] Babcock v. Lamb, 1 Cowen, 238; Hetfield v. Cent. R. R. Co. 5 Dutcher, 571.

[2] Van Buskirk v. Irving, 7 Cowen, 35.

[3] Gronour v. Daniels, 7 Blackf. 108.

[4] Hendrix v. Trapp, 2 Rich. 93.

[5] Welch v. Nash, 8 East, 394.

[6] Whittington v. Boxall, 7 Jur. 722; 12 L. J. N. S. 318.

* Williams, in his note to Saunders' Reports (2 Saund. 402, n. 1), says: "It seems to be an established rule, whenever the defendant in trespass *quare clausum fregit* justifies the trespass by reason of some title or easement which gives him a legal right to do the act which is the subject of the action, he must set forth his title or right to enjoy the easement, specially, so that the plaintiff may have an opportunity of traversing it." Chitty (2 Pl. 495) says: "A justification under a rent charge, or in respect of any easement or incorporeal right, must be pleaded." And Starkie (3 Stark. on Ev. 1462) says that the defendant cannot, under the general issue, give in evidence a right to an easement; and he quotes Hawkins v. Wallis, 2 Wils. R. 173, where it was claimed that the easement had been exercised for thirty years.

In an action of trespass for damage done by cattle, a plea that the defendant's cattle were free commoners on uninclosed land adjoining the *locus in quo*, and that they committed the alleged trespass by reason of the insufficiency of the plaintiff's fence, was held not to amount to the general issue (Sturman v. Colon, 48 Ill. 463).

or authority set up in his justification, the excess must be pleaded specially.[1]

15. *What a special plea ought to contain.*

§ 1007. Care must be taken in framing the plea to include in it what, admitting it to be true, is essential to the defense. In trespass for breaking and entering the doors and windows of a meeting-house, a plea that "the defendants entered as members of the religious society, peaceably, in order to engage in religious worship, as they might lawfully do, doing no unnecessary damage, which are the supposed trespasses," is bad on demurrer, in not averring that the defendants were members of the society, and not denying the acts charged as trespasses, nor setting forth any cause in justification of them.[2]* Goodrich v. Judevine[3] was an action for the breaking and entering, by the defendant, of the plaintiff's close, breaking down the plaintiff's fences, and with cattle, horses and men, treading down the herbage there growing, and taking and carrying away from the premises, the plaintiff's buildings and timbers and other materials, and also taking and carrying away granite belonging to the plaintiff. The defendant pleaded first the general issue; second license, and three pleas in bar. The pleas were pleaded as an answer to the whole declaration, but set forth a justification not of the whole of the acts of trespass complained of, but only of a part of those acts which were alleged as matter of aggravation. In respect to everything complained of in the declaration, except the taking and carrying away of the stone, the pleas were silent. It was held that if the defendant had the right to take and carry away

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[1] West v. Blake, 4 Blackf. 234.

[2] Baptist Soc. v. Fisher, 3 Harr. 240. [3] 40 Vt. 190.

* In an action for injuring the plaintiff's wall by inserting joists in it, the defendant offered to prove in justification that such wall was used by him in the erection of an adjoining building under a parol agreement with the plaintiff. It was held that as license from the plaintiff was not specially pleaded, the evidence could only be received in mitigation of damages (Hamilton v. Windolf, 36 Md. 301).

the stone, he should have pleaded that he entered the close for the purpose of exercising that right, and that, in so doing, he did no unnecessary damage. Held, further, that the pleas should have alleged that the stone mentioned in the declaration as taken and carried away by the defendant were taken and carried away by him before the time for the removal of the stone, as enlarged and extended by the agreement referred to in the plea had expired, and that the taking and carrying away of the stone by the defendant was the same trespass for which this action was brought. For aught that appeared in the pleas, the taking and carrying away of the stone by the defendant might have been after the enlarged time for the removal of the stone by the defendant had expired, and it was held that the pleas in this particular were fatally defective.

§ 1008. A plea justifying the breaking and entering a house without warrant on suspicion of felony ought to show distinctly, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him. To trespass first, for breaking and entering a dwelling-house, secondly for false imprisonment, the defendant pleaded, setting out grounds of suspicion of felony against the plaintiff, and then stated, "wherefore the defendant suspecting the plaintiff to have been guilty of feloniously stealing the said goods, did peaceably enter the dwelling-house of the plaintiff, the outer door being opened to him by the plaintiff's mother, in company with one B., a constable, and did then give the plaintiff into the custody of B., and then, in a reasonable time from entering the dwelling-house, left the same, and then conveyed the plaintiff therefrom to the police station." The plea was held bad on special demurrer for not showing with sufficient certainty for what purpose the defendant entered into the dwelling-house, nor whether he found the plaintiff there.[1]

[1] Smith v. Shirley, 15 L. J. N. S. 230.

§ 1009. If the defendant attempts to justify under a special plea of title and possession, he must aver every material fact necessary to constitute a title. An averment that the title, &c. was in another on the fifteenth day of, &c., and that he attached, &c., on the sixteenth day of the same month, does not connect the title of the other and himself. An averment that the execution was levied, &c., is bad, unless it appears that the execution was in full life. An averment that by reason whereof (alluding to the prior statement of the levy of the execution, &c.) the defendant became seized and possessed in his own right, &c., is argumentative and bad pleading, unless the prior averment will necessarily warrant the conclusion of seizin and possession—*i. e.* unless they are such as to give title and possession. An averment in the plea that the defendant was seized and possessed, &c. at the time when the trespass is alleged to have been committed, will not avail in case there are two counts in the declaration, and in each trespasses are alleged to have been committed at different times.[1]

§ 1010. In justifying under another's title, it must be shown that the acts were done by his authority.[2] * So,

[1] Gleason v. Howard, Brayt. 190.

[2] Dunlap v. Gledden, 31 Maine, 510; Doloff v. Hardy, 26 Ib. 545.

* In an action of trespass, *quare clausum fregit*, the defendant pleaded that the close was the close and freehold of L. P., wherefore the defendant, as the servant and at the command of L. P., committed the trespasses in the declaration mentioned. Replication traversing the command. It was held, after verdict for the defendant, that the plea was good, though L. P. was an infant and a ward in chancery (Ewer v. Jones, 10 Jur. 965).

A plea to a declaration in trespass *quare clausum fregit* stated that B. was seized in fee of the *locus in quo*, and that the plaintiff held it of him as tenant from year to year, upon terms that B., or his incoming tenant, at any time after a certain day, when the plaintiff should have received notice to quit, should have liberty to enter and plow the arable land held by the plaintiff. Averment of notice to quit, that B. agreed to let, and that the defendant agreed to take the premises as tenant from year to year, from and after the expiration of the plaintiff's tenancy; and that the defendant thereupon became the incoming tenant, and entered after the certain day, to plow the land. Replication, admitting the seizin in fee *de injuria*. It was held, first, that the plea was good upon general demurrer, inasmuch as enough appeared to warrant the allegation that the defendant was the incoming tenant, which might have been traversed; secondly, that the plea justified under an authority or power derived from the plaintiff, and therefore that the replication was bad (Milner v. Myers, 15 L. J. N. S. 158; 10 Jur. 472).

In an action of trespass for breaking and entering the plaintiff's house and

where the defendant justifies under a right which he derives from a tenant for life, he must aver the continuance of the

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taking his goods, the defendants pleaded that the plaintiff, at the time when, &c., held and enjoyed a dwelling-house of L., as tenant thereof to L., under a demise thereof, viz., demise before then made by L. to the plaintiff, on which demise, a certain weekly rent was reserved and made payable at the end of each week by the plaintiff to L.; that such rent being in arrear, the plaintiff had fraudulently removed the said goods from the dwelling-house so held by him, to the house in which, &c., to prevent L. from distraining them for the said rent, leaving no sufficient distress behind; and because the said goods had been so removed and were kept in the said house in which, &c., and the said house was locked up, the defendants, as the servants and by command of L., broke and entered the house and seized the goods. Replication *de injuria*. The plea was held good on general demurrer. But it would have been bad on special demurrer for not stating the demise with sufficient particularity (Bowler v. Nicholson, 12 Ad. & E. 341; 4 Per. & D. 16; 5 Jur. 95).

Trespass for breaking and entering a dwelling-house of the plaintiff, and evicting him therefrom, &c. Plea that before and at the time when, &c., the Marquis of H. was seized of the said dwelling-house in his demesne as of fee, and being so seized, he before the said times when, &c., demised the same to the then churchwardens and overseers of the poor of the parish of A. and their successors on behalf of the parish for one whole year, and so on from year to year, &c.; by virtue of which demise, the then churchwardens and overseers entered and became possessed; and the churchwardens and overseers, and their successors for the time being, have been thenceforth by virtue of the premises, and of the statute in such case provided, possessed of said term, &c.; that afterward, and before the said times when, &c., the said dwelling-house then being vested in the churchwardens and overseers on behalf of the parish, and being a tenement provided at the charge of the parish for the habitation of the poor thereof, one M. S. then being a poor person, had been permitted by the churchwardens and overseers for the time being to occupy the said tenement, and from thence until, and at the time of making the complaint thereinafter mentioned, remained in possession, and had refused to quit the same, and deliver up possession to the churchwardens, &c., within one month after a notice and demand in writing for that purpose, signed by the churchwardens and overseers of the poor of the said parish, which had before then been delivered to the said M. S., the said M. S. continuing in such occupation, under and by virtue of the said permission at the time of such delivery. The plea then stated the preferring of an information by one of the overseers against M. S. before a justice, pursuant to the statute, the issuing of a summons thereon, the delivery of the summons to M. S. seven days before the day appointed for the hearing, and the neglect of M. S. to appear; and averred that upon proof of the delivery of the summons, the justice proceeded to determine the complaint, and adjudged the same to be true. It then alleged the issuing of a warrant to cause possession of the premises to be given to the churchwardens and overseers, pursuant to the statute, which was delivered to the defendant A. to be executed, by virtue of which he the defendant A., and the other defendant as his servant, within a reasonable time after the adjudication and delivery of the said warrant, to wit, at the time in the plea mentioned, the same being in the day time, entered the said dwelling-house; and because the plaintiff and his family were then occupying the same, the plaintiff claiming some title thereto, under color of a pretended certain charter of demise to be thereof made to him by the said M. S. for the term of his natural life, after her said refusal and neglect, whereas nothing passed thereby, and although the plaintiff and his family were then requested, they refused to go out of the said tenement; that the defendants then gently put out and removed the plaintiff and his family from the said tenement for the purpose of delivering possession to the said churchwardens and overseers,

life.[1] A plea of leave and license to erect a wall on a given spot is not supported by proof of a license to erect only.[2]*

&c.; and so justified the trespasses complained of. It was held on special demurrer, that the seizin in fee of the Marquis of H. at the time of the demise to the churchwardens and overseers was sufficiently averred (Smith v. Adkins, 8 Mees. & W. 362; 1 Dowl. N. S. 129).

In Smith v. Adkins, *supra*, it was further held, that it was no objection that the names of the then churchwardens and overseers were not mentioned, as the grant would be good by the name of office to the then individual officers; that it was not necessary to state the acceptance of the demise by them to have been by deed; and that the express color given by the plea, by the averment of the charter of demise was sufficient, for that it gave a color of title though it was a bad one.

[1] Dayrell v. Hoare, 13 Ad. & E. 356; 4 P. & D. 114.

[2] Alexander v. Bonnin, 6 Scott, 611; 4 Bing. N. C. 799.

* A license to enter must be pleaded; or if given in evidence under the general issue with notice, the plaintiff may recover for all the trespass not justified by the license (Sawyer v. Newland, 9 Vt. 383; Hill v. Morey, 26 Ib. 178).

Where, to a declaration alleging trespass *quare clausum fregit*, the defendant pleads a license, the plea will not be supported by evidence of a lease. "If such a mistake had occurred in a deed, or any act in *pais*, the court would not perhaps be precluded from construing the expression according to its legal effect and the true intent of the parties. But more strictness is required in pleadings. The party is to state his case according to the legal effect and operation of the facts on which he relies. It is not sufficient to display the evidence on the record, and leave it to the court to infer that there was a feoffment, a lease, or a license, but he must say that the party did enfeoff or did demise, &c." (Johnson v. Carter, 16 Mass. 443, per Jackson, J.)

A., assignee of a term, agreed to let premises to B., on the usual conditions—*i. e.*, B. to pay rent, &c., and to hold A. harmless with his landlord. The rent became in arrear, and some of A.'s goods which were on the premises were seized and sold. A. then brought assumpsit against B., on the promise of indemnifying, and stated that his goods were on his premises by B.'s leave and license. B. traversed this last allegation. It was held that the traverse was immaterial, because A. being still in legal possession, and B.'s interest only equitable, no goods of A. on the premises could need B.'s sufferance to prevent their presence being a trespass (Groom v. Bluck, 2 Scott N. R. 665; 5 Jur. 532).

License to enter the plaintiff's house, if pleaded, is a bar to an action for breaking and entering and debauching his daughter. But it cannot be given in evidence under the general issue (Bennett v. Allcott, 2 T. R. 166).

Where, in an action of trespass *quare clausum*, the plea was, 1, leave and license for a special purpose; 2, leave and license generally, and a verdict was found for the plaintiff on the issue raised by the first plea, and for the defendant on that raised by the second plea, it was held that the defendant was entitled to judgment (Redman v. Taylor, 3 Ind. 144).

The defendant cannot protect himself by setting up an outstanding mortgage made by the father of the plaintiff and purchased by the defendant after the commencement of the suit (Evans v. Prosser, 3 Term R. 186; Le Bret v. Papillon, 4 East, 502). The defense is not aided in the case of a mortgage of the premises in question, made by the ancestor of the plaintiff, and assigned to the defendant after the commencement of the suit, by proof that in fact the mortgage was purchased by the defendant some three years before the commencement of the action, but, by mistake at the time of the purchase, was discharged upon the record, instead of being assigned (Fitzpatrick v. Fitzpatrick, 6 R. I. 64). The pleas of not guilty, and of soil and freehold, look to the state of things at or before the commencement of the action. If matter of discharge accrue to the defendant pending the action, as from the plaintiff's release or the like, it

In Ross v. Nesbit,[1] the defendants pleaded that the premises in question belonged to the United States, and that one of the defendants had long previous to the alleged trespass, and at the time thereof, a "claim title" to said land, and had erected a dwelling-house thereon, and was then and there the owner thereof, and that as such he and the other defendants, as his servants, entered said land, as they lawfully might, and removed said dwelling-house, &c. It was held that the plea was bad in not alleging possession in the defendant.

§ 1011. The following are instances in which the pleading was held defective: Where in an action for entering the plaintiff's close and carrying away stone, the defendant justified under an act of Congress for constructing a national road, it was held that the plea ought to have set forth facts to show a necessity for such an invasion of private right.[2] In trespass for entering premises and carrying away corn, a plea that the corn was taken as the property of a third person by a constable, under execution, and sold to the defendant, is insufficient, in not alleging that the corn was the property of such third person.[3] Where the defendant pleaded that the damage was caused by the removal of a partition fence, and that notice had been given to the plaintiff of the removal, it was held that an averment of reasonable notice was not sufficient, but that the plea ought to have averred that notice was given in due time and to a proper person.[4] In trespass for removing the plaintiff's fences, an answer was held bad which justified under an order of the county commissioners locating a road, without averring that the supervisor gave the occupant of the land the notice required by law.[5] Since,

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must be pleaded to the further maintenance of the action, if it has arisen after suit, but before plea of continuance; and *puis darrein continuance*, if after plea pleaded or issue joined. In Massachusetts, it has been held that a mortgage of the ancestor of the demandant acquired pending a writ of entry, cannot be set up by the tenant to support a title defective at the commencement of the writ, even though pleaded *puis darrein continuance* (Curtis v. Francis, 9 Cush. 428).

[1] 2 Gilman, 252.
[2] Fulton v. Monahan, 4 Ham. 426.
[3] Terril v. Thompson, 3 Bibb, 272.
[4] McCormick v. Tate, 20 Ill. 334.
[5] Ruston v. Grimwood, 30 Ind. 364.

in an action for entering the plaintiff's premises and removing a gate, the removal of the gate is but aggravation, an answer which justifies the removal of the gate, but admits the plaintiff's title and possession is not sufficient; nor an answer which justifies merely on the ground that the defendant has an easement on the land; nor an answer which justifies that one of the defendants was a water commissioner for the district, without averring that the other defendants entered in aid of him.[1] An answer which sets up a justification of certain acts therein alleged, without stating that such acts are the same as those charged in the complaint, is bad on demurrer.[2]

§ 1012. Where the declaration alleges distinct acts of trespass, the plea should embrace all of them. Thus, in trespass for breaking and entering a close, and with cattle eating up the grass, a justification that is good for the breaking and entering, is bad as to the trespass with cattle. A declaration in trespass charged that the defendants broke and entered the plaintiff's dwelling-house and made a noise, &c.; and also then broke open ten doors of the plaintiff of and belonging to the said dwelling-house; and broke to pieces ten locks of the said doors with which they were then fastened, and seized the plaintiff's goods. A justification under a *fi. fa.* by one defendant, alleged that he sued out the writ, and that by authority thereof, the other defendant being the sheriff, peaceably entered, the outer door being open, in order to seize, and then did seize the goods then being in the same house; and in so doing the defendants unavoidably made some noise, &c., which are the trespasses, &c. On special demurrer it was held that the plea was bad, the breaking of the doors and locks being not aggravation merely, but a substantive trespass, distinct from the breaking and entering, and requiring to be justified, which was not done.[3] The rule is, however, to be understood to apply to such acts only as are

[1] Pico v. Colimas, 32 Cal. 578. [2] Wheeler v. Meshinggomesia, 30 Ind. 402.
[3] Curlewis v. Laurie, 12 Q. B. 640.

material and the gist of the action. In Grout v. Knapp,[1] the declaration alleged the breaking and entering of the plaintiff's close by the defendant, and the destruction of the plaintiff's fence and gate. The defendant pleaded a public right of way, and that having occasion to use it, he entered the *locus in quo* for that purpose, which were the same trespasses of which the plaintiff complained in his declaration. To this plea the plaintiff demurred generally, and on the argument insisted that although the plea justified the breaking and entering, it did not the destruction of the gate and fence. It was held that as the destruction of the gate and fence was not of the gist of the action, but matter of aggravation merely, the plea was good.*

§ 1013. A justification good as to part only of the tres-

[1] 40 Vt. 163.

* In this case, the court said: "The plea in its introductory averment refers only to the breaking and entering of the plaintiff's close, throwing down and destroying the fence and letting out the plaintiff's cattle, making no reference to the alleged destruction of the gate. Technically it does not commence as an answer to a part of the declaration, as it makes no exception to any cause of action declared upon. It may be regarded, therefore, as a plea to the whole declaration, and in that view it was unnecessary to enumerate the several acts of trespass of which the plaintiff complains, much less any act or matter of aggravation. And if it only partially enumerates, in its commencement, the several supposed causes of action, but alleges facts which, if true, are in law a justification of all that is of the gist of the action, the plea is not bad on general demurrer for that cause. But in the other view, if we regard the allegation in the declaration as to the destruction of the gate, which is not referred to in terms by the plea, as of the gist of the action, and construe the plea as an answer to only a part of the declaration, the plaintiff should not have demurred, but should have taken judgment by *nil dicit* for so much as was not answered by the plea. But however this may be (and we dispose of the case on this ground), the destruction of the gate and fence is not of the gist of the action, but matter of aggravation merely. It is true they may be a part of the freehold; yet this form of action could not be maintained to recover damages for their destruction solely without regard to the technical allegations distinguishing it from trespass *de bonis asportatis*. But the question is susceptible of another view. The declaration in this case will admit of the construction either that the matter unanswered by the plea was insisted and relied upon as aggravating the damages merely, or that it was relied upon by the plaintiff as a distinct injury, and that he intended to recover for it. If there is any reasonable doubt as to the construction of the declaration in this particular, the defendant was at liberty to treat it as of the former character, and having done so, conceding that the plaintiff's meaning was to insist upon the latter construction, and intended to avail himself of such injury, he should have brought it forward by a new assignment" (citing Woodward v. Robinson, 1 Strange, 302; Chamberlain v. Greenfield, 3 Wils. 292; Hubbell v. Wheeler, 2 Aik. 359; Anderson v. Buckton, 1 Strange, 192; Welch v. Nash, 8 East, 394; 1 Chitty Pl. 597; 3 Ib. 1116, note 10; 2 Selwyn's N. P. 1350; Sedgwick on Damages, 139).

passes complained of in the declaration, is bad as a whole if it profess to answer the whole. A declaration in trespass stated a breaking, entering, damaging the doors, hinges and locks, spoiling the grass and fruit trees, and exposing the plaintiff's goods to sale on his premises, by means of which, &c., the plaintiff was not only disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded that before action brought the plaintiff became a bankrupt. It was held, on general demurrer (affirming the judgment of the court below), that as there were some causes of action included in the declaration which would not pass to the assignees, the plea which embraced the whole, and was not addressed to any particular portion of the declaration, was insufficient.[1] In Parker v. Parker,[2] there were two counts—one for cutting down and carrying away sixteen stooks of rye, and the other for taking and carrying away sixteen stooks of other rye. The defendant pleaded, "as to the force and arms or anything against the peace, and also the whole trespass and all the trespasses in the declaration mentioned, excepting the breaking and entering the close aforesaid, and cutting down and carrying away sixteen stooks of rye then and there growing, she says she is not guilty thereof in manner and form as the plaintiffs complain against her." And the plea then justified the breaking and entering the close, and the carrying away the sixteen stooks of rye, because the close was her soil and freehold. It was held that the plea purported to be an answer to the whole declaration, and if it did not contain a sufficient answer to the whole the plaintiffs should have demurred.* A plea which justifies the breaking, entering, and staying twenty-

[1] Rogers v. Spence, 12 Cl. & Fin. 700. [2] 17 Pick. 236.

* Putnam, J.: "It is a denial of all, excepting of the part justified. If the defendant had taken away other sixteen stooks of rye than those which were set forth in the justification as to the residue, it would have been competent for the plaintiffs, under the issue of not guilty of all the matters set forth in the introductory part of the plea, to have proved that fact. But there is nothing contained in the report to show that there were any other stooks of rye taken away than those contained in the justification as to the residue of the trespass."

four hours, when the declaration charges a breaking, entering, and staying three weeks, covers the whole declaration.[1] But where the declaration contains two counts, a plea to the whole cause of action, alleging matters in justification of one of the counts, which does not allege that the causes of action in the two counts are the same, is bad on general demurrer.[2]

§ 1014. Every special plea should either expressly or impliedly confess that but for the defense set forth in the plea the action could be sustained, and not argumentatively deny the alleged trespass by averring that the plaintiff is mistaken in the place where the act alleged as a trespass was in fact committed. In Dorman v. Long,[3] the premises in question were described as bounded on the south by lot number ten, Buffington's patent. The defendant pleaded specially that the land whereon the alleged trespass was committed was lot number ten, Buffington's patent, and that it belonged to one Brewster, whose hired man, agent and servant the defendant was, and under whose directions he acted. The plaintiff having demurred to this plea, judgment was awarded him. In Simpson v. Coe,[4] the defendant pleaded in bar that the *locus in quo* was parcel of a close called Spinny Place, which said Spinny Place was the soil and freehold of the defendant. As the plea amounted to a statement of argument instead of fact, it was adjudged bad. The defendant should have pleaded directly that the *locus in quo* was his freehold, and evidence that the Spinny Place was his freehold, and that the *locus in quo* was parcel of the Spinny Place would have maintained the plea. A declaration alleged a number of trespasses at different dates, in different closes. The defendant pleaded that the several closes were one and the same close, and that it was his freehold. Held on demurrer that the plea was bad; that the defendant should have set up his justification as to all the

[1] Monprivatt v. Smith, 2 Camp. 175.
[2] M'Gillicuddy v. Forsythe, 5 Blackf. 435; Rubottom v. M'Clure, 4 Ib. 505.
[3] 2 Barb. 214. [4] 3 N. Hamp. 12.

closes, or he should have denied the trespass as to all the closes but one, and justified his entry as to that one.[1] A traverse is necessary when the defendant justifies a trespass at another place than that laid in the declaration.[2] But where a trespass was laid at Teddington, and the defendant justified for *damage feasant* at Kingston, and that he impounded the cattle at Teddington, the plea was held good without a traverse.[3] *

§ 1015. Where the name of the close is set forth in the declaration, the defendant may plead *liberum tenementum*, either in himself or in a person with whom he is in privity,[4] together with a plea denying that the close is the plaintiff's.[5] † The plea of *liberum tenementum* simply raises an issue whether or not the premises are the freehold of the defendant.[6] It admits such a possession in the plaintiff as would entitle him to maintain trespass against a wrong-doer, but asserts in answer, that the defendant is the freeholder, with the right to the immediate possession,[7] and renders it incumbent

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[1] Nevins v. Keeler, 6 Johns. 63; and see Dutton v. Holden, 4 Wend. 643.

[2] Benjamin v. Howell, 1 Wils. 81. [3] Ryley v. Parkhurst, 1 Wils. 219.

[4] Harvey v. Brydges, 14 L. J. N. S. 272; 9 Jur. 759; Jones v. Water Lot Co. 18 Geo. 539.

[5] Slocombe v. Lyall, 6 Exch. 119; 2 Pr. R. 33; 20 L. J. Exch. 96.

[6] Gilchrist v. Laughlin, 7 Iredell, 310.

[7] Ryan v. Clarke, 13 Jur. 1000; 18 L. J. Q. B. 267; Doev. Wright, 2 Per. & D. 672; 10 Ad. & E. 763; Lempriere v. Humphrey, 4 Nev. & Man. 338; 3 Ad. & E. 181; 1 Har. & W. 170; Appleby v. Obert, 1 Harr. 336.

* In an action of trespass for breaking the plaintiff's closes and encumbering them with stones, and pulling down rails, &c. thereon, the plea denied that the plaintiff at the times when, &c. was possessed of the said closes, rails, &c., in manner and form, &c., concluding to the country. It was held on special demurrer that the plea properly concluded to the country (Fleming v. Cooper, 5 Ad. & E. 221; 6 Nev. & M. 809).

† Where, in an action of trespass for injury to land, the defendant in his justification sets up such an interest in the *locus in quo* as, if supported, would give him right and authority to do the acts complained of, he sets up a title paramount to the title of the adverse party (Lay v. King, 5 Day, 72, per Brainard, J.)

In England, it was held, on error from the Exchequer Chamber affirming the judgment of the Court of Exchequer, that *liberum tenementum* is a good plea to a declaration in trespass for breaking and entering a dwelling-house in the occupation of the plaintiff, and expelling him and his family therefrom, although the premises are particularly described in the declaration (Harvey v. Bridges, 1 Exch. R. 261; 3 Dowl. & L. 55; 14 M. & W. 437).

on the defendant to prove his title.[1] A plea that a third person has a freehold in the land, is bad.[2] *Liberum tenementum*, to a declaration in trespass charging an assault upon the plaintiff, is bad.[3] But where the declaration alleged that the defendant with force and arms broke and entered a certain dwelling-house and land of plaintiff, then being in his actual possession and occupation, and with force and arms ejected the plaintiff and his family from the occupation of the same, against the peace, &c., to which the defendant pleaded *liberum tenementum*, the plea was held good.[4]

§ 1016. According to Chitty,[5] the plea of *liberum tenementum* gives implied color, and if the defendant claim under a demise from the plaintiff, express color need not be given. But when from the nature of the defense, the plaintiff would have no implied color of action, the defendant cannot plead specially any matter which controverts what the plaintiff would, on the general issue, be bound to prove without giving express color. Thus, in trespass to land, if the defendant plead a possessory title under a demise from a third person, this plea showing that the right of possession is in the defendant, would, without giving express color, amount to the general issue. But giving color, creates a question of law for the decision of the court, and prevents the plea from amounting to the general issue. In Collet v. Flinn,[6] Flinn brought an action in the Common Pleas against Collet for breaking into a stable. The defendant pleaded that the stable belonged to one Hone, who rented it to the defendant for one year, and that by virtue of such letting he entered, &c., concluding with a verification. Upon demurrer to this plea judgment was rendered for the plaintiff. The Supreme Court, per Savage, Ch. J., in affirming the judgment, said: "The doctrine contended for by the plaintiff in error is not

[1] Brest v. Lever, 7 Mees. & W. 593; 9 Dowl. P. C. 246.
[2] Richardson v. Murrill, 7 Mo. 383.
[3] Roberts v. Taylor, 1 C. B. 117; 14 L. J. N. S. 87; 9 Jur. 330.
[4] Harvey v. Brydges, *supra*.
[5] 1 Pl. 500.
[6] 5 Cowen, 466.

denied; that when the declaration in trespass is general, the defendant may plead *liberum tenementum*, and drive the plaintiff to a new assignment. But it is denied that the plea demurred to is a plea of *liberum tenementum*. It shows a freehold in Hone, and only a possessory right in the defendant below, and in such cases, the plea not giving color to the plaintiff, amounts merely to the general issue."

§ 1017. If the plaintiff have described in his close more or other land than he has the exclusive right to possess, and the defendant would drive him to confine the trespass complained of upon the face of his declaration to that part of the land which is actually his, or to establish his title to the residue, the defendant may plead soil and freehold in himself or another as to all of the close which he does not admit the plaintiff to possess, describing it particularly; and as to the residue, the general issue or other plea. This will compel the plaintiff to new assign the trespass, and either traverse or avoid the plea of soil and freehold so as to restrict the controversy to the points really in dispute between the parties.[1] But in Rich v. Rich[2] the declaration described the land on which the alleged trespass was committed in the very words of the plaintiff's deed. The plea, instead of being not guilty as to a part of the land, and setting up title to that part, claimed a freehold in the whole of the plaintiff's lot. In other words, it was a formal plea of *liberum tenementum* to the whole close, on which the plaintiff took an issue equally broad. The defendant, not having taken the precaution to limit his plea in terms, the plaintiff claimed at the trial that the implied admission of the various acts of trespass set forth in declaring was co-extensive with the close. He insisted that what was not denied in a special plea was admitted, and therefore that the trespasses here stood admitted in all their particulars and variety, and also in respect

[1] Stevens v. Whistler, 11 East, 51; Shank v. Cross, 9 Wend. 160; Lee v. Rogers, 1 Lev. 110.

[2] 16 Wend. 663.

to that part of the close which belonged to the plaintiff; and he claimed that he was entitled to a verdict for at least nominal damages. It was, however, held, that as the defendant had shown title to the place where the trespass was in truth committed, though that was only part of the ground covered by the declaration and plea, he was entitled to a verdict. *

§ 1018. The defendant may justify that he is seized of the adjoining land, and as appurtenant to it has a right to pass at all times and in all directions over the plaintiff's close.[1] We have seen that the plea of right of way raises a question of title in the easement claimed.[2] It admits the possession of the plaintiff, but not an absolute title in him.[3] †

16. *Averments which are unnecessary in defense.*

§ 1019. The defendant is not obliged to answer or justify anything which is inserted in the declaration as mere matter of aggravation. Thus, we have seen[4] that in trespass for breaking and entering the dwelling-house of the plaintiff and debauching his daughter, the breaking and entry is the gist of the action, and the debauching mere matter of aggravation; and if the breach of the close is not proved, the defendant is entitled to a verdict. So, in trespass for breaking into the plaintiff's house and expelling him therefrom (pro-

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[1] Emerson v. Wiley, 10 Pick. 310.

[2] Bartlett v. Prescott, 41 N. Hamp. 493; Pritchard v. Atkinson, 4 Ib. 293; 2 Blk. Com. 20; *ante*, § 984.

[3] Law v. Hempstead, 10 Conn. 22.

[4] *Ante*, § 999.

* In an action of trespass *quare clausum*, the defendant gave notice that the title of lot No. 12 was in him, and that the acts done were on that lot. It was held that this was equivalent to a plea of soil and freehold, and that the defendant might prove title in himself by showing title to lot 12, and that the *locus in quo* fell within that lot (Washburn v. Tinkham, 8 N. Hamp. 507).

† In an action of trespass *quare clausum fregit*, the declaration contained two counts, the second of which charged the trespass on other days and times and on other parts of the closes in the first count mentioned. The defendant pleaded a right of way over the closes. The plaintiff traversed the right of way and new assigned. To the new assignment there was a payment of money into court, and the acceptance of it. It was held that the plea justified all the trespasses in the declaration, and that the defendant therefore was not bound to prove two rights of way (Wood v. Wedgewood, 2 Dowl. & L. 809; 14 L. J. N. S. 132).

vided that an assault and battery or trespass is not committed by such expulsion), the expulsion is mere aggravation, and a justification of the breaking and entering covers the whole.[1] A declaration stated that the defendants, with force and arms, and with a strong hand, against the form of the statute, in such case, &c., broke and entered the plaintiff's dwelling-house then in his actual occupation, made a noise and disturbance therein, and stayed therein making such disturbance, &c., and in a forcible manner and with a strong hand broke open the doors, broke the locks, &c., and with force and arms, &c., assaulted the plaintiff, and in a forcible manner and with a strong hand expelled him, &c. Pleas: not guilty; and as to the breaking and entering, &c., making a noise, &c., and staying, &c., and breaking open the doors, &c., "as in the declaration mentioned," that the dwelling-house, &c., was the dwelling-house, soil and freehold of one defendant; wherefore he, in his own right, and the others as his servants, &c., at the time when, &c., broke and entered, &c., and committed the supposed trespasses. On special demurrer to the last plea it was held that (assuming the averments in the count to be indivisible, and that all must be answered by the plea), that the plea answered every material part of the declaration, the averments "with force and arms," "with a strong hand," and "against the form of the statute," being on these pleadings, matters of aggravation only.[2]*

§ 1020. In trespass for breaking and entering and carrying away goods, a plea which justifies the breaking and entering only, is sufficient.[3] To a declaration for breaking

[1] Bul. N. P. 94; Hyde v. Morgan, 14 Conn. 104; Holly v. Brown, Ib. 255; Kingsbury v. Pond, 3 N. Hamp. 511.

[2] Davison v. Wilson, 11 Q. B. 890; 12 Jur. 647; 17 L. J. Q. B. 196.

[3] Herndon v. Bartlett, 4 Port. 481.

* Under the statute of Missouri, which provides that if it shall appear on the trial that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed was his own, the plaintiff shall recover single damages only, it has been held that the defendant need not set up probable cause in his plea or answer (Walther v. Warner, 26 Mo. 143; Brown v. Carter, 52 Ib. 46).

and entering the plaintiff's house, and taking and carrying away his goods and chattels then being in the same, and converting and disposing thereof to the defendants' use, the defendants pleaded in justification of the entry, that the dwelling-house was the freehold of T. P., and that they entered as his servants, and because the plaintiff's goods were incumbering the close, they removed them to a convenient distance. It was held on special demurrer, that the allegation in the declaration of the conversion of the goods was mere matter of aggravation, and that therefore the plea was not bad for omitting to justify it.[1]

§ 1021. When the defendant justifies under a lease, he need not set out the lease in his answer.[2] If he justify under a statute authorizing a corporation to take the land for public use, the plea need not allege that the corporation has taken the proper means to ascertain the damages.[3]

§ 1022. Special pleas have no effect by way of estoppel in relation to any facts averred or admitted by them, as to the rights of the parties in the trial of the case, unless the issues upon such special pleas shall become subjects of litigation; and then they estop only as admissions that operate to preclude proof in contradiction to the averment, or to dispense with proof of what is admitted in the pleadings. They in no manner, in the particular case, operate as estoppels *in pais*, and outside of the purposes of the particular issue taken upon such pleas themselves; and least of all can they be regarded in the light of operating as an estoppel by having unwarrantably misled the other party.[4]

17. *Replication.*

§ 1023. The replication need only answer the material averments of the plea. In an action of trespass against an overseer of roads for going on to the land of the plaintiff,

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[1] Pratt v. Pratt, 6 Dowl. & L. 20.
[2] Dillon v. Brown, 11 Gray, 179.
[3] Rubottom v. McClure, 4 Blackf. 505.
[4] Child v. Allen, 33 Vt. 476.

and cutting and carrying away timber, the defendant pleaded that he took the timber to repair bridges, "it being the nearest unimproved land to said bridges." It was held that a replication that it was not the nearest unimproved land, was sufficient.[1] In an action for breaking and entering the plaintiff's stable, and taking therefrom two horses, the defendants pleaded that an execution against a third person was delivered to the sheriff, that the horses were the property of the execution debtor, and were subject to the execution, and that the sheriff, by virtue of the execution, and the defendants by his command, broke and entered the close and stable and took the horses. A replication that the horses did not belong to the execution debtor, but to the plaintiff, was held good on general demurrer.[2] *

§ 1024. Care must be taken that the issue raised by the replication is material. Trespass for breaking and entering the plaintiff's dwelling-house, and seizing and carrying away his goods. Plea a justification under a judgment recovered in a court baron, and a precept issued thereon. Replication that there is not any memorandum of the proceedings or of the said supposed judgment remaining in the said court baron in the said plea mentioned. It was held (Littledale doubting) that the replication tendered an immaterial issue, and was therefore bad on general demurrer.[3] In trespass for breaking and entering the plaintiff's dwelling-house, locking, &c., the doors thereof, ejecting the plaintiff, and seizing and converting his goods, the defendant in his plea justified the trespasses, except the ejecting, under a distress for rent, alleging an impounding in the dwelling-house, and that the defendant, in order to a safe impounding, necessarily locked, &c., the doors of the dwelling-house; and a subsequent sale

[1] Austin v. Waddell, 10 Mo. 705. [2] M'Gee v. Givan, 4 Blackf. 16.

[3] Dyson v. Wood, 5 D. & R. 295; 3 B. & C. 449.

* Trespass for breaking and entering a dwelling-house. Plea of justification under a *fi fa.* Replication that the said writ was irregularly sued out, and was afterwards set aside by a judge's order. Held upon special demurrer, that the replication was good, as sufficiently showing that the writ was set aside for irregularity (Rankin v. De Medina, 1 C. B. 183; 2 Dowl. & L. 813; 9 Jur. 89).

in satisfaction of the rent and costs of distress and sale. Replication that the defendant at, &c., broke and entered the dwelling-house and locked the doors, &c., of his own wrong, and for another and different purpose than the purpose in the plea mentioned, that is to say, for the purpose of ejecting, &c., the plaintiff from the dwelling-house, &c. It was held that the replication was bad, inasmuch as it raised an immaterial issue on the intention of the defendant in entering, instead of traversing the entry for the purpose of distraining, with a conclusion to the country.[1] *

§ 1025. Objection may be taken to the replication on the ground of ambiguity or duplicity. Trespass for breaking and entering the plaintiff's dwelling-house, and staying and continuing therein, making a noise and disturbance for a long time—to wit, for four days then next following—and seizing his goods, &c. Plea as to the breaking and entering the dwelling-house, and staying and continuing therein, as in the declaration mentioned; a justification by the leave and license of the plaintiff to take possession of certain goods. Replication traversing the leave and license, and new assignment, that the plaintiff issued his writ, &c., not only for the breaking and entering the dwelling-house and staying and continuing therein, as in the plea mentioned, but also for that the defendants, without the license of the plaintiff, stayed and continued in the dwelling-house, making such noise and disturbance, &c., for other and different purposes than those in the plea mentioned, and for a much longer time—to wit, three days longer than was necessary for taking possession of the goods. It was held that the replication and new assignment were not bad for duplicity, time being,

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[1] Woods v. Durrant, 16 M. & W. 149; 16 L. J. 313.

* In trespass *quare clausum fregit*, the defendant pleaded that the close was the freehold of H., wherefore the defendants, as the servants of H., and by his command, committed the trespasses. Replication that the defendants did not, as the servants of H., and by his command, commit the trespass. Held that the replication involved a negative pregnant, and was therefore bad on special demurrer (Jones v. Jones, 4 Dowl. & L. 494; 11 Jur. 335; 16 L. J. 299; 16 M. & W. 699).

in the case of a continuing trespass, equally divisible for this purpose as space.[1]* In trespass for breaking and entering the plaintiff's mill, and taking his fixtures, &c., the defendants pleaded title in A., as sub-lessee of the premises for a term of years, and that A., becoming bankrupt before the lease expired, the defendants, as his assignees, elected to take the lease, and entered and became possessed of the mill, &c., giving the plaintiff express color. The plaintiff replied that A., before his bankruptcy, made a sub-lease to B., by way of mortgage of the mill, &c., under which sub-lease B. became possessed; that after A.'s bankruptcy, and whilst B. was so possessed, it was agreed between A. and B. and the plaintiff, that B. and A. should grant an under-lease of the mill to the plaintiff, and should sell him the fixtures, &c., at a certain price; and that the plaintiff, with the consent of B. and A., before the bankruptcy of the latter, entered and became possessed of the mill, and of the fixtures, &c. It was held that the replication was not objectionable on the score of ambiguity or of duplicity, the whole statement therein forming one complete title in the plaintiff to the possession of the *locus in quo* and of the fixtures, &c.[2]

§ 1026. Where, in an action for trespass to land, and also for taking therefrom the plaintiff's goods, the defendant pleads *liberum tenementum* and a justification of the removal

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[1] Loweth v. Smith, 12 Mees. & W. 582; 2 Dowl. & L. 212; 14 L. J. N. S. 51.

[2] Pim v. Gazebrook, 2 C. B. 429; 3 Dowl. & L. 454; 15 L. J. N. S. 32.

* In an action of trespass *quare clausum fregit*, for entering the plaintiff's premises with horses, cattle, and teams, treading down and destroying the grass and herbage and cutting up the turf, the defendant pleaded several pleas justifying the alleged trespasses. The plaintiff, in his replication, used the following language: "Nevertheless, in this behalf, the plaintiff says that he brought his said action not only for the trespasses in said plea mentioned and therein attempted to be justified, but also for that the defendant, on the several days and times in the said declaration mentioned, with force, &c., broke, &c., and committed all the trespasses in said declaration mentioned, on other and different occasions, and for other and different purposes than in the said seventh plea mentioned, and in other and different parts of the said close, out of the said way in that plea mentioned; which said trespasses newly assigned are other and different trespasses than said trespasses in said plea mentioned, and therein attempted to be justified." It was held that the plaintiff had a right to elect for what trespasses he would go, and that, as damages were given for those trespasses alone, the defendant had no ground of complaint (Robbins v. Wolcott, 19 Conn. 356).

of the goods, a replication sufficient as to the latter will be sustained. The defendants pleaded, among other things, *liberum tenementum* in J. W., and that J. W. leased the premises to the plaintiff, with a proviso for re-entry for non-repair; that the premises were out of repair, and that the defendants entered as the servants of J. W., and because the plaintiff was unlawfully in possession, &c.; and also justifying the removal of the goods of the plaintiff, which were wrongfully placed on the premises, to a convenient distance, doing no damage to the same. The plaintiff replied as to so much of the plea as related to the last count, that, after the removal of the goods, the defendants converted them to their own use. It was held, on special demurrer, that the replication was good.[1] *

§ 1027. If the defendant plead soil and freehold in another by whose command he justifies the trespass, such

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[1] Darlington v. Pritchard, 5 Scott N. R. 610; 2 Dowl. N. S. 664; 7 Jur. 677; 12 L. J. N. S. 34.

* At Michaelmas, 1823, the plaintiff became tenant from year to year of certain premises under one R. P. About Christmas, 1833, R. P. died, having devised the premises (which were copyhold) to his son F. W. P., then a minor, charged with an annuity to his widow, M. P. After the death of R. P., the rent was regularly paid to the widow; and, on the 24th of March, 1836 (which was after F. W. P. had been admitted as tenant of the manor) an agreement in writing was made between the plaintiff and M. P. for the continued occupation of the premises by the former, without any variation in the terms of the tenancy. On the 23d of March, 1840, the plaintiff was served with a notice to quit, signed by M. P. and F. W. P.; and, upon his failure to quit pursuant to that notice, a further notice was served upon him, under the statute, and afterward a complaint was laid before the magistrate by F. W. P., on behalf of himself and M. P.; whereupon the magistrates granted a warrant. Possession having been taken by an officer, under the warrant, and the plaintiff's goods removed from the premises, the key was either delivered to M. P., or laid down upon a table in her presence, and she was afterwards seen upon the premises. In trespass against M. P. and F. W. P. the defendants pleaded jointly that the defendant F. W. P. was seized in fee of the premises, and that the alleged trespass was committed by him in the exercise of his right, and by the other defendant as his servant and by his command. There was also a plea of not guilty by M. P. The plaintiff entered a *nolle prosequi* as to F. W. P.; and, as to the other defendant, replied setting up the demise by her of the 24th of March, 1836, by way of estoppel. The jury having found for the plaintiff against M. P., it was held: First, that the verdict was warranted by the evidence; secondly, that trespass was the proper form of action; thirdly, that the allegation in the plea that the defendant M. P acted as the servant and by the command of F. W. P. (whose title was not denied) was not admitted by the replication (Darlington v. Pritchard, *supra*).

command may be traversed by the plaintiff.[1] And where defendants plead a license to one, and to the other defendants as his servants, the plaintiff may controvert license to the defendants. The defendants pleaded a license "to the said defendant P. K., given as well for himself as for the other defendants as his servants." Replication that "the defendants entered of their own wrong, and without the leave and license to them given in that behalf, &c." Demurrer assigning for cause that the license pleaded and that traversed were different. Held, that the replication was good.[2] When the defendant justifies a trespass for preventing a tortious act of the plaintiff, and the latter relies on a license which rendered his act lawful, he should reply the license.[3] A plea of leave and license to trespass for breaking and entering, &c., may be rebutted by the replication *de injuria* without replying or new assigning excess, the principle being that such replication traverses the defendant's justification to the extent pleaded.[4]

§ 1028. A replication of an outstanding term in a stranger, without tracing the title from him to the plaintiff, is a sufficient answer to a plea of *liberum tenementum.* In such case the replication confesses the freehold and a presumptive right of immediate possession, but avoids the presumption which is a consequence of the right of freehold, and by so doing makes the defendant a wrong-doer, notwithstanding he is the freeholder, the possession of the plaintiff being asserted in the declaration and admitted in the plea. An averment in such a replication that "the stranger entered into the said close and became and was possessed thereof for the said term," is unnecessary, not involving an averment of the possession continuing in the stranger until the time of the alleged trespass, which averment would be contradictory not only to the declaration of the plaintiff, but to the plea of

[1] Chambers v. Donaldson, 11 East, 65; Cary v. Holt, Ib. 70, n.
[2] Hoy v. Kirk, 1 Alcock & Napier, 231.
[3] Taylor v. Smith, 7 Taunt. 156. [4] Symons v. Hearson, 12 Price, 569.

the defendant. To a plea of *liberum tenementum* to an action of trespass *quare domum fregit*, the plaintiff replied an outstanding term granted by the defendant to D. R., and entry by D. R., but did not derive title from D. R. It was held, on special demurrer, that the replication was good, and was no departure, for it did not cover an actual possession in D. R. at the time of the trespass complained of; that the averment of an entry by D. R. which was immaterial did not necessarily involve the allegation of the possession continuing in him up to the time of the trespasses complained of; and that the court would not put such a construction upon it as would render it contradictory to the previous pleading.[1]

§ 1029. A question sometimes arises as to how far the plaintiff has admitted the defense in his reply. In an action for cutting down the plaintiff's trees, the defendant pleaded that the trees were cut lawfully by him as overseer of highways. The plaintiff, instead of traversing this plea, newly assigned that he brought his action not only for the trespasses mentioned in the plea, but also for entering and cutting down trees on other occasions, &c. It was held that the justification was admitted.[2] In trespass for breaking and entering the plaintiff's house and taking his goods, the defendants, by their plea, justified under a writ of *fi. fa.* against a third person, and that the goods taken belonged to the third person. The plaintiff, admitting the writ, replied *de injuria residuo causæ*. It was held that the seizure under the writ was not admitted by the replication, but only the writ; and that a direction to the jury that the onus of proving his title lay upon the plaintiff, was wrong.[3] To an action of trespass for breaking the plaintiff's close and laying a railroad thereon, the defendant justified under the reservation contained in certain deeds. The plaintiff new assigned to the plea that the trespasses were committed on other and

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[1] Ryan v. Clarke, 13 Jur. 1000; 18 L. J. Q. B. 267; 7 D. & L. 8.

[2] Davidson v. Schenck, 2 Vroom, 174, Van Dyke, J., dissenting.

[3] Carnaby v. Welby, 1 P. & D. 98; 2 Jur. 1065.

different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default. It was held that the plaintiff could not dispute that some species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorized by the reservation.[1]

18. *When new assignment necessary.*

§ 1030. Since a breaking and entering will cover the whole declaration, if the plaintiff mean to insist on the expulsion as making the defendant a trespasser *ab initio*, he must new assign it.[2] And the same should be done when the defense consists in a right of way, and the alleged trespass was committed out of the way. Trespass for breaking and entering the plaintiff's close (which was set out by abuttals), and pulling down certain posts and bars standing thereon. Plea, that there was a public footway over the close, and that the defendants, because the posts and bars obstructed the way, pulled them down. Replication, traversing the footway. It was held that the defendants were entitled to a verdict, on proof of a right of footway in any direction over the close, and were not bound to prove a way over the place where the posts and bars stood; and that if the plaintiff had intended to complain that the trespasses were committed out of the way, he ought to have new assigned.[3] In an action of trespass for breaking and entering the plaintiff's close called, &c., and cutting down and prostrating one hundred yards of his rails there standing, the defendant pleaded a public right of way over the close, and that the defendants were using the said way, and because the said rails were wrongfully erected upon and standing in and obstructing the said way, they prostrated the same, &c. The plaintiff replied that the said rails were not standing in the said way

[1] Dand v. Kingscote, 6 Mees. & W. 174. [2] Williams v. Holmes, 2 Wis. 129.
[3] Webber v. Sparks, 10 Mees. & W. 485; 12 L. J. N. S. 41.

in manner, &c. The defendants had cut down some rails of the plaintiff's standing on a public highway in the close described, and other rails belonging to him which were in the same close and not on the highway. It was held that the plaintiff could not recover; for by taking issue on a plea which restricted the matter of dispute to the highway, he had excluded himself from proof as to rails in any other part of the close, and to recover for these he should have new assigned.[1] *

§ 1031. If the declaration allege that the premises are situated in a certain town, without naming the *locus in quo*, or specifying abuttals, and the defendant plead *liberum tenementum*, upon which the plaintiff takes issue without new assigning, the defendant may show title to any lands in the town.[2] In Elwis v. Lombe,[3] it was held that "if a man declare *quare clausum* generally in such a *ville*, the defendant may plead *liberum tenementum*, and if the plaintiff traverse it, it is at his peril; for if the defendant has any part of his land in the whole town, he shall justify it there; and therefore the better way is to make a new assignment." Where the general issue is pleaded with notice to a general count, instead of *liberum tenementum*, under which the defendant

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[1] Bracegirdle v. Peacock, 8 Q. B. 174.

[2] Austin v. Morse, 8 Wend. 476; Hawke v. Bacon, 2 Taunt. 156.

[3] 6 Mod. 117.

* Trespass for breaking and entering the plaintiff's close and damaging the fences, &c. Plea of justification under a right of way. New assignment that the action was brought for a trespass on a certain other portion of the said close, setting out that portion by abuttals. Plea to the new assignment, that before the said time when, &c., and whilst the defendant so had the right to the said way in the first plea mentioned, the plaintiff obstructed the way in the first plea mentioned, by digging a trench across the same; and because the defendant could not remove the obstruction, he did, for the purpose of avoiding the same, and using the way, depart out of the same along the said other portion of the close in the new assignment mentioned; and that, without breaking and damaging the same, he could not go over the residue of the said close in which, &c., he did necessarily a little break and damage the said fences, &c. Replication *de injuria*. It was held, first, that the right of way stated in the plea to the declaration was not admitted by the plaintiff in his new assignment; secondly, that the right being re-asserted, though informally, in the plea to the new assignment, it was put in issue by the replication, so as to throw the onus of proving it on the defendant (Robertson v. Gantlett, 16 M. & W. 289; 4 Dowl. & L. 548; 16 L. J. 156).

proves his freehold, the plaintiff may newly assign as to the *locus in quo*, and prove his own title or possession.[1] *

19. *Sufficiency of new assignment.*

§ 1032. The sufficiency or insufficiency of the new assignment will, of course, depend upon the circumstances of the case, as well as upon the manner in which it is framed, and the mode in which it is sought to be applied. The plaintiff in her declaration alleged that the defendant broke and entered a certain shop, rooms, and apartments of the plaintiff in and parcel of a house. To this the defendant pleaded a justification, that by the leave and license of the plaintiff he broke and entered the said shop in the declaration mentioned, "the said shop, rooms and apartments in the declaration mentioned, being one and the same shop, and not different apartments," and stayed therein for a reasonable time only. To this the plaintiff replied, that the defendant of his own wrong, &c., committed the trespasses in the plea mentioned, and new assigned that the plaintiff brought her action not only for the trespasses in the plea mentioned, but also for that the defendant continued in the shop a much longer time than in the plea mentioned, and also at the time when, &c., broke and entered two other rooms and apartments behind the said shop, to wit, &c., being other rooms and apartments than in the declaration mentioned, and other and different from the said shop, and stayed, &c., which were other and different trespasses from those in the plea. To this new

[1] Taylor v. Cole, 3 T. R. 292; 1 H. Bl. 555.

* Mr. Chitty (1 Pl. 565–6) says, that in trespass to real property, the plaintiff may answer a plea of *liberum tenementum* in either of four ways: 1. If the close has been described by a name or abuttal in the declaration, then the replication should deny the defendant's title, and conclude to the country. 2. If the plaintiff derives title under the defendant, then he should not deny the defendant's title, but reply a lease, or some other title under him. 3. If the plaintiff has a middle case, and neither derives title under the defendant, nor has a title inconsistent with the defendant's title, he may reply that before the defendant had anything in the premises, another person was seized, and show a title derived from such person. 4. If the declaration be general, without naming the *locus in quo* or the abuttals, and there be any reason to apprehend that the defendant has any land in the same parish, the plaintiff must new assign, setting out the *locus in quo* with more particularity.

assignment there was a special demurrer, on the ground that it charged a further trespass, and was a departure. The demurrer was, however, overruled.[1] To a declaration containing three counts for breaking and entering the plaintiff's closes, he newly assigned that the close in which, &c., in the first count mentioned, abutted on certain closes respectively called A., B., and C., some or one of them; and the defendant pleaded thereto that the close newly assigned was his soil and freehold; and issue was joined thereon; and the plaintiff proved that he had a close abutting on B., and the defendant that he had a close abutting on A. and C.; and the jury found a verdict for the plaintiff on the new assignment. The defendant objected that the record was not sufficiently certain, and that he had established his own issue. But the court refused to disturb the verdict; holding that the defendant should have demurred to the new assignment in the first instance.[2] The following new assignment to a plea of *liberum tenementum* was held sufficient: That the piece of land in the declaration mentioned was and is a certain close, situate, &c., and bounded as follows, &c.; that said close now is, and at said time when, &c., was, another and different close from the said close in the plea mentioned, and therein alleged to be the soil and freehold of the defendant.[3]

§ 1033. A new assignment which adds nothing to the allegations previously made and in issue is bad. Declaration in trespass for breaking the plaintiff's dwelling-house, expelling the plaintiff, and taking his goods. Pleas of *liberum tenementum* as to the trespasses in and to the dwelling-house. Reply denying the pleas and new assigning the expulsion. Held on demurrer, that the new assignment was bad, as the pleas justified the expulsion as well as the breaking of the house.[4] *

[1] Harvey v. Lankester, 14 Jur. 982; L. J. Q. B. 299; 7 Dowl. & L. 32.

[2] Lethbridge v. Winter, 8 Moore, 326; 2 Bing. 49; 9 Moore, 95.

[3] Halsey v. Mathews, 3 Ind. 404.

[4] Meriton v. Coombes, 1 Pr. R. 516; 19 L. J. C. P. 336.

* If the defendant plead the general issue, and also a special justification

20. *When new assignment unnecessary.*

§ 1034. According to technical rules of pleading, a new assignment in actions of trespass *quare clausum fregit* is necessary only where the defendant pleads soil and freehold, or some other special plea in bar.[1] If he plead the general issue of not guilty to the whole trespass alleged, with or without a brief statement under the statute, the plaintiff has no occasion to make a new assignment, but may give evidence of any act of trespass covered by his declaration.[2] And the same is true when the defendant pleads the general issue, and a special plea to matters alleged by the plaintiff by way of aggravation,[3] or the general issue and a plea of leave and license. In Barnes v. Hunt,[4] the plaintiff declared that on the 1st of September, and on divers other days and times between that day and the day of exhibiting the plaintiff's bill, the defendant broke and entered the plaintiff's close, setting forth divers acts of trespass. The defendant pleaded the general issue, and also specially in bar, that at the said several days and times when, &c., he committed the said several trespasses by leave and license of the plaintiff. At the trial, it was made a question whether, as the plaintiff had declared for trespasses committed on a particular day, and on divers other days and times afterward, and the defendant's plea alleged generally that he had done all the acts complained of by the license of the plaintiff, and the whole of that plea was put in issue, there was any necessity for the plaintiff to have made a new assignment to enable him to

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that the *locus in quo* was part of a certain common field, which was then allotted to him by the leet jury of the manor; and the plaintiff reply and new assign to the special plea, after setting out the abuttals of the closes trespassed upon, that the closes newly assigned are different from the defendant's allotment, when in fact they are the same, the defendant is entitled to a verdict on the issue upon the new assignment (Pratt v. Groome, 15 East, 235).

Where the place is more accurately described in a new assignment, it is to be taken to be the same place mentioned in the declaration (Jefferies v. Pitter, 1 Ld. Ken. 389).

[1] Helvis v. Lamb, 2 Salk. 453; Lambert v. Stroother, Willes, 223.

[2] Palmer v. Dougherty, 33 Maine, 502; Rev. Sts. of Maine, ch. 115, § 18.

[3] Neville v. Cooper, 2 C. & M. 329. [4] 11 East, 451.

recover for the trespasses committed prior to the license. It was contended for the defendant that there was nothing in issue except the cause of justification, namely, the license, and that if the defendant had proved any trespass covered by his license the issue must be decided for him. The court, however, did not recognize this claim of the defendant, but held that unless the defendant could prove his whole plea and show that the license covered as many trespasses as the plaintiff had alleged and was able to prove, it was not a defense to the action. And in trespass alleged to have been committed on several days, and plea of leave and license to the whole, if some of the trespasses were committed after the license was revoked the plaintiff need not new assign, as the defendant, by his plea, undertakes to prove a license sufficient to cover all the acts of trespass.[1]

§ 1035. If the plaintiff in his declaration begin by naming his own close, it is not necessary for him to new assign after a plea of *liberum tenementum* generally, which does not give any further description of the close. Therefore, where in trespass for breaking and entering a certain close of the plaintiff's called Foldyard, the defendant pleaded that such close was his soil and freehold, and issue was taken thereon, which was found for the plaintiff, it was held that a new assignment was unnecessary, as the plaintiff was entitled to recover on proving a trespass done in a close in his possession bearing the name given in the declaration, although the defendant might have a close in the same parish known by the same name.[2]

§ 1036. Where the defendant pleads title to a parcel of the land described in the declaration, and that the alleged trespass was committed on such parcel, the plaintiff is not required to new assign that the defendant also trespassed on other parts of said land. In Lamb v. Beebe,[3] the plea al-

[1] Haward v. Grant, 1 Car. & P. 448.
[2] Cocker v. Crompton, 2 D. & R. 719; 1 B. & C. 489.
[3] 10 Conn. 322.

leged the title in the defendant to a certain parcel of land particularly described in the plaintiff's declaration. The plea averred that the land in the plea thus particularly described was the same land upon which the trespasses complained of were committed—thus implying that no acts of trespass were committed upon any other part of the land described in the declaration. The defendant proved that he had committed some acts upon the land described in his plea, and to which he claimed title, and then objected that the plaintiff could not be permitted, for any purpose, to prove other acts of trespass upon other parts of the land described in his declaration, without a new assignment, contending that the investigation was to be confined to the question of title to the land described in his plea. It was held that evidence to prove acts of trespass committed on other parts of the land claimed by the plaintiff, and for which he brought his suit, was admissible, as well to disprove the allegations in the defendant's plea as to show the damages sustained by the plaintiff—the question not being solely whether the defendant had title to the land described in his plea, but whether all the acts of trespass were committed upon it. In Smith v. Powers,[1] the plaintiff, in his declaration, specified the close in which he alleged the trespass was committed. The defendant pleaded, in substance, that he was not guilty of all the alleged trespass, except breaking and entering a certain portion of that close (which he particularly described), and there cutting the trees mentioned in the plaintiff's declaration; and as to entering upon that part of the close, and cutting those trees, he justified on the ground that it was his freehold. The plaintiff joined issue upon the allegation, that the defendant was not guilty of anything more than entering upon the part of the close embraced in the justification, and traversed the justification itself, tendering an issue to the country. It was held that as

[1] 18 N. Hamp. 216.

the whole matter was duly put in issue, a new assignment by the plaintiff was bad.*

21. *Rejoinder.*

§ 1037. Cases under this head arise, where the defendant neglects to rejoin, when the state of the pleadings renders it necessary, or where there is some alleged defect in the rejoinder. To a plea of *liberum tenementum* and leave and license, the plaintiff denied the license and replied to the other plea a demise from year to year. The defendant, in his rejoinder, denied the demise. The defense (which was sought to be proved by the admissions of the plaintiff), was, that at the time of the letting, the plaintiff had agreed to give up the possession whenever the defendant required the land. It was held that the stipulation to give up possession should have been made the subject of a rejoinder, and that it could not be gone into under the plea of leave and license.[1] To a plea of *liberum tenementum*, the plaintiff replied a demise for a year, and so from year to year as long as the plaintiff and defendant should respectively please. Rejoinder that the demise was from year to year, saving and reserving the game, with full power to the defendant to carry away the same, and that the defendant entered for that purpose. "Without this, that the defendant demised the close to the plaintiff for a year, and so, from year to year, as long as the plaintiff and defendant should respectively

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[1] Tomkins v. Lawrence, 8 Car. & P. 729.

* In this case the court said: "If the plaintiff can prove that the defendant has entered upon any other part of the close described in the declaration than that embraced in the justification, he will be entitled to a verdict and judgment on the first issue; for the defendant pretends to no justification for any such act. And the defendant having admitted that he entered upon the part of the close which he specifies in his justification, must sustain his plea as to that, or the plaintiff will be entitled to judgment on the second issue for the acts which the defendant thus admits he has done. If the defendant sustain this matter of justification as to that part of the close, and the plaintiff can prove nothing more to have been done, the plaintiff has no title to maintain his action. It is very clear, therefore, that there is no necessity for a new assignment, and nothing in the case to be tried under it if it were admitted" (citing 1 Chitty's Pl. 602, 3d ed.; Cheasley v. Barnes, 10 East, 73; Parker v. Parker, 17 Pick. 236; Boynton v. Willard, 10 Pick. 166).

please, in manner and form, as the plaintiff in her replication hath alleged." It was doubted whether this rejoinder merely put in issue the demise from year to year, or whether the defendant could go into evidence to show that the demise was qualified by a reservation of the game.[1]

§ 1038. In the following cases, the rejoinder was sustained. In trespass for breaking and entering the plaintiff's close, the defendants justified as servants, and by command of B. the assignee of the lessee. The plaintiff replied, that one of the defendants having lawful authority from B., demised and let the close for a certain term; that he, the plaintiff, accepted the demise, and entered and became possessed of the close; and that during the continuance of that demise, the defendants, of their own wrong, and in violation of the agreement, committed the trespasses complained of. The defendants rejoined that B. did not demise to the plaintiff *modo et forma.* It was held that this traverse was not too large, and that it was not competent for the plaintiff to object on general demurrer that the rejoinder traversed what was not alleged by the replication, viz., that B. demised; or that it traversed not the facts alleged, but an inference and conclusion of law resulting from such facts; or that it involved a denial of the authority to demise which the defendants were estopped from making.[2] In an action of trespass *quare clausum* the declaration was general, not describing any close in particular. The plea described a close by metes and bounds containing one hundred and fifty acres, and stated that the supposed trespass was committed in that close, and that it was the soil and freehold of A., as whose servant the defendant did the act complained of. The replication stated that the trespass was committed in a close of fifteen acres, being a part of the close of one hundred and fifty acres, which part was described by metes and bounds; and it further stated that it was the soil and freehold of the

[1] Robinson v. Vaughton, 8 Car. & P. 252.

[2] Wilkins v. Boutcher, 4 Scott N. R. 425; 1 Dowl. N. S. 478; 6 Jur. 284.

plaintiff, and contained a traverse that the whole close of one hundred and fifty acres was the soil and freehold of said A. The defendant, in the rejoinder, pleaded to this new charge that he was not guilty of any trespass on the close of fifteen acres, and concluded to the country. It was held that by the replication restricting the close described in the plea and confining the question to the fifteen acres, it was immaterial who owned the residue of the one hundred and fifty acres; and, therefore, that the rejoinder was good.[1] To an action of trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded a right to the possession under a demise derived from the owner in fee, giving as express color, a charter of demise to the plaintiff for life, with the allegation: "Whereas, nothing of or in the said dwelling-house in which, &c., ever passed by virtue of that charter." The plaintiff replied a demise prior to that granted to the defendant. Rejoinder setting out a breach of a condition under which the plaintiff's demise was granted, and then justifying an entry by the defendant for such condition broken. It was held, first, that the entry was to be deemed as peaceably made, and was a good answer to the action; secondly, that the rejoinder was no departure from the plea.[2]*

22. *Burden of proof.*

§ 1039. It is incumbent upon a person who persists in remaining on the land of another against his will, to show all the circumstances which make such occupation lawful.[3] Where a railroad company was charged with maliciously ob-

[1] Low v. Ross, 3 Maine, 256.

[2] Wright v. Burroughs, 10 Jur. 968.

[3] Hayling v. Okey, 17 Jur. 325; 22 L. J. N. S. Exch. 139.

* In Phelps agst. Sanford, Kirby, 343, which was an action of trespass for entering the plaintiff's land and cutting and destroying his timber, the issue was thus closed: "Which the defendant prays may be inquired of by the court." "And the plaintiff likewise." After verdict for the defendant, it was moved, in arrest, by the plaintiff, that the issue being closed to the court, the jury could not legally return a verdict. Law, C. J., said: "Here was an issue tendered, and nothing left for the other side but to join; and the case being put to the jury, it is presumed that it was done by mutual consent and agreement, and the omission a mere misprision, and, therefore, ought not to be taken advantage of to defeat a trial."

structing a river, whereby the plaintiff's land was flooded, the defendants were required to prove that the acts charged were strictly within the powers conferred by their charter.[1] This was an action for damages caused by the overflowing of the plaintiff's land by means of a bridge, abutments, and embankments. The premises of the plaintiff which he alleged had been thus injured, were outside of, and beyond the five rods which the defendants were authorized to take in the construction of their road. They claimed that by their charter they had the right to obstruct the passage of the water in the river to the injury of the plaintiff's property, without any restriction or limitation, and that the only remedy of the plaintiff was an application for an assessment of his damages under the statute. It was held that the remedy thus given by the statute was confined to cases where the authority conferred by the legislature was exercised within proper limits; that to maintain their defense, the defendants were bound to show that all due and reasonable precautions were taken in the construction and maintenance of their road, and that nothing was done wantonly, negligently, or carelessly, so as to cause unnecessary damage to the property of the plaintiff situated without the line of their located limits.*

§ 1040. When the plaintiff is in possession of the premises, and each party claims to own the land, the burden of proof is on the defendant to make out his title to it.[2] To a

[1] Mellen v. Western R. R. Corp. 4 Gray, 301.

[2] Heath v. Williams, 25 Me. 209.

* "A corporation," said the court in the above mentioned case, "to whom the right of eminent domain has been delegated by the sovereign power, cannot, in the exercise of this right over private property situated beyond the limits of that which they are authorized to take and appropriate as a part of their franchise, act recklessly and wantonly, or do any acts which are not necessary and proper to carry out and perfect the work which they are authorized to construct. Undoubtedly, great latitude of discretion is to be allowed to those who are intrusted by law with the erection and maintenance of great public works, in the location and mode of construction which they may adopt to effect the object and purposes to be accomplished under their authority. So long as they act in good faith, within the scope of the powers granted to them without being guilty of negligence, carelessness, or wanton disregard of the rights of individuals, they will be protected from all liability except in the mode and by the process fixed by the statute under which they act" (per Bigelow, J., citing Rowe v. Granite Bridge, 21 Pick. 348; Dodge v. County Commrs. 3 Metc. 383).

declaration for breaking and entering the plaintiff's close, the defendant pleaded first, not guilty; secondly, that the close was not the close of the plaintiff; thirdly, that the close was the soil and freehold of the defendant. It was held that evidence of possession was sufficient to entitle the plaintiff to a verdict on the second plea.[1] In Hazen v. Boston and Maine R. R.[2] which was an action of trespass *quare clausum*, the defendants having justified their entry upon and use of the plaintiff's land under their charter, the court ruled that as the plaintiff had proved his title, the entry of the defendants upon the land, and the construction of their road upon it, the burden was upon them to show that the land was covered by the authorized location of their road, and if they failed to do so, they were liable. Where the trespass was alleged to have been committed on a grant from the State described by metes and bounds, with the exception of two hundred and fifty acres previously granted, it was held that the defendant was bound to show that the trespass was on the part previously granted.[3] In an action of trespass for removing the plaintiff's house from his land, it was proved that the house was removed and found on the land of the defendant occupied by him. It was held under the plea of the general issue, that the burden of proof was on the defendant to show that he did not remove the house.[4]

23. *The evidence must conform to the pleadings.*

§ 1041. The plaintiff need not prove all the allegations in his declaration. But he must prove enough of them to constitute a ground of recovery, and to entitle him to recover in the form of action which he has adopted.[5] * He cannot

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[1] Heath v. Milward, 2 Scott, 160; 2 Bing. N. C. 98; 1 Hodges, 198.

[2] 2 Gray, 574. [3] McCormick v. Monroe, 1 Jones L. N. C. 13.

[4] Finch v. Alston, 2 Stew. & Port. 83.

[5] Bul. N. P. 94; Hyde v. Morgan, 14 Conn. 104.

* In trespass against two excise officers for entering the plaintiff's house, there was, at the close of the plaintiff's case, no evidence against one of the defendants. It was held that if no further evidence was given for the plaintiff,

be compelled to select some one of several lots of land described in his declaration to which his proof shall apply, but may prove damages occasioned by the defendant upon each and all of the lots as alleged.[1]

§ 1042. We have already [2] spoken of the latitude allowed with respect to the allegation of time in the declaration. It is therefore scarcely necessary now to say that the plaintiff need not prove that the trespass was committed on the precise day charged.[3] Where the trespass is laid with a *continuando*, if the plaintiff fails to prove an entry within the period specified in his writ, he may waive the time alleged in the declaration, prove a single trespass at any time before action brought, and recover therefor.[4] *

§ 1043. The plaintiff is entitled to recover upon substantial proof that the injury was on his land, though the boundaries be not exactly proved.[5] A description of a close as abutting on another's land does not imply that it is abutting all along on such land.[6] Under an allegation that the trespass was committed upon a certain tract, the plaintiff need not prove the boundary of the whole tract. It is sufficient that he show that he is in possession of a part, and that the trespass was committed on such part.[7] But where a particular place is alleged in a declaration which gives the boundaries, or otherwise describes it with certainty, it must

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he must then elect to go on as to the other defendant only, and that he could not wait until the defense was concluded (Davis v. Moseley, 1 Car. & K. 710).

[1] Gardner v. Gooch, 48 Maine, 487.

[2] *Ante*, §§ 73, 96, 994.

[3] Moore v. Boyd, 24 Maine, 242; Bliss v. Winston, 1 Ala. 344; U. S. v. Kennedy, 3 McLean, 175; Cooper v. Taylor, 3 Green, 455.

[4] Bul. N. P. 86; Webb v. Turner, 2 Strange, 1095; Hume v. Oldacre, 1 Starke, 351; 2 Saund. Pl. & Ev. 855; Fontleroy v. Aylmer, 1 Ld. Raym. 239; Brown v. Manter, 22 N. Hamp. 468; Chandler v. Walker, 21 Ib. 282; Little v. Downing, 37 Ib. 355.

[5] Barden v. Smith, 7 Wis. 439.

[6] Wheeler v. Rowell, 6 N. Hamp. 215.

[7] Tyson v. Shueey, 5 Md. 540; Porter v. Sullivan, 7 Gray, 441; Manning v. McDonnell, 3 Brevard, 15; Brown v. Hedges, 1 Salk. 290; Helvis v. Lamb, 2 Ib. 453; Drewry v. Twiss, 4 T. R. 558.

* In Michigan, it has been held that the plaintiff in such case must elect as to time, and if he prove a trespass anterior to the time laid in the *continuando* he can go no further (Gibert v. Kennedy, 22 Mich. 5).

be proved as laid.[1] Accordingly, where the declaration alleged that the trespass was committed at Fairhaven, in a certain close of the plaintiff lying and being in Fairhaven, beginning in the west line of Poultney, &c., giving the boundaries, and making the west line of Poultney the east boundary of the close, it was held that the plaintiff must prove and could recover only for a trespass committed in the *locus in quo* thus described.[2] *

§ 1044. When the evidence at the trial is calculated to remove from the minds of the jury every occasion for mistake or uncertainty, an equivocal designation of the property injured will not be regarded as a misnomer or material variance between the averments of the declaration and the proof adduced to maintain the action. Durgin v. Leighton[3] was an action for tearing away a mill dam, to which the general issue was pleaded. It was proved that the plaintiff owned and possessed the premises in question, and that the dam destroyed was a false dam a short distance above the dam proper, which was used to check the water while the plaintiff should repair his mill dam. This evidence being objected to, was held admissible, there being no question as to the identity of the close, and the dam destroyed being a mill dam, although erected for a temporary purpose and distinguished by the name of "false dam."

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[1] Bull. N. P. 89.

[2] Hooker v. Hicock, 2 Aiken, 172.

[3] 10 Mass. 56.

* In the above case, the court said: "The case does not state that any uncertainty existed, or that any question was made at the trial respecting the divisional line between the two towns, though probably such was the fact. If in truth there was any uncertainty as to the line, and it was doubtful in which of the towns the land on which the trespass was committed lay, the plaintiff might have obviated any objection of a variance and avoided all difficulty in this respect by inserting another count in his declaration laying the *locus in quo* in Poultney. But not having done this, and the trespass being alleged to have been committed in Fairhaven, and the close described as there situate, the plaintiff was bound by the description so given, and unless he proved a trespass committed in the close thus described as being in Fairhaven, and bounded east by the west line of Poultney, he was not entitled to recover."

§ 1045. Under an allegation of a single trespass, the plaintiff may introduce evidence of distinct acts of trespass afterward committed by the defendant.[1] But the plaintiff will not be permitted to go into proof of a distinct substantive ground of action not alleged by him in his declaration. Where the action is for breaking and entering the plaintiff's close and destroying his mill dam, evidence of a trespass committed on a part of the dam not within the mill lot is not admissible, it being a distinct cause of action of which the defendant received no notice by the declaration.[2] In an action for entering on land and cutting and carrying away trees, the plaintiff will not be allowed to introduce evidence against the objection of the defendant to show that trees were cut on land not described in the writ as land on which a trespass was alleged to have been committed.[3] A declaration alleging that A. B. broke and entered the dwelling-house of the plaintiff, and made a disturbance therein, and broke open part of the leads and roof of the said dwelling-house, is not supported by proof of breaking an internal rail fence and trespassing on leads forming the roof of a counting-house occupied by A. B., but used as a basement to the house of the plaintiff.[4]

§ 1046. Where a declaration in trespass alleges that the defendant broke and entered the dwelling-house of the plaintiff "and other enormities, then and there did," evidence may be given of keeping the plaintiff out; because that is a consequence of the wrongful entry. And under an allegation of breaking and entering the plaintiff's close, "*et alia enormia*," it was held that he might prove the pulling down of his house in the same town.[5] Such an averment will not however admit of proof of an assault and battery. The general principle is, that under *alia enormia*, nothing can be given in evidence which would of itself form a substantial ground of action;

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[1] Brady v. Bronson, 45 Cal. 640.
[2] White v. Moseley, 5 Pick. 230.
[3] Longfellow v. Quimby, 29 Maine, 196.
[4] Mudie v. Bell, 3 Car. & P. 331.
[5] Snider v. Myers, 3 W. Va. 195.

but such matter should be specially averred, for the reason that the defendant cannot be supposed to come prepared to defend against any cause of action of which he has no notice in the declaration.[1]

§ 1047. Evidence cannot be given by a party relative to a material allegation, which was not controverted by him in his pleading. In an action of trespass *quare clausum fregit*, the defendant pleaded that A. C. was seized in fee, and being so seized, granted a right of way. The plaintiff replied traversing the grant. It was held not competent for the plaintiff to prove that A. C. was not seized in fee, for the purpose of rebutting the presumption of the grant.[2]* Trespass for cutting down a Virginia creeper. Plea, removal, because it was doing damage to the defendant's premises. Replication, that the defendant used greater force and violence, and did greater damage than was necessary. It was held that the plaintiff could not go into evidence to show the quantum and nature of the damage done to the premises.[3] Where in an action for breaking and entering the plaintiff's close and removing a fence, the defendant in his answer only controverts the breaking and entering, he cannot introduce evidence to disprove the removal of the fence.[4] But if he has proved a justification of the entry, he will have made out a complete defense to the plaintiff's entire case, and will be entitled to a verdict, although he has shown no justification for the other acts alleged by way of aggravation. He will thus have rebutted the gist of the action, and all incidental matters will necessarily have fallen with it. † Although a party neglect-

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[1] Sampson v. Coy, 15 Mass. 493.

[2] Cowlishaw v. Cheslyn, 1 C. & J. 48.

[3] Pickering v. Rudd, 1 Stark. 56; 4 Camp. 219.

[4] Knapp v. Slocomb, 9 Gray, 73.

* Where there are several issues, and amongst them, one on the plaintiff's possession of the close, the plaintiff has a right to the trial of all the other issues, though it appear on the opening of the evidence, that he was not in possession of the close (Fry v. Monckton, 2 M. & Rob. 303).

† In Massachusetts where under the practice act (St. 1852, ch. 312, §§ 14–26), in an action for breaking and entering the plaintiff's close, and removing a

ing to plead an estoppel cannot take advantage of it, yet if the state of the case is such, that he has no opportunity to plead it, he may show it in evidence, and it will have the same effect. Therefore where to an action of trespass *quare clausum fregit*, the defendant pleaded title in a third person under whom he claimed, without showing how such third person's title was derived, or when it accrued, it was held that the plaintiff might give in evidence an award against the title without pleading it.[1]

§ 1048. The plaintiff is not restricted under the general issue to the mere fact of possession, but may also prove that it is legal, and that he has a title to the premises, so as to enhance the damages.[2] It is not however incumbent on him to prove that he was in the exclusive possession of the premises at the time of the alleged trespass, the defendant in such case not being at liberty to controvert the plaintiff's possession.[3]

§ 1049. The defendant may give in evidence, under the general issue, any matter that contradicts the allegations which the plaintiff is bound to prove, or shows that the act complained of is not in its own nature a trespass. Thus, he may give in evidence soil and freehold in himself, or in any other by whose authority he entered, or that he has any other right to the possession—as that he is the plaintiff's mortgagee, or the lessee of such mortgagee.[4] For he cannot be a trespasser in exercising a right which the law gives him, nor be bound to justify when he does not *prima facie*

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fence, the defendant answers that he is ignorant whether the close described in the declaration belonged to the plaintiff, and whether he entered the plaintiff's close, and therefore can neither admit nor deny the same, but leaves the plaintiff to prove the allegations in the declaration, the defendant may introduce evidence to rebut the plaintiff's case. If it were not so, it would follow that no fact could be put in issue and tried, which the defendant was not able to deny on his own knowledge (Knapp v. Slocomb, 9 Gray, 73).

[1] Shelton v. Alcox, 11 Conn. 240.

[2] Hunter v. Hatton, 4 Gill, 115.

[3] Stone v. Hubbard, 17 Pick. 217; Printz v. Cheeney, 11 Iowa, 469.

[4] Rawson v. Morse, 4 Pick. 127; Johnson v. Howson, 2 M. & R. 226; Murray v. Webster, 5 N. Hamp. 391.

appear to be a trespasser. He may show title in a third person, and a license from him, under the general issue; or such facts may be pleaded specially.[1] But where the plaintiff is in possession, evidence of title in a stranger under whom the defendant does not justify, is not admissible under the general issue.[2] Under this plea, one tenant in common may prove the mere exercise of rights of ownership;[3] or the defendant may show that he entered by the license of another who is a tenant in common with the plaintiff.[4] In Rosse's case,[5] which was tried under the general issue, the jury found in a special verdict, that Sir T. Bromley was seized of the *locus in quo*, and had leased it to the plaintiff and one A.; that A. assigned his moiety to C., by whose command the defendant entered. It was objected that the tenancy in common between the plaintiff and him in whose right the defendant justified, could not be given in evidence, and so could not be found by verdict, but ought to have been pleaded in the beginning. But the whole court were clear that it might be given in evidence.*

§ 1050. The right of possession which may be proved under the general issue must be exclusive of any superior claim of the plaintiff to the premises; and it must not be confined to a particular purpose, such as the enjoyment of a privilege conferred by an incorporeal hereditament. The former, when established, disproves the plaintiff's right of action. The latter does not. It merely shows that it is subject to a qualification, and that is a fact to be established

[1] Rasor v. Qualis, 4 Blackf. 286; Gambling v. Prince, 2 N. & M. 138, *contra*.

[2] Beach v. Livergood, 15 Ind. 496; Philpot v. Holmes, Peake, 67; see Nelson v. Cherrell, 1 M. & Scott, 452; Carter v. Johnson, 2 M. & Rob. 263; Ashmore v. Hardy, 7 Car. & P. 501.

[3] Voyce v. Voyce, Gow, 201.

[4] Rawson v. Morse, 4 Pick. 127.

[5] 2 Leon, 23.

* In England, the defendant might formerly have given evidence of soil and freehold under the general issue (Argent v. Durrant, 8 T. R. 403; s. p. Fox v. Oakley, Woodf. L. & T. 541). But now the plea of not guilty operates as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which if intended to be denied, must be traversed specially (3 Nev. & Man. 9; 5 B. & Adol. 9; 10 Bing. 471; 2 C. & M. 23; 2 Dowl. P. C. 325).

affirmatively on the defense.[1] In Saunders v. Wilson,[2] which was an action of trespass *quare clausum fregit*, the defendant at the trial in the Common Pleas, offered to prove that the premises in question were a private road laid out for his benefit by agreement of the owner of the land, the landlord of the plaintiff. This evidence being excluded as not admissible under the general issue, and a verdict rendered for the plaintiff, the judgment was affirmed by the Supreme Court.

§ 1051. In an action of trespass for breaking and entering the plaintiff's house, the defendant cannot under the general issue give in evidence matter of justification or excuse—such as that the breaking and entering complained of were by virtue of an execution;[3] nor in action for taking away a house, that the house was removed with the plaintiff's consent;[4] nor in an action for taking oysters from the oyster bed of the plaintiff in a river, that it was a public river from which all citizens had a right to take oysters.[5]

§ 1052. When the defendant pleads a justification, his evidence must be coextensive with it.[6] In an action of trespass for breaking and entering the plaintiff's dwelling-house, and taking away certain goods, the defendant pleaded that one W. F., before the said time when, &c., held a certain dwelling-house as tenant to the defendant, at the rate of £8, and that just before the time when, &c., the sum of £8 of the rent aforesaid was due from the said W. F. to the defendant, and that afterward, and within thirty days of the said time when, &c., the said W. F. fraudulently and clandestinely carried and conveyed away his goods to prevent the defendant from distraining the same, to the dwelling-house of the plaintiff, without leaving any other goods sufficient to satisfy the said arrears of rent whereon the defendant could distrain; that the defendant requested the plaintiff to allow him to search his house for the goods so clandestinely re-

[1] Ferris v. Brown, 3 Barb. 105.
[2] 15 Wend. 338.
[3] Carson v. Wilson, 6 Halst. 43.
[4] Finch v. Alston, 2 Stew. & Port. 83.
[5] Shreves v. Liveson, 1 Penn. 247.
[6] Berry v. Vreeland, 1 N. J. 183.

moved, which the plaintiff refused to do; and that thereupon the defendant obtained a search warrant from a justice, under and by virtue of which he entered the plaintiff's dwelling-house for the purpose of searching for the said goods, which was the trespass of which the plaintiff complained. The plaintiff new assigned that the action was brought, not for the trespass in the plea mentioned, but for breaking and entering the house on another and different occasion, and at another and different part of the same day. The defendant pleaded to the new assignment that W. F. was his tenant at the rent of £8, and that £8 for one year's rent was in arrear; that W. F. had fraudulently removed his goods to prevent a distress to the plaintiff's house, and that he entered to take them. To which the plaintiff replied *de injuria*. At the trial it was proved that W. F.'s goods had been fraudulently removed to the plaintiff's house to avoid the distress, but no evidence was given of any demise at the rent stated, or of the rent in arrear. It was held that these facts were not admitted by the new assignment, and should have been proved.[1]

§ 1053. Under the foregoing rule, proof of a license to commit some of several alleged trespasses will not sustain a plea of a license to commit all of them. To a declaration for several trespasses on the plaintiff's land on divers days, &c., the plea alleged that at the said several days, &c., the defendant committed the said several trespasses by license of the plaintiff; and the latter replied that the defendant of his own wrong, and without the cause alleged, committed the said several trespasses, &c. It was held that evidence of a license which covered some, but not all of the trespasses proved within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication.[2]

§ 1054. In general, however, evidence which substantially sustains the plea will be sufficient. In trespass *quare*

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[1] Norman v. Wescombe, 2 Mees. & W. 349. [2] Barnes v. Hunt, 11 East, 451.

clausum fregit, the defendant pleaded that the close was the close and freehold of P., and that the defendant, as her servant, and by her command, committed the trespasses, &c. Replication traversing the command of P., who was a minor and ward in chancery. It was held that the plea was supported by proof that the defendant was the general agent of P., and the receiver of her rents appointed by the Court of Chancery, and that he did the acts complained of in the execution of his authority as such general agent.[1] But a plea that the close is not the close of the plaintiff is not supported by proof that he is a tenant in common of it with others who authorized the alleged trespass.[2]

§ 1055. It is error to permit evidence of title which is not set up in the pleadings.[3] Where the plea averred that the premises in question belonged to A., and that the defendants entered under a license from A., it was held that they could not be permitted to prove title in one of the defendants, nor an arbitration and award between the plaintiff's grantor of the one part and one of the defendants of the other part, establishing a division line; for the reason that the proceedings were not between the parties to the suit, and did not show title in A.[4] Ferris v. Brown[5] was an action for breaking and entering the plaintiff's saw mill, to which the general issue was pleaded, with notice of special matter in justification. It was proved that the plaintiff, at the time of the alleged trespass, was the owner and in possession of the premises. The defendants stated, in their notice, that they intended to justify under a sealed contract executed in the year 1790 by the then owner of the land and five others, for erecting a saw mill where the mill in question then stood, and giving the right to the parties and their assigns forever, or during their pleasure to use the mill and premises; and

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[1] Ewer v. Jones, 16 L. J. 42.
[2] Wilkinson v. Haygarth, 12 Q. B. 837; 16 L. J. Q. B. 103.
[3] Fidler v. Smith, 10 Iowa, 587.
[4] Coan v. Osgood, 15 Barb. 583. [5] 3 Barb. 105.

that the parties to the said contract, and those claiming under them, had used the mill from the date of the execution of the contract to the present time. At the trial, the alleged contract was not proved. The defendants offered to prove the several facts stated in their notice, except the contract, and also facts tending to establish in them a right by prescription to the use of the mill. But the evidence was ruled inadmissible; and a verdict having been rendered at the circuit for the plaintiff, the Supreme Court refused to disturb it.*

§ 1056. Under the plea of *liberum tenementum*, paramount title in either party, as also records, plots and papers bearing upon the question of possession, may be given in evidence.[1] † The defendant is not required to prove title to the whole premises, but only to the part on which the al-

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[1] Wilson v. Bibb, 1 Dana, 7.

* In Ferris v. Brown, *supra*, the court, in denying a new trial, said: "It is not necessary to decide whether the alleged contract would, if it had been proved, have conveyed to the parties any definite right to the use of the saw mill. The defendants abandoned their claim under that, and set up a right by prescription. The admission of that defense could not be claimed under the notice subjoined to their plea. The rights claimed, and the facts to establish them, were essentially variant. It was not contended, on the argument, that proof going to establish a prescriptive right to the use of the mill could be received under that notice; but it was said that it was admissible under the plea of the general issue. It is undoubtedly true that in trespass *quare clausum fregit* the defendant may, under that plea, give in evidence *liberum tenementum*, or the right of possession in himself, or those under whom he claims. In this case, title in the defendants is not pretended. It is supposed, however, that the prescription claimed would, if proved, have established the right of possession in them. An exclusive right of possession cannot be established by prescription. A qualified right for a particular purpose may be. Blackstone (4 Com. 264) says that nothing but incorporeal hereditaments can be claimed by prescription; but that no prescription can give a title to lands and other corporeal substances of which more certain evidence may be had. Judge Thompson says, in Cortelyou v. Van Brundt, 2 Johns. 362, that prescription will not in any case give a right to erect a building on another's land. This is a mark of title and of exclusive enjoyment, and it cannot be acquired by prescription. Title to land requires the higher evidence of corporeal seizin and inheritance. The defendants are then brought within this dilemma: If what they claim in the plaintiff's land was of a higher character than an incorporeal hereditament, it could not be established by prescription; if it was an incorporeal hereditament, they could not prove it under the plea of the general issue."

† Tenancy in common cannot be given in evidence under a plea of *liberum tenementum* (Voyce v. Voyce, Gow, 201; Erwin v. Olmsted, 7 Cowen, 230; Roberts v. Dame, 11 N. Hamp. 236). Whether, under such plea, the plaintiff may prove twenty years' adverse possession, or whether it must be specially replied, *quære* (Lowe v. Govett, 3 B. & Adol. 863).

leged trespass was committed.[1] * Where the trespass is charged to have been committed in a certain township, without describing the land, the defendant may prove title to any land in the township.[2] Proof that both parties have a close of the same name will not be sufficient.[3] And although where a party brings an action to recover a tract of land, declaring on a seizin in fee, his action is sustained if he shows a title to an undivided part of it, and he may recover according to his title; yet the same principle is not applicable to a case where he alleges a particular title as the ground of excuse or justification for an act which would otherwise be a trespass.[4] A plea that the close was the close and soil of the defendant, not being a plea of freehold, is sustained by proof that the defendant had a right of pre-emption in the premises at the time of the alleged trespass.[5]

§ 1057. While the court is not required to receive, and ordinarily will not admit, evidence to contradict a witness upon a collateral issue, it may, under peculiar circumstances, do so. In Ellsworth v. Potter,[6] which was an action of trespass *quare clausum fregit*, the defendant, while testifying in his own behalf, was asked whether he had had any difficulty with the plaintiff; to which he replied that he had not, except in regard to a hay knife which the plaintiff stole

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[1] Phillips v. Phillips, 1 New Jersey, 42.

[2] McFarlane v. Ray, 14 Mich. 465. [3] Cooke v. Jackson, 9 D. & R. 495.

[4] Great Falls Co. v. Worster, 15 N. Hamp. 412.

[5] Millison v. Holmes, 1 Smith Ind. R. 55.

[6] 41 Vt. 685; and see Powers v. Leach, 26 Ib. 270; Lawrence v. Barker, 5 Wend. 301; 1 Cowen & Hill's Notes, 729.

* Where, in an action of trespass *quare clausum fregit*, the plaintiff, in order to prove his title to the place of the alleged wrongful acts of the defendant, which was part of a highway, offered evidence of his acts of dominion over and use of the property, and especially of his cutting wood thereon for his fires, as owner, from time to time for a great many years; and the defendant, in order to negative adverse possession in the plaintiff, offered to prove that at the time the plaintiff so cut wood there was and long had been in the town a usage for any person who chose, although not owning the fee of the highway or of the adjacent land, to cut and take wood for their fires from said highway; but no evidence was offered, or claim made, that any such acts were done the *locus in quo;* it was held that the evidence was properly excluded as not relevant to the issue (Evans v. Bidwell, 20 Conn. 209).

of him. The plaintiff was permitted, against objection, to give her version of the matter of the hay knife, and testified that the defendant concealed it upon her premises, and then procured a search warrant, and found it where he had himself left it. It was conceded that the testimony objected to was not pertinent to an issue on trial, and the question was whether its admission was error. It was held that it was not; but that it was discretionary with the court to say how much, if anything, ought to be heard to repel the prejudice calculated to be produced by the improper testimony given by the defendant.*

24. *Proof of title or possession.*

§ 1058. It is incumbent upon the plaintiff to prove the existence and breach of the close[1] and possession, either actual or constructive;[2] or if it is vacant, that he has the title, or is in possession of a part under a deed for the whole.[3] †

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[1] Heebner v. Chave, 5 Penn. St. R. 115.

[2] Marr v. Boothby, 19 Maine, 150; Grout v. Knapp, 40 Vt. 163.

[3] Winkler v. Meister, 40 Ill. 349; Smith v. Wilson, 1 Dev. & Bat. 40.

* In Ellsworth v. Potter, *supra*, the court said: "The reply of the defendant that he had had no difficulty with the plaintiff, except in regard to a hay knife,' was so far, an appropriate answer to the question; but when he volunteered to cast an imputation or stigma upon the plaintiff, by adding 'which she stole of me,' he was testifying upon his own motion, and not in reply to the questions of the cross-examining counsel. Had they chosen to call out his testimony upon the collateral question whether the plaintiff stole the hay knife, they would ordinarily have been bound by the answer and not permitted to contradict it. But they did not call it out. The defendant volunteered it; and although he did so during his cross-examination, it is no more a part of the cross-examination than if he had stated it in his examination in chief, on inquiry, by his own counsel. Having thus illegitimately, and of his own motion, thrust into the case a charge of theft upon the plaintiff, and supported it by his own oath, it does not lie in his mouth to claim that it is a collateral fact, and that the plaintiff is bound by his testimony, not in answer to her questions, and that she must go through the trial under the imputation he has chosen to cast upon her. It is not for him to insist that her request to be allowed to state her version of the transaction shall be denied by the court. The court is not bound to turn aside from the trial of the real issue, to hear any personal explanation from the plaintiff on collateral matters, but if in their discretion they do so, the defendant cannot complain."

† In King v. Dunn, 21 Wend. 253, which was an action of trespass *quare clausum fregit*, there was just such a close or parcel of land as the declaration described, and the question on the pleadings was whether the plaintiff was bound to prove title to every part of the close. The Supreme Court, per Bronson, J., said: "The plaintiff was, I think, entitled to a verdict on the first count, not-

Where it appeared that the defendant having planted land while in his possession, then left, and afterward entered while the land was in the possession of the plaintiff and carried away the crop, it was held that the plaintiff, in order to maintain the action, must prove that he entered under a rightful authority.[1] The plaintiff must show that he obtained the possession in a proper and fair manner, not by indirect means, by force or fraud, or by entering in the absence of the defendant, and against his consent, or without his permission. If he obtained possession by artifice or violence, and the defendant, on coming to a knowledge of the fact, ejected him, the plaintiff, whatever other remedy he might enforce, could not maintain trespass.[2]

§ 1059. The same acts and doings may be regarded as acts of trespass, or of possession and ownership, according to the claim set up by the person performing them. Cutting wood and timber from year to year, disclaiming any ownership, or perhaps without any claim of title, might be considered as nothing more than trespass, and no evidence of possession; whereas, the same acts on a lot of land marked out, or the boundaries of which were designated by a survey or deed recorded, or by known and acknowledged metes and bounds, and under a claim of title, might be treated as unequivocal acts of possession.[3] Entry on land, and a survey of it for the purpose of ascertaining its location, quality, and boundaries, are sufficient evidence of possession;[4] and where each party claims solely by virtue of possession, a contract of purchase is admissible to show the character of the posses-

withstanding the fact that a small part of the close described in the count was not owned by him, but by a stranger. The court below erred in treating this as a question of variance. It was enough that he showed title to that part of the close in which the trespass was committed. And so, too, of the defendant; although he pleaded that the whole close was his soil and freehold, he would have been entitled to a verdict on showing that he owned the part where the trespass was committed" (citing Stevens v. Whistler, 11 East, 51; Tapely v. Wainwright, 5 Barn. & Ad. 395; Rich v. Rich, 16 Wend. 663).

[1] Myers v. Myers, 1 Bailey, 306.
[2] Zell v. Ream, 31 Penn. St. R. 304.
[3] Sawyer v. Newland, 9 Vt. 383.
[4] Cobleigh v. Young, 15 N. Hamp. 493.

sion.[1] In trespass for breaking and entering the plaintiff's mine and taking coal, evidence of working by the plaintiff, in another part of the same mine within eighty yards of the place of the alleged trespass, coupled with a statement by the defendant that he had got the coal and was willing to pay such amount as should be settled by arbitration, was held to be evidence of the plaintiff's being in possession of the place where the trespass was committed.[2] Proof that the plaintiff was in the separate possession of two rooms of a house, was held sufficient to satisfy an allegation that the plaintiff was in possession of the messuage, upon which the defendant had taken issue.[3]

§ 1060. Proof of the right to the use of water overflowing land does not establish title to or possession of the land. Nostrand v. Durland[4] was an action for breaking and entering the plaintiff's close and cutting down and carrying away the trees standing upon one part of it, and carting and depositing sand and dirt upon another part of it, and by the latter act diminishing the quantity of water to which the plaintiff was entitled for the use of his mill. The plaintiff claimed the land on which the trees were felled and the earth deposited, under a grant for "all that certain stream and pond of water and saw mill thereunto belonging, situate," &c., "with the privilege of raising the pond as high as is necessary for all uses and purposes of said mill." He did not prove any title to the trees which were cut, or any privilege extending over the land on which they stood, except to overflow it with his pond if that should become necessary for the purposes of his mill. It did not appear that the quantity of water had been diminished by the acts of the defendant. It was held that as the plaintiff had not shown any title to the land, nor possession of it, he could not maintain the action. It may be observed that usually a

[1] Moore v. Moore, 21 Maine, 350.
[2] Wild v. Holt, 9 Mees. & W. 672; 1 Dowl. N. S. 376.
[3] Fenn v. Grafton, 2 Bing. N. C. 617; see Monks v. Dykes, 4 Mees. & W. 567.
[4] 21 Barb. 478.

grant of water under any designation does not convey the land which it covers. To have that effect, the word "land," or something equivalent to it, must be inserted in the conveyance. There are terms, however, which designate both land and water, and by which the land will pass. Sir Edward Coke[1] says that "*stagnum*—in English, a pool—doth consist of water and land, and therefore by the name of *stagnum*, or a pool, the water and land shall pass also. In the same manner *gurges*, a deep pit of water, a *gors*, or *golfe*, consists of water and land, and therefore by the grant thereof by that name the soil doth pass." The foregoing reasons would seem to be equally applicable to a river or pond, although the exclusion of both from the same category has been definitely settled.[2]

§ 1061. Recorded title deeds of the premises in question belonging to the plaintiff, make out a *prima facie* case of title sufficient to enable him to maintain the action;[3]* but it is otherwise as to a judgment in favor of the plaintiff in an action of ejectment against a third person.[4] Where there was a plea of *liberum tenementum* the plaintiff was allowed to prove a purchase under a decree and sale prior to the trespass, although the sale was not ratified and a deed given until afterward.[5] And where the defendant justified under proceedings in partition, in which the report of the commissioners was confirmed by the court previous to the alleged trespass, but the judgment record was not signed and filed

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[1] Co. Litt. 5 *a*.

[2] Nostrand v. Durland, *supra*, per Strong, J., citing Rogers v. Jones, 1 Wend. 237; Jackson v. Halstead, 5 Cow. 216.

[3] Wentworth v. Blanchard, 37 Maine, 14; Dolloff v. Hardy, 26 Ib. 545; Dunlap v. Glidden, 31 Ib. 510.

[4] Southington Ecclesiastical Soc. v. Gridley, 20 Conn. 200.

[5] Hunter v. Hatton, 4 Gill, 115.

* In an action of trespass for cutting timber, it appeared that the plaintiff had no actual possession of the land, and in order to establish legal seizin or constructive possession he introduced in evidence a patent for the land from the State to his grantors, and then conveyance to him. The defendant set up no title to the land, and pleaded the general issue. It was held that the plaintiff was entitled to recover, his right of possession being established by the patent and the conveyance under it (Hull v. Campbell, 56 Penn. St. R. 154).

until afterwards, it was held that this made no difference, but that if signed and filed in time to be used at the trial it was sufficient.[1] * In an action by the trustees of the Wabash

[1] Van Orman v. Phelps, 9 Barb. 500.

* In this case the alleged trespass consisted in cutting and carrying away a quantity of hay. The judgment in partition, upon the report of the commissioners, was rendered in June, 1845, and the hay was cut and taken in July following. The premises where the hay grew and was cut were set apart, in the report of the commissioners, to one Robert Land, under whose direction the hay was taken by the defendants. At the trial of the cause in the Common Pleas, the defendants' counsel requested the judge to instruct the jury that by the proceedings in partition the land on which the hay grew became the sole property of Robert Land, and that if they believed that the defendants were acting as his servants, or by his direction, when he took the hay, the verdict should be in their favor. The judge declined so to charge, but told the jury that the premises in question did not become the sole property of Robert Land until the record in partition was filed. The Supreme Court held that the judge erred in charging as he did, and in refusing to charge as requested. Welles, J., in delivering the opinion, said: "A record of judgment is nothing more than evidence, and is the highest kind, and in most cases conclusive evidence of the judgment of the court. It is an authentic history of the proceedings and judgment in the suit. It is, nevertheless, only evidence. It is the fact or facts which it proves that is to have effect. The important fact in reference to the question under consideration which this record proved was the judgment in partition, by which not only the tenancy in common in the premises where the hay grew was severed and destroyed, but the title in severalty to such premises, as between the parties to the partition suit was vested in Robert Land. This judgment gave him the immediate right of entry, and vested in him *eo instanti* it was rendered the title to the premises set apart to him, with the grass then standing and growing thereon, which was, until severed therefrom, a part of the freehold. The statute provides that 'upon any report of commissioners being confirmed by the court, judgment shall thereupon be given that such partition be firm and effectual forever, and such judgment shall be binding and conclusive.' That the evidence of the fact was not made perfect until after the alleged trespass had been committed, was immaterial. If it was perfected in time to be used at the trial, it was sufficient, and the delay in making it up does not lessen or alter its grade or effect. There is nothing to shake the soundness of the foregoing view, except certain other provisions of the Revised Statutes, which are relied upon by the counsel for the defendant in error. Those provisions are as follows, viz: 'The clerk of every court of record shall mark upon the back of every record of judgment filed in his office the time of filing the same. No judgment shall be deemed valid, so as to authorize any proceedings thereon, until the record thereof shall have been signed and filed.' 'No judgment shall affect any lands, tenements, real estate or chattels real, or have any preference as against other judgment creditors, purchasers or mortgagees, until the record thereof be filed and docketed as herein directed' (2 R. S. 360, secs. 11, 12; N. Y. Rev. Sts. 5th ed. vol. 3, pp. 638, 639). These sections, I am inclined to think, were only intended to define and secure the liens of judgments upon land for the money adjudged to be paid, and do not apply to a case like the present, where the proceedings and judgment are *in rem*, and where the judgment is like a specific decree in a court of equity. This construction seems to be authorized by the terms of the sections recited, 'No judgment shall affect any lands,' &c., 'as against other judgment creditors, purchasers or mortgagees, until,' &c. The plaintiff in the court below cannot be regarded, it seems to me, as a judgment creditor, purchaser, or mortgagee, within the meaning of the 12th section. It is equally clear that the

and Erie Canal for a trespass upon certain lands which they claimed, a list of lands selected by the State for the completion of the canal, embracing the lands trespassed upon, was held *prima facie* evidence of title thereto in the trustees.[1] *

§ 1062. The plaintiff is required to establish the location of the monuments named in the deed under which he claims, and that they embrace the place of the alleged trespass.[2] Where lands were located on plots, and an action was brought for entry on land called B., and the defense related to land called B., on a part of which the alleged entry was made, it was held that the plaintiff could only recover for a trespass committed within the lines of the tract called B., as the same was located by him on the plots, although he had been in possession of the land on which the trespass was charged to have been committed, and had cultivated the same, claiming it as a part of B. for more than fifty years, and it had always been called and reputed to be part of that tract.[3] And in an action for trespass on lot No. 7 as located, it was held that the plaintiff was not entitled to recover for a trespass within the inclosures, if not on lot No. 7, although he proved that he had had possession by inclosures of what was supposed to be lot No. 7 for upwards of twenty years.[4] It is sufficient to establish the plaintiff's right by any one who knows the lines and corners, or who can prove the plaintiff's possession.[5] Evidence of a witness that he was present when the land on which the trespass was alleged to have been committed was located and taken up, and that it was located as it was then represented on the plots, was held

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11th section does not apply to the present case. 'No proceedings have been sought to be had upon the judgment in partition in this case; none, certainly, under which the defendants below seek to justify their acts.'"

[1] Evans v. Wabash &c. Canal, 15 Ind. 319.

[2] Robinson v. White, 42 Me. 209. [3] Chapman v. Brawner, 2 Har. & J. 366.

[4] Carroll v. Smith, 4 Har. & J. 128.

[5] Leadbetter v. Fitzgerald, 1 Pike, 448.

* In Brown v. Giles, 1 Car. & P. 118, the plaintiff's counsel after he had closed his case, was permitted to recall a witness to prove that the *locus in quo* was in the possession of the plaintiff, which he had omitted to do on his previous examination.

admissible to prove the original beginning and location of the tract.[1] And where it appeared that the defendant had notice of the execution of the warrant of resurvey, the plaintiff was allowed to prove by witnesses the trespass noted on the plots, without giving the plots in evidence.[2]

§ 1063. The fact that there is a right of way over land upon which a trespass has been committed, will not prevent the plaintiff from relying upon the usual *prima facie* evidence of ownership.[3] In Hewins v. Smith,[4] the defendant justified the alleged trespass under a claim of right of way over the close, and at the trial introduced evidence tending to prove that he and his predecessors from whom he derived title to his own close, had used a way passing across the plaintiff's close for more than twenty years. To rebut any presumption arising from such a use, the plaintiff offered to prove that the *locus in quo* was a part of a large extent of woodland, no part of which was inclosed by fences, and that there were other ways leading from the defendant's close across lands of others to the public roads. It was held that this evidence was admissible, as having a tendency to prove that the use of the way by the defendant was permissive. If lands of other owners in the vicinity were so used without objection, and such use was not intended as adverse to the rights of the owners, it might be presumed, if nothing appeared to the contrary, that the plaintiff's land was used in like manner. The plaintiff's counsel also proposed to argue from his title deed to the premises, which conveyed the *locus* without excepting any way, and with covenants of warranty, that the grantor resisted the right of way. It was held that this circumstance had some tendency, though slight, to show that the use of the road was permissive.

§ 1064. The defendant may prove that he has a right of way by producing deeds to show it, or by parol evidence of

[1] Hogmire v. M'Coy, 2 Har. & J. 351.
[2] Trammell v. Hook, 1 Har. & M'Hen. 259.
[3] Ashley v. Landers, 9 Allen, 250.
[4] 11 Metc. 241.

twenty years of uninterrupted use adverse or in hostility to the owner of the land, from which a grant might be inferred. He is not restricted to either mode of proof, but may resort to both or either to sustain his plea; and it is not a well founded objection, that the defendant having undertaken to prove an express grant or reservation of a way by deed, he is not at liberty to prove one by prescription, or that he is bound to elect his mode of proof, and to abide by such election.[1] Where the plaintiff establishes no title to the premises, he cannot object that there are errors or interlineations in the deed under which the defendant claims title, and holds possession.[2] Any title, whether freehold or possessory, in the defendant, may be proved if such title shows that the right of possession was in the defendant, or not in the plaintiff.[3] *

§ 1065. Where by the statute creating a corporation the members have the rights of tenants in common, the acts of one of them are admissible in evidence to prove possession in the corporation. In an early case in Massachusetts,[4] it

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[1] Hamilton v. White, 4 Barb. 60; aff'd 5 N. Y. 9.

[2] Brown v. Pinkham, 18 Pick. 172. [3] Floyd v. Ricks, 14 Ark. 286.

[4] Props. of Monumoi Great Beach v. Rogers, 1 Mass. 159.

* Under the act of New York relative to justices' courts (Laws, 31st sess. ch. 204, s. 7), providing that "it shall be competent to the defendant, notwithstanding his plea of title, to show on the trial that the plaintiff had not possession of or title to the premises at the time such proposed trespass was committed," the defendant might show three things, either of which would entitle him to a verdict, viz.: title in himself; title in a third person; or possession out of the plaintiffs. In Douglas v. Valentine, 7 Johns. 273, which was an action of trespass *quare clausum fregit* originally brought in a justice's court, and therefore subject to the regulations contained in the foregoing act, the defendant proved that he was in possession of the premises, and had been so for upwards of six years, and that the plaintiffs never had any possession, except that a tenant of the defendant delivered them a key of the house. A verdict having been found for the plaintiffs, the Supreme Court, in setting it aside, said: "This act of the tenant (delivering the key to the plaintiffs), did not, and could not in the least, prejudice the possession of the defendant; and indeed every attornment of a tenant to a stranger is void. This proof was declared upon the trial not to be sufficient for the defense. But as it appears to be a right allowed to every such defendant, by the act, to show that the plaintiff had not possession, the defendant showed enough to entitle him to a verdict. Though the parties afterwards went into testimony on the question of title, there was nothing shown to contradict, but the evidence went to confirm the fact that the plaintiffs never had possession, for they purchased of one who had never been in possession, but had brought an ejectment against the defendant, which had then been pending about two years."

appearing of record that there was such a corporation as the plaintiffs, the question was whether the plaintiffs should be admitted to prove the acts of individuals who were proprietors, to show the possession of the plaintiffs at the time of the alleged trespass. To show this, they offered to prove that one of the proprietors entered and set out grass, &c., in the *locus in quo*. The evidence was objected to on the ground that the possession of a corporation must be proved by corporate acts, and that, therefore, in order to prove an entry by an individual so as to make it inure to the benefit of the corporation, the plaintiffs must show by the records of the corporation that such person was the agent of the corporation for that purpose. It being shown that the powers of proprietors of common and undivided lands were not abridged but enlarged by the statutes, and that the individuals composing such a corporation had the same rights which as tenants in common they had before they were incorporated, it was held that the evidence was admissible.

§ 1066. Where evidence has been introduced on the part of the plaintiff which shows a *prima facie* title in him, it cannot be avoided by one who has no title except a naked possession. Lawrence v. Russell[1] was an action for cutting wood on the plaintiff's land, to which the general issue was pleaded. The plaintiff derived his title from one Allen, and it was proved that the lot in question was located and set off to Allen as one of the proprietors in the common and undivided lands in the town, by a committee of the proprietors duly appointed to make locations in severalty to and among the proprietors within the township. This location was recorded in the books of the proprietors, and the title thus derived had never been called in question by the proprietors. There was evidence tending to show that Allen's father was one of the proprietors, and a deed from him to Allen was given in evidence. The defendant proved that one Sherman had cut wood and timber on the premises for twelve or

[1] 17 Pick. 388.

fifteen years, and that he had a power of attorney from Sherman to manage Sherman's lands. It was held that as the defendant's title depended solely upon acts of possession, it was not competent for him to prove that the ancestor of the plaintiff received his full share of the common lands before the partition, or that the premises had been before the partition assigned to another person in severalty. *

1067. The defendant may prove that a stranger and not the plaintiff was in possession at the time of the alleged trespass,[1] but he cannot justify under a third person unless he show both the title and possession of that person.[2] † In an

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[1] Chatham v. Brainerd, 11 Conn. 60.

[2] Merrill v. Burbank, 23 Maine, 538; Finch v. Alston, 2 Stew. & Port. 83; Reed v. Price, 30 Mo. 442; Chambers v. Donaldson, 11 East, 65.

* In Lawrence v. Russell, *supra*, the court said: "This evidence clearly shows a *prima facie* title in the plaintiff derived from the original proprietors, and whether it can be avoided by them or not, it seems clear that it cannot be avoided by one who is a mere stranger to the title, and who has no title except a naked possession. The defendant offered to prove that the ancestor of Allen had, before this location, taken up his full share of the common lands. But if this fact were proved, it would not show that the location was void. It is equivalent to a partition in common form, and binds the possession even between the parties, although it does not affect the right of property. But if the proprietors acquiesce, it is not competent for the defendant to interpose, and it would be no defense if he could show that Allen had obtained a larger share of the common property than he was entitled to. Nor would it be competent for the defendant to prove that the *locus* had been assigned to another proprietor before the location and assignment to Allen.

† Where the question in an action of trespass was whether the plaintiff or one T. W., under whom the defendant claimed, was entitled to the close upon which the supposed trespass was committed, it was held that T. W. was a competent witness for the defendant, inasmuch as the result of the suit could not change the possession (Rees v. Walters, 3 Mees. & W. 527; 1 Horn. & H. 110; 2 Jur. 878).

An agreement under seal to make a title in fee simple at some time thereafter, if an act of Congress could be obtained authorizing such conveyance, does not prove title in the defendant (James v. Tait, 8 Port. 476). So, an agreement and award establishing a dividing line for the then future is not evidence to show what the line was at the time of the alleged trespass more than a year previous (Smith v. Brown, 14 N. H. 67; see Drane v. Hodges, 1 Har. & McHen. 262).

In an action of trespass against several, evidence which shows title in one under whom the others justify is admissible, and so likewise is evidence to rebut it (Tarry v. Brown, 34 Ala. 159).

An exception to the plaintiff's evidence of title after verdict, no instructions to the jury with regard thereto having been asked for by the defendant, is too late; for if it had been made at the trial it would have afforded the plaintiff an opportunity of introducing further evidence. In Leach v. Woods, 14 Pick. 461, the objection was not presented until after verdict, nor was the instruction asked for when the cause went to the jury, but the counsel for the defendant stated that they intended to present it, and believed that the attention of the court

action for entering on land and cutting and removing timber therefrom, the defendant offered to show at the trial title to the premises on which the alleged trespass was committed out of the plaintiff under a lease executed by the plaintiff's grantor prior to the conveyance under which the plaintiff claimed, and that they had been occupied by the lessee and his grantees under the lease up to the time of the trial. It was held that the evidence was admissible in order to rebut the proof given by the plaintiff of constructive possession in himself, although possession in a stranger was not averred in the answer.[1] Although a bare tort-feasor who has invaded the quiet possession of another cannot shield himself under the title of a third person between whom and himself there is no privity of connection,[2] yet under a plea that the close in the declaration mentioned was not at the time when, &c., the close of the plaintiff, the defendant may prove a lawful right to the possession of the close, either in himself or in some other person under whose authority he claims to have acted,[3] and he may justify his entry by showing that he acted under the authority of a tenant in common of the land.[4] He cannot, however, impugn the title of the plaintiff who is in possession by a tenant paying rent.[5]

25. *Evidence as to matters of aggravation.*

§ 1068. Although where an unlawful entry is proved, evidence as to matters of aggravation is not material to the

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and of the adverse party was called to it. As in the position in which the cause was placed by the evidence, it would have been important for the defendant that such instructien should have been given, if by law he was entitled to it, the judge reserved it for the consideration of the Supreme Court. Wilde, J., delivering the opinion of the latter court, said: "The exception taken to the plaintiff's evidence of title came rather too late. It ought regularly to have been taken during the trial; for if it had been, the plaintiff might have had an opportunity to go a step further back in his title and connect himself with the title of Green. We have, however, considered the exception, and are of opinion that it would not have availed the defendant if had been seasonably made."

[1] Miller v. Decker, 40 Barb. 228.

[2] Branch v. Doane, 18 Conn. 233.

[3] Jones v. Chapman, 2 Exch. 803; 18 L. J. Exch. 456; Everett v. Smith, Busbee, N. C. 303.

[4] Jewett v. Foster, 14 Gray, 495.

[5] Wilson v. Hinsley, 13 Md. 64.

owner's right to recover,[1] yet it is competent for the plaintiff to show that the act of the defendant was malicious, as bearing upon the question of damages.[2] But proof of matter of aggravation alone, which is merely incident to, and not the gist of the action, will not be sufficient.[3] * Where, however, in an action of trespass to land, there was also an allegation of personal injury, it was held that the plaintiff might recover for the latter, although he could not prove the former.[4] So where a declaration in trespass charged an unlawful entry upon the land of the plaintiff, and also, the taking and carrying away therefrom, of a quantity of seaweed, and no special demurrer was interposed, it was held that the plaintiff was entitled to recover upon proving either the unlawful entry, or the unlawful asportation.[5]

§ 1069. Insulting language used by the defendant to the plaintiff, in connection with the trespass, may be shown. In an action for breaking and entering the plaintiff's close, and searching for game, the plaintiff was permitted to prove that the defendant, upon being warned off the land, used very intemperate language, and threatened to commit him, although no matter of aggravation was alleged.[6] So, likewise, abusive words used by the defendant to the plaintiff's wife, at the time of the alleged trespass, may be proved to

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[1] Halsey v. Mathews, 3 Ind. 404; Merriam v. Willis, 10 Allen, 118.

[2] Renwick v. Morris, 7 Hill, 575; Perkins v. Towle, 43 N. Hamp. 220; Norris v. Morrill, 40 Ib. 402; Druse v. Wheeler, 22 Mich. 439.

[3] Reed v. Peoria & Oquawka R. R. Co. 18 Ill. 403; Eames v. Prentice, 8 Cush. 337; overruling Sampson v. Henry, 13 Pick. 36, on this point; Houghtaling v. Houghtaling, 5 Barb. 379; Howe v. Wilson, 1 Denio, 181; Ricketts v. Salwey, 2 Barn. & Ald. 363.

[4] Wright v. Chandler, 4 Bibb, 422. [5] Church v. Meeker, 34 Conn. 421.

[6] Merest v. Harvey, 5 Taunt. 442; Edwards v. Beach, 3 Day, 447; Churchill v. Watson, 5 Ib. 140.

* An authority cited by Bacon (Abr. Tit. Costs, B), 1 Freeman, 394, Case 511, is sometimes referred to as laying down a different doctrine. The case was this: In trespass *quod domum fregit et bona asportavit*, as to the *domum fregit*, the defendant was found not guilty, but as to the taking of the goods, guilty; and damages were assessed at fifteen shillings. It was held that the plaintiff was entitled to costs. This was the only point decided. No question was made whether the jury could properly find such a verdict; and besides, for aught that appears, there was a general count for the taking of the goods, without any charge of breaking the close.

show the nature of the transaction.[1] But evidence that the defendant threatened and endeavored to deter the plaintiff's witnesses from testifying, is not admissible.[2]

§ 1070. Evidence of the conduct of the defendant previous to the trespass is admissible; but not his acts long subsequent to it. Therefore, in an action of trespass against five for breaking into the plaintiff's house, the plaintiff was not permitted to go into proof (as evidence of malice), that nine months after the trespass, one of the defendants indicted him for perjury.[3] The state of feeling between the parties is alone material, and not the cause or history of the quarrel.[4]

§ 1071. In an action for breaking into the plaintiff's house, and making a violent assault upon him, evidence showing the situation of the plaintiff's son's wife and family with whom the plaintiff resided, is admissible to show the malice of the defendants and the aggravated suffering of the plaintiff; and the circumstance that the defendants entered in order to make an attachment, instead of mitigating, ought rather to enhance the damages, the defendants having no legal right to break open a dwelling-house for such a purpose.[5]

26. *Evidence in mitigation.*

§ 1072. Proof of an apparently good title in the defendant is admissible in mitigation of damages.[6] In an action for wrongfully removing a fence, it was held that the defendants might prove, in mitigation, that they were acting under a vote of the town.[7] But if the possession of the plaintiff be admitted or proved, the defendant cannot show want of title in the plaintiff, in mitigation.[8] It was accordingly held, in an action for entering on land and destroying

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[1] Golding v. Williams, Dudley, S. C. 92.
[2] Larkin v. Taylor, 5 Kans. 433.
[3] Newton v. Wilson, 1 Car. & K. 537.
[4] Winter v. Peterson, 4 Zabr. 524.
[5] Sampson v. Henry, 11 Pick. 379.
[6] Caston v. Perry, 2 Bailey, 104; Reeder v. Purdy, 41 Ill. 279.
[7] Gray v. Waterman, 40 Ill. 522.
[8] Reed v. Price, 30 Mo. 442.

a bridge built thereon, that it was no justification that the bridge was erected by the plaintiff upon the land of a third person without first paying him therefor according to law.[1] *

§ 1073. It is no excuse, that the trespass was committed through ignorance.[2] Therefore it is error in the court to charge the jury that the defendant would not be liable if he committed the act in the *bona fide* assertion of a claim of title which he thought to be good.[3] But evidence in mitigation, that the defendant entered under an honest, though mistaken, belief that his entry was lawful, is admissible. In Machin v. Geortener,[4] the trespass consisted in an entry upon a wood lot by the defendant, as a surveyor, with several other persons as his assistants, and measuring off about sixteen acres of it, alleged to have been sold to one Buel for quit rent. The defendant offered in evidence, in mitigation of damages, a deed from the State to Buel for the rent in question, and a power of attorney from Buel to him to enter. This evidence having been rejected in the court below, the judgment was reversed on that ground. Houston v. Kimball[5] was an action for breaking and entering the plaintiff's house, and carrying away a pauper boy, the custody of whom was claimed by the plaintiff. The defendant took the boy, as overseer of the poor of the town, with the consent of the boy's father, for the purpose of binding out the boy, so as to save the town any further expense toward his support. It was held that the defendant could not justify a forcible entry into the plaintiff's house for the object alleged, and that the plaintiff was entitled to recover damages therefor; but that if the defendant acted in good faith under a supposed right in law to do as he did, the plaintiff should not recover more than his actual damages. In an action of trespass

[1] Beebe v. Stutsman, 5 Clarke, Iowa, 271.

[2] Maye v. Tappan, 23 Cal. 306.

[3] Shipman v. Baxter, 21 Ala. 456.

[4] 14 Wend. 239.

[5] 22 Vt. 575.

* In an action for forcibly taking possession of the plaintiff's wheat field, ejecting the plaintiff, and harvesting and selling the grain, the defendant cannot give in evidence the value of his labor in harvesting and threshing the crop (Ellis v. Wire, 33 Ind. 127).

quare clausum fregit and *de bonis asportatis*, it appeared that the defendant bought land in order to build a house on it, there being a house already there occupied by a tenant; that the defendant commenced excavating for the foundation of the building, and that during the temporary absence of the tenant he removed the tenant's goods from the house and tore it down. It was held that the defendant might prove, as a part of the *res gestæ*, and to show the *animus* with which he acted, that it was one of the conditions of his purchase that he was to go into immediate possession; that he might also prove, as giving character to his conduct, that the plaintiff told a witness that he (plaintiff) could leave at any time, and that the plaintiff's being in possession would not prevent the defendant from commencing work on his building, which conversation was communicated by the witness to the defendant, and that the work of excavating was begun in consequence of what the plaintiff had said.[1] Unless the defendant is proved to have supposed himself to be on his own land when he committed the trespass, proof that he thought he was on public lands will not diminish the damages.[2] *

§ 1074. The defendant will not be allowed to prove in mitigation of damages a distinct and independent wrong committed by the plaintiff. In Murden v. Priment,[3] the defendant, who occupied a room over the plaintiff's blacksmith shop, bored holes in the floor and poured water on to the workmen and tools in the shop below. On the trial in the New York Marine Court, evidence offered by the defendant to prove that he sustained damage from smoke entering his room from the plaintiff's forge, was excluded, and judgment having been rendered for the plaintiff, it was affirmed on appeal. So, it is no excuse for entering a dwelling and car-

[1] Farwell v. Warren, 51 Ill. 467. [2] Emerson v. Beavaus, 12 Mo. 511.

[3] 1 Hilton, 75.

* It is no defense that the title to the land is in the United States; nor is the magnitude of the trespass, nor its great cost, nor its value and importance to the trespasser and his privies, any justification (Weimer v. Lowery, 11 Cal. 104).

rying away property, that the plaintiff kept a bawdy house.[1] In an action for breaking and entering the house of the plaintiff, and tearing off the outer doors of the same, evidence that a family of lewd females lived in the house, who were visited by profane and disorderly men, and that these men passed over the defendant's land and left his bars down, that on Sunday, a short time before the trespass, they disturbed a religious meeting at his house, swore at him, and one of them struck him, was held not admissible under the general issue to rebut the presumption of malice, or in answer to a claim for exemplary damages.[2] But it may be proved in mitigation of damages, that at the time of the alleged wrong, the plaintiff was in possession of the premises as a trespasser against the defendant.[3]

§ 1075. In an action of trespass for breaking and entering the plaintiff's house with intent to ravish the plaintiff's wife, it is not competent for the defendant to prove that the woman was an abandoned character. "It is said, indeed, that the plaintiff has alleged, as a circumstance to aggravate damages, that the defendant entered with intent to ravish, and that the defendant has a right to prove, in mitigation, anything which tends to show that he did not enter the house with that intent; and that for this purpose, he had a right to prove that the wife was a woman of a lewd and abandoned character; that this being proved, it would raise a strong presumption that he did not enter with that intent. To this it is sufficient answer to say, admitting her to be a woman of the character described, it would furnish no such presumption; though it might, indeed, lead to a conjecture, if he knew her character to be that of a lewd woman, that he might expect less resistance in the accomplishment of his object than he would have expected in an attempt upon a woman of unshaken constancy and virtue."[4]

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[1] Love v. Moynehan, 16 Ill. 277.
[2] Perkins v. Towle, 43 N. Hamp. 220.
[3] McDonald v. Lightfoot, Morris, 450.
[4] Davenport v. Russell, 5 Day, 145.

27. *Presumptions.*

§ 1076. When a man enters into the possession of land, he is presumed to enter and claim in his own right. So if a man has a deed of lands, this gives character to his acts, and they are to be taken as the acts of an owner, and not a trespasser.[1] In an action of trespass against a railroad company for the use of a right of way, the presumption is in favor of the regularity of the proceedings of the company procuring the condemnation. Such proceedings are competent evidence and cannot be impeached collaterally.[2] *

§ 1077. Possession is *prima facie* evidence that the whole interest is in the plaintiff, and that he has suffered to the full extent of the injury.[3] Where the plaintiff claimed the whole bed of a river flowing between his land and the land of the defendant, the defendant contending that each was entitled *ad medium filum aquæ*, it was held that evidence of ownership exercised by the plaintiff upon the banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff.[4] †

§ 1078. Priority of possession, in the absence of direct evidence, may be presumed from the conduct of the parties. In Cook v. Rider,[5] the land was in Provincetown, and incapa-

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[1] M'Grady v. Miller, 14 Vt. 128.

[2] Galena &c. R. R. Co. v. Pound, 22 Ill. 399.

[3] Todd v. Jackson, 2 Dutch. N. J. 525.

[4] Jones v. Williams, 2 Mees. & W. 326. [5] 16 Pick. 186.

* In an action by a corporation for a trespass upon the corporate property, it is not necessary, in order to prove the corporate existence, to produce the records of the corporation; it is sufficient to produce the charter and show that the corporation exists *de facto* (Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315).

† Upon proof that a colonist has a right, under the colonization laws of Texas, to land in a colonial town to be selected by himself, the undisputed possession by him of land in the town for several years, is presumptive evidence of title (Kemper v. Victoria, 3 Texas, 159).

ble of cultivation, and was unoccupied and waste until these parties attempted to occupy it. The plaintiff proved an entry by himself, and a staking out of the limits of the land ten years previous, claiming to hold the same in fee, and that he had continued his claim and possession by keeping up the stakes around the exterior lines, and by building salt works within a part of the lot so claimed. The defendant pleaded that the lot belonged to him, and that he had entered thereon and built a fence around it. The right of the parties, therefore, depended upon which of them was the first occupant. It was held that the case should be sent to the jury with instructions, that if "they should find that the plaintiff did drive stakes around the land with intent to take possession, and that such inclosing had been acquiesced in as a valid possession by the people of Provincetown, and that the plaintiff did enter and claim the same accordingly before the defendant entered and built his fence, and that the defendant knew, or by ordinary care might have known those facts, then the verdict should be for the plaintiff; and that the mode usually practiced by the people of Provincetown touching the taking and continuing of possession was competent and proper evidence for the consideration of the jury in ascertaining the intent with which the acts of the plaintiff were done upon the premises." Proof that as often as the defendant took down a fence in order to drive across the plaintiff's land the latter put it up again, would, in the absence of explanation, be presumptive evidence of the possession of the land by the plaintiff.[1]

§ 1079. Circumstantial evidence is admissible to show that the defendant is the person who committed the trespass. In an action for breaking down a fence, the plaintiff proved that the defendant was in such a situation that he could have committed the trespass; that he was near the place where the fence was thrown down, and was there on the evening before the act was committed. He proposed also to show

[1] Houghtaling v. Houghtaling, 56 Barb. 194.

that the defendant was hostile to him; that he tried to prevent one Small, who was in company with him on the evening before the trespass, from testifying in the case, and that the defendant had talked about the trespass in a manner that showed that he knew all about it. It was held that these circumstances were proper to be left to the jury.[1]

§ 1080. In an action by one in possession of land under a contract of purchase, for injury to his interest in the property, incurred while he was in the actual occupation of the premises, evidence of the value of the premises and of the cost of the several buildings erected thereon is competent for the purpose of showing the situation of the property and the surrounding circumstances. Such facts relate to the character of the property which, in connection with other evidence, may tend to show how much injury the plaintiff has sustained.

28. *Admissions and declarations.*

§ 1081. The plaintiff may have made such admissions as show that he cannot maintain the action. Trustees for the sale of certain premises gave notice, dated May 18th, to A., the rightful occupier of a cottage thereon, not to trespass on any part thereof, and afterward brought an action against him for trespassing on an orchard. The same parties gave another notice to A., on the 18th of the following March, and, before the trial, to quit the possession of all the ground which he had rented or occupied under them. It was held that the second notice acknowledged A. as a tenant, and operated as a waiver of the first, which had treated him as a trespasser, and consequently that the action could not be maintained.[2]

§ 1082. Declarations of the plaintiff made just after the occurrence are admissible in evidence to disprove the theory

[1] Janvrin v. Scammon, 9 Fost. 280.

[2] Barton v. Cordy, M'Clel. & Y. 278; 1 Car. & P. 664.

which he seeks to establish at the trial; but not his declarations as to statements made by persons to him inconsistent with the testimony which he introduces at the trial. In an action for setting fire to and burning the plaintiff's barn, it appeared that when the plaintiff commenced his investigations, with a view to ferret out the perpetrator of the outrage, his attention was directed to an animal answering a particular description; and that upon information, which he said was derived from certain persons, he stated to several witnesses that he supposed that the man who set fire to the barn rode a large gray, logy traveling horse, dapple gray behind. The description thus given pointed to a certain horse known as the Langdon horse. At the trial, the plaintiff endeavored to prove that on the night in question the defendant had in his possession, and rode in the direction of the fire, a gray mare belonging to one Harvey, and she was described as light gray, about the common size, and more than an ordinary traveler, of high life, and darker about her neck and shoulders than any other portions of her body. The defendant offered to prove, by several witnesses, the foregoing statements of the plaintiff, made by him just after the fire as derived from the information of others, the plaintiff being at the time of the occurrence many miles away. The evidence was admitted as tending to show that the description upon which the witnesses finally relied was an afterthought, upon its being ascertained that on the night in question the Harvey mare was in the possession of the defendant. A verdict having been found for the defendant, the judgment thereon was affirmed at the general term of the Supreme Court; but it was afterward reversed by the Court of Appeals.[1] *

[1] Stephens v. Vroman, 18 Barb. 250; 16 N. Y. 381.

* In the above case, Denio, Ch. J., in delivering the opinion of the New York Court of Appeals, said: "Assuming, as we must, that the out door statements of these persons, as to the size and appearance of this horse, were entirely immaterial, and ought not to be repeated to the jury, however clearly proved to have been made, upon what principle is it that they become evidence in consequence of being established by the admission of the plaintiff? The admission only proves that such out-of-door statements were actually made; but the statements themselves being worthless and incompetent, as instruments

§ 1083. Declarations made by one who claims to be the owner of land adverse to his title are admissible in evidence not only against him, but against all others claiming title to the same land under him; but not declarations in his favor. Courts in laying the rule down have been very careful to limit its operation to cases where the evidence is offered against the interest of the party making the declarations, or those claiming under him. The presumption is, that the declarations of a party as to his title, made against his interest, are true. But, on the other hand, to allow him to make declarations in support of his title, and then give those declarations in evidence, would in effect, be to allow him to make evidence in his favor at his pleasure. A similar effect would be produced if they might be proved by those standing in his situation, and claiming the same title he did. In Deming v. Carrington,[1] the plaintiff claimed to be the owner of the premises upon which the alleged trespass was committed; while the defendants insisted that the title was in one Cowles, under whom they entered. It was admitted that the plaintiff and Cowles were adjoining proprietors; and the only question in dispute regarded the locality of the division line. It was held that the acts and declarations of Cowles, adverse to his title were admissible, although he was alive and competent to testify.* In Smith v. Martin,[2] the

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of evidence, the manner in which they are brought to the notice of the jury is immaterial. The jurors have no right to be informed of them in any manner. But it is argued, that the fact that the plaintiff had heard such statements from persons having the same opportunities of knowing the truth which his witnesses actually produced and examined had, is evidence that he was prosecuting his suit in bad faith, and that his admissions were properly received for that purpose. This reasoning involves an obvious fallacy. The plaintiff had a perfect right to prosecute his action if his case was a true one. If the charge which he made against the defendant was false, and he knew it, undoubtedly he ought to be turned ignominiously out of court. If it was false, he should be beaten whether he knew it or not. The issue was upon the truth or falsity of the charge. Yet the argument I am examining assumes that the jury should have credited the declarations, and upon the evidence which they afforded should have convicted the plaintiff of knowingly maintaining a false suit. This is only another method of avoiding the rule of law which pronounces hearsay to be incompetent to establish a fact in a court of justice."

[1] 12 Conn. 1.

[2] 17 Conn. 399; and see Rogers v. Moore, 10 Ib. 13; Norton v. Pettibone, 7 Ib. 319; Beers v. Hawley, 2 Ib. 467.

* In Deming v. Carrington, *supra*, the declarations in question, related to

controversy was as to the dividing line between the lands of the parties. The plaintiff, in support of her claim, offered in evidence the declarations of her father from whom she derived title as heir at law, made while he was living and the owner of the lands which descended to her, as to the boundary between the lands of the parties. The judge before whom the cause was tried, not bearing in mind the distinction between declarations made by an owner against his interest and those in his favor, admitted the evidence, and the Supreme Court, on this ground, granted a new trial. When the defendant justifies that A. was the owner of the land, and that he entered by his command, the declarations of A. made subsequent to the act complained of are not admissible. He must be called himself as a witness.[1] *

§ 1084. If the plaintiff and defendant claim title from the same person, the plaintiff need not prove that such person has title. The defendant, by relying on him as a source of title, admits that he has title.[2] Where both parties claimed title from one Holmes, who was not living at the time of the trial, it was held that the declarations of Holmes were admissible to prove the contents of a lost deed made by him to the grantor of one of the parties.[3] The declarations of the person under whom both parties claim, may be

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the division line between Cowles and the plaintiff; were of the most unequivocal character; were repeatedly made; were accompanied with acts showing the extent of his possession and his right to occupy; and were directly at variance with the claim made by the defendants who entered under him.

In Woolway v. Rowe, 1 Adol. & Ell. 114; Denman, Ch. J., in delivering the judgment of the court, said: "The first question raised in this case, was, whether the declarations of a person formerly interested in the estate now the plaintiff 's, were admissible in evidence, where the party himself might have been called. We think they were receivable, on the ground of identity of interest. The fact of his being alive at the time of the trial, when perhaps his memory of facts was impaired, and when his interest was not the same, does not, in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights."

[1] Garr v. Fletcher, 2 Stark. 71; but see Morss v. Salisbury, 48 N. Y. 636.

[2] McBurney v. Cutler, 18 Barb. 208.

[3] Bosworth v. Sturtevant, 2 Cush. 392; White v. Loring, 24 Pick. 322.

* In Morss v. Salisbury, *supra*, it was held that the defendant in an action of trespass *quare clausum fregit* might prove under the general issue, the declarations of a former occupant under whom the defendant claimed, to show adverse possession.

proper evidence as to the extent of their respective rights. Where it appeared that the plaintiff and defendant respectively occupied lands belonging to the same landlord, and abutting on different sides of a lane, and that the defendant held under a lease which was not produced, it was held that the declaration of the landlord that "he had let the lane jointly to the plaintiff and defendant, as much to one as the other," was properly received in evidence; and that being received, it proved the plaintiff and defendant to be tenants in common, and consequently that neither of them could maintain trespass against the other in respect of the lane.[1]

§ 1085. The admission by the defendant, that the plaintiff is entitled to mesne profits, renders it unnecessary for him to prove that the defendant was in possession at the time of the suit.[2] The written admission of the defendant, that the land belongs to the plaintiff, made upon the settlement of a previous action brought to establish the title, is admissible.[3] When an agent in possession leaves the land, the evidence of his abandonment depends upon his intention, of which his declarations at the time are proof.[4]

§ 1086. Declarations of the defendant may be introduced to show that the wrongful act was committed by him. In an action for burning the plaintiff's dwelling-house, it was held that it might be proved that the defendant had threatened to tear the house down and blow it up with powder, with hostile expressions toward the plaintiff and the occupants of the house.[5] Such proof is competent for the consideration of the jury upon the question whether the defendant committed the trespass alleged. The fact of the burning having been proved, threats by the defendant that he would burn the house, are very strong evidence that he did burn it.

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[1] Noye v. Reed, 1 M. & R. 63.
[2] Samuels v. Findley, 7 Ala. 635.
[3] Kellenberger v. Sturtevant, 7 Cush. 465.
[4] Kercheval v. Ambler, 4 Dana, 166.
[5] Morrow v. Moses, 8 Fost. 95.

§ 1087. The mere impression or understanding of one of the parties, not communicated to the other and assented to by him, will not justify the inference that the understanding of the other party was the same. The understanding of a transaction, if it can be called a fact, is one resting entirely in the mind of the witness, and cannot be disproved. But it is not so as to any act or declaration of either party connected with the transaction, whether prior or subsequent thereto, from which a jury may infer the understanding or intention. Rich v. Jakaway [1] was an action charging the defendant with procuring a person of the name of Freeman to shoot through a tin pipe in the plaintiff's building commonly called a ventilator. It was proved that Freeman was told to shoot by the defendant; but it was a matter of dispute whether the direction or proposition of the defendant to shoot the gun was to shoot at the tin pipe on the plaintiff's building, or at a martin cage on a building of the defendant. And with reference to that question, it was held not competent for the plaintiff to inquire of Freeman whether he would have shot at the pipe if he had not understood from the defendant that he would pay the damage, and whether he did shoot with the understanding from the defendant that he would pay the same. "The understanding of Freeman of what the defendant would do in regard to the wrongful act could be learned only from the transaction itself, including what was said between him and the defendant relating to it, and all accompanying circumstances. It was to be inferred from such evidence, and the inference belonged exclusively to the jury. The defendant was not responsible for the act unless what he said and did justified such an understanding by Freeman, or induced the act; and this, also, was for the jury to determine upon the like evidence before them." *

[1] 18 Barb. 357.

* The rule alluded to in the text was well stated by Sutherland, J., in Murray v. Bethune, 1 Wend. 191.

In an action of trespass *quare clausum* against a sheriff, the defendant's testimony that he did not levy on the premises in question is not admissible to con-

§ 1088. The case sometimes turns on an admission made at the trial. Trespass for breaking a close called Lord's Leys. Plea, a right on Brockeridge Common, and that Lord's Leys was part of the common. Replication, no right on Lord's Leys. At the trial the plaintiff admitted that the defendant had a right on all of Brockeridge Common except the portion called Lord's Leys, and the defendant admitted that he had no right on Lord's Leys. It was held that the plaintiff was entitled to judgment.[1] Where the action is brought by a corporation, the plea of the general issue admits that the plaintiffs are a corporation capable of suing.[2] *

29. *Damages.*

§ 1089. With regard to the person entitled to damages, it is obvious that the one who owned the land at the time the trespass was committed, has a right to the damages in an action brought by him therefor, and not the subsequent grantee who owns the land at the time of the trial.[3]

§ 1090. Although every unlawful entry upon the premises of another is a trespass, and whether the owner suffer much or little he is entitled to recover, yet without proof of actual injury, he can only be allowed nominal damages.[4] Therefore in an action of trespass in placing earth on the plaintiff's lot, which was a benefit to him, it was held that

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tradict his own deed and the entry of his levy (Sawyer v. Leard, 8 Rich. S. C. R. 267).

[1] Maxwell v. Martin, 6 Bing. 522; 4 M. & P. 291.

[2] Concord v. McIntire, 6 N. Hamp. 527.

[3] Furbush v. Goodwin, 5 Fost. 425.

[4] Blake v. Jerome, 14 Johns. 406; Dixon v. Clow, 24 Wend. 188; Perker v. Griswold, 17 Conn. 288; Norvell v. Thompson, 2 Hill, S. C. 470; Caruth v. Allen, 2 M'Cord, 226.

* Although the ruling of the court is erroneous in compelling the plaintiff to prove a trespass which is admitted, yet if the trespass be proved, and therefore no injury be sustained by the plaintiff on that ground, the judgment will not be reversed where the defendant has made out a title in himself, or brought himself within the provisions of the statute, by showing that the plaintiff had not possession of or title to the premises at the time the supposed trespass was committed (Marsh v. Berry, 7 Cow. 344).

he could not recover as damages what it would cost to remove the earth.[1] Where it was proved that the defendant tore down a wall between the premises of the plaintiff and the adjoining land of the defendant, and that a few bricks and some mortar fell on the plaintiff's land, and the plaintiff's interest in the land was not proved, and a verdict was rendered for 1*s.* damages, it was held that as the plaintiff had not shown that he had any interest in the land beyond that of possession, he had not established his right to more damages than the jury had given.[2] In an action by a tenant against his landlord for unlawfully entering upon the leasehold premises, it appearing that the plaintiff previous to the trespass had removed all of his property from the premises, that no injury had been sustained by the entry, and that there was nothing from which improper motives could be presumed on the part of the defendant other than the mere unlawfulness of the entry; it was held that the plaintiff was only entitled to recover nominal damages.[3]* Jewett v. Whitney[4] was an action for expelling the plaintiff from a mill and tearing the mill down. It appeared that the mill, which stood on the premises when the defendant took possession, had become nearly worthless. In its then condition,

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[1] Murphy v. City of Fond Du Lac, 23 Wis. 365.

[2] Jones v. Gooday, 8 M. & W. 146.

[3] Shannon v. Burr, 1 Hilton, 39; and see Pastorious v. Fisher, 1 Rawle, 27; Lamb v. Priest, N. Y. Com. Pleas, Jan. Term, 1852; Ives v. Humphreys, 1 E. D. Smith, 202; Walrath v. Redfield, 11 Barb. 368.

[4] 43 Me. 242.

* In Shannon v. Burr, *supra*, judgment was rendered for the plaintiff in the court below for fifteen dollars damages. The appellate court said: "There can be no doubt that the plaintiff was entitled to judgment. The entry by the defendant upon the premises of the plaintiff was an unlawful entry. He had no more right than any stranger, prior to the expiration of the term, to go into the premises in the mode in which he entered. The landlord has no right upon his tenant's premises during the term, without the tenant's consent, unless such right of entry is reserved in the letting. If the tenant had been evicted from the premises, the damages could not have exceeded the value of the premises during the eviction; and where it does not appear that there was any bad motive imputable to the defendant, or any injury sustained in consequence of the entry on the plaintiff's premises, I think damages beyond the actual injury ought not to have been awarded. The judgment should be reduced, by limiting the damages to six cents, and affirmed for that sum and the costs of the court below, and reversed as to the residue."

the profits of it could not have exceeded the cost of repairs. Under these circumstances, the defendant co-operated with the cotenants of the plaintiff in tearing down the old mill, and erecting, at the expense of more than two thousand dollars, a new one in its stead. So far as the materials obtained from the old mill were of value, and would answer, they were put into the new. It was held that although the plaintiff might possibly have lost some immediate profits before the date of his writ, yet as he had largely gained in the increased value of his estate, he was entitled to recover nominal damages only.

§ 1091. In the absence of evidence of any injury, proof of fraudulent conduct on the part of the defendant would not be a ground of damage. Where a person wishing to buy certain land which was mortgaged paid the mortgagee the full amount of his claim therein, and the mortgagee released his interest to the mortgagor to enable him to give a deed of the whole estate, but before the conveyance to the purchaser was executed attached the land in a suit against the mortgagor, it was held, in an action of trespass brought by the purchaser against the mortgagee, that the plaintiff could only recover nominal damages. The court stated the grounds of the decision as follows: "There is no evidence of any injury done to the soil, or to the buildings, or to the trees, or any other product of the soil. The trespass, for aught that appears, and probably in fact was a simple entry, so that there is no ground for any but nominal damages unless the jury had a right to consider the fraud practiced, and to give arbitrarily what they might suppose as proper either as punishment or compensation. We do not think they had any right in this action to assess damages upon any such principle. If the soil had been disturbed, or the trees been cut down, then, in such case, they would give the utmost value of the property injured or destroyed, but because the defendant acted fraudulently, the plaintiff is not entitled to his money unless he suffered by the fraud. It looks like an attempt either to punish the defendant or to reimburse the

plaintiff for the expenses of his suit in a way different from that provided by law."[1]

§ 1092. The principle upon which damages are given is, that the party is to be indemnified for what he has actually suffered, and then all those circumstanoes which give character to the transaction are to be weighed and considered. Thus, whether the entry was violent or quiet, whether through malice or mistake, whether under color of right or without any pretense of title, are all proper subjects of consideration. As a person acting without pretense of right would be subject to greater damages than one acting under a *bona fide* claim of title, such claim, accompanied by proof of actual title, should be submitted to the jury. If, for instance, a tenant at sufferance was holding over, and the lessor ejected him by force, under an execution which was technically defective, the tenant ought not to recover the same damages as if he had been dispossessed in the night by an armed ruffian whose object was plunder.[2] Where armed men broke into a store, took away the stock, put the owner in fear of bodily harm, threatened his life if he resisted, and injured his business, it was held that they were liable not only for the value of the property taken, but also for the breaking and entering and other injuries.[3]

§ 1093. Where a building belonging to the plaintiff has been wrongfully demolished, the question for the consideration of the jury is, what sum of money will be required to replace the house as nearly as practicable in the situation it was in at the time the wrong was perpetrated.[4] But in an action by a reversioner for the pulling down of his house, which was occupied by his yearly tenant, it was held that the diminution in the salable value of the premises was the measure of damage.[5]

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[1] Spear v. Hubbard, 4 Pick. 143. [2] Bateman v. Goodyear, 12 Conn. 575.
[3] Freidenheit v. Edmundson, 36 Mo. 226.
[4] Duke of Newcastle v. Hundred of Broxtowe, 4 B. & Ad. 273.
[5] Hosking v. Phillips, 3 Exch. 168.

§ 1094. A mere disseizor who enters without right upon the land of another, is responsible for damage which results from any of his wrongful acts.[1] But, as already stated,[2] after an ouster, the plaintiff can recover damages only for the simple trespass or first entry. For though every subsequent act is a continuance of the trespass, yet to enable the plaintiff to recover damages for these acts, there must be a re-entry. A disseizee may have trespass against a disseizor for the disseizin itself, because he was then in possession, but not for the injury after until he has gained possession by re-entry, when the action may be sustained for the intermediate damages.[3] *

§ 1095. In trespass for cutting into the plaintiff's close and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the ex-

[1] Russell v. Fabyan, 34 N. Hamp. 218; Ridgely v. Bond, 17 Md. 14.

[2] *Ante*, § 928.

[3] Holmes v. Seely, 19 Wend. 507; Case v. Shepherd, 2 Johns. Cas. 27; Stevens v. Hollister, 18 Vt. 294.

* In Stevens v. Hollister, *supra*, Williams, Ch. J., dissenting, said: "The defendant was without title, or claim to title, a mere intruder, and liable for all the damages which the plaintiff has sustained; and upon a mere technical point the plaintiff is permitted in this action only to recover nominal damages for the first entry, and is to take some measures to make a re-entry, and then bring another action for the residue of the injury which he has sustained. If the law is so, the defendant is surely entitled to the benefit of it, though the reason why it is so may not be so obvious. But without a full conviction that it is so, I cannot yield my assent to it. The rule adopted in Connecticut is much the best and safest, which is to permit the owner of the soil who has a right to the possession, and can bring an action to recover it, to maintain either trespass or ejectment at his election, as it is not always very readily determined whether a person on land of which he is not the owner is in possession or a mere intruder. On the principles of the common law, however, it appears to me that the plaintiff was entitled to recover in this action for all the damage he had sustained by the defendant's entering and cutting the timber, &c."

A person will not lose his legal remedy by yielding to a wrongful dispossession. In Hamilton v. Cutts, 4 Mass. 349, the action was on a covenant of warranty of lands. The plaintiff had permitted the person who claimed the land to take possession, on the ground of a paramount title, and then prosecuted the representative of his grantor to recover damages. There had been no evidence of a legal ouster. Chief Justice Parsons, in delivering the opinion of the court, said: "The tenant may yield to a dispossession without losing his remedy on the covenant of warranty. There is no necessity for him to involve himself in a lawsuit to d fend against a title which he is satisfied must ultimately prevail. But he consents at his own peril. If the title which he has yielded be not good, he must abide the loss; and in a suit against his warrantor, the burden of proof will be on the plaintiff" (approved in Stone v. Hooker, 9 Cow. 154; see 4 Hill, 646).

pense of restoring it to its original condition.[1] J. T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually. The lessee covenanted that he would not dig more, or, if he did, that he would pay an increased rent of £375 per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug and took away the brick earth, and the lessee recovered against him the full value of it. It was decided that he was entitled to retain the whole damages.[2] In an action of trespass, however, for digging and carrying away ore from lands belonging to the United States, it was held that neither the value of the ore after it was dug, nor the rate at which leases were made for such lands, was a proper criterion of damages; that the injury done to the soil was the gist of the action, and ore extracted might be proved in aggravation of damages.[3] But in California, in an action for entering on the plaintiff's mining claim and taking away gold-bearing earth, the trespass not being willful, it was decided that the measure of damages was the value of the earth at the time it was taken, estimated by deducting the expense of extracting the gold from it.[4]

§ 1096. In trespass for getting coal from a mine, the proper measure of damages is the value of the coal as soon as it is severed from the freehold, which may be ascertained by deducting from the salable value of the coal at the pit's mouth the expense of carrying it there from the mine.[5] The defendant is not entitled to any deduction for the expense of getting the coal, or for a rent payable to the mine owner on coal obtained from the mine.[6]

§ 1097. In an action of trespass for cutting off lead pipe which was laid by the plaintiff upon the land of the defend-

[1] Jones v. Gooday, 8 Mees. & W. 146; Mueller v. St. Louis &c. R. R. Co. 31 Mo. 262.

[2] Attersoll v. Stevens, 1 Taunt. 183. [3] U. S. v. Magoon, 3 McLean, 171.

[4] Maye v. Tappan, 23 Cal. 306.

[5] Morgan v. Powell, 2 G. & D. 721; 3 Ad. & E. N. S. 278.

[6] Ibid.; Wild v. Holt, 9 M. & W. 672; Hilton v. Woods, L. R. 4 Eq. Cas. 432.

ant under a verbal license, in order to convey water to the premises of the plaintiff, the expense of digging or deepening the reservoir and laying the pipe, or any consequential damage sustained by the plaintiff, by reason of the stopping of the water cannot be recovered; but only for the actual injury to the pipe, and possibly exemplary damages if the act was willful. In Houston v. Laffee,[1] the land of the defendant was conveyed to him by one Stevens, who had previously given the plaintiff verbal permission to lay down a lead pipe from a spring on the land to the plaintiff's buildings, a distance of 23 rods. In the deed of Stevens to the defendant, no mention was made of this license; but after the purchase, the plaintiff continued to use the water of the spring, by means of the pipe, without objection on the part of the defendant. Afterward the spring becoming useless, the plaintiff, with the knowledge and consent of the defendant, caused a well to be constructed, and obtained water therefrom by means of his lead pipe, the defendant at the same time using the well for his family. The well was afterward deepened by mutual agreement, the plaintiff defraying most of the expense, and he then continued to use it, as he had previously done, until he defendant taking some offense, without notice to the plaintiff, cut off his lead pipe and forbade him to come upon the land to take up his pipe, or for any purpose. The plaintiff kept a livery stable, and was put to extra trouble and expense in procuring water for his horses and house by the defendant's acts. The court, said: "It would seem clear, that in this action of trespass, the plaintiff cannot recover the money he had expended in digging or deepening the well, or purchasing or laying the pipe, or the consequential damages he may have suffered in his stable in consequence of the stopping of the water, at that particular time. Whatever other remedies the plaintiff may have to recover back his money expended or his damages received, we think he cannot recover on those

[1] 46 N. Hamp. 505.

grounds in this action. Can the plaintiff recover at all in this action? The lead pipe remained the property of the plaintiff though in defendant's land, and he could have maintained trespass against a stranger who had no interest in or right to either the pipe or the lands, if he had cut it off. But the defendant had the right to revoke his license in a way that should be effectual; and if the cutting off of the pipe was done simply for the purpose of putting an end to the license, and without any malice or intentional wrong, we think the defendant would not be liable in this action. But if he cut the pipe wantonly, unnecessarily, and maliciously, and with a view to injure the pipe, or to injure the plaintiff, we think he would be liable. In any case, we cannot see that he would be liable for anything more than the actual injury to the pipe, unless he might possibly be liable for exemplary damages; but as the case stands, we think there is nothing to show that he is liable at all."

§ 1098. In an action of trespass for entering on land and cutting and removing timber therefrom, the plaintiff is entitled to recover for the injury to the land, and also the value of the timber as it was when first severed from the freehold. The latter clause of the rule would not apply to trees kept for shade or ornament, which might have a special value as connected with the land, independent of, and superior to, their intrinsic value for purposes of building or fuel.[1] In an action for wrongfully taking trees and converting them into shingles, it was held that the plaintiff was entitled to recover the enhanced value of the timber as manufactured into shingles.[2] In Longfellow v. Quimby,[3] which was an action for cutting and taking away trees from the plaintiff's land, it was held that the plaintiff was entitled to recover compensation for the injuries occasioned by the acts of the defendant upon his lands, to be ascertained by an estimate of the value of the trees cut and carried away, and of the

[1] Bennett v. Thompson, 13 Ired. 146.
[2] Rice v. Hollenbeck, 19 Barb. 664. [3] 33 Maine, 457; s. c. 29 Ib. 166.

injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and to the amount thus ascertained might be added six per cent. per annum for being deprived of the use of the property from the time of the taking to the time of judgment. In Barton v. Fisk,[1] the plaintiff, claiming an equitable right to certain timber on lands in the possession of the defendants, brought an action to compel the defendants to release to him said timber with the right of removal, and to obtain an injunction to restrain the defendants, 1st, from cutting, drawing, taking, or interfering with such timber; 2d, from prosecuting an employee of the plaintiff, on account of such timber, or on account of cutting, drawing, taking or using the same; 3d, from doing any act to prevent or hinder the plaintiff or his agents from removing said timber and using the same. He procured an *ex parte* injunction in accordance with this prayer in the complaint, on furnishing an undertaking that the plaintiff would pay all damages, not exceeding five hundred dollars, which might be sustained by the defendants by reason of said order, if the court should finally decide that the plaintiff was not entitled thereto. The ultimate judgment in the action was in favor of the defendants—dismissing the plaintiff's complaint with costs. Meanwhile, the defendants obeyed the injunction, and the plaintiff, not being interfered with, cut and removed from the defendants' land, timber to the value of four hundred and fifty dollars. It was held that the measure of damages, was *prima facie* the value of the property which the defendants had lost.*

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[1] 30 N. Y. 166.

* In the above case, the court said: "If the property had remained specifically the same during the litigation, and at its conclusion had been within the defendants' reach, the damages probably would have been such as resulted from their being deprived of its use *pendente lite*, and from any depreciation in value. But under the existing facts, it is the same thing as though it had been destroyed while the owners were prevented from extending their hands for its preservation. The plaintiff's argument is, that the loss was not occasioned by the injunction, but by the tortious act of the plaintiff and his assistant unconnected with that process. This is too narrow a view of the question. If it had been carried off and converted by a stranger, while the owners were prohibited from doing anything to protect it, the persons who restrained them ought to make recompense

§ 1099. In an action of trespass by a creditor against his debtor for entering and cutting trees upon land belonging to the debtor's wife, which land the creditor has levied on and set off to himself upon an execution against the debtor, the plaintiff can only recover the special damages which he has sustained by the breaking and entering, and by whatever has been carried away which was necessary for the enjoyment of the life estate.[1] *

§ 1100. The plaintiff cannot select any other place than that where the injury was originally done, to enhance the value of the articles taken, although they might have been greatly enhanced in value by a removal to such other place. It is true he may seize them wherever he can find them, and

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for the loss. *A fortiori*, he should make compensation when he himself carried it off and converted it during the restraint which he had procured to be imposed. The efficient cause of the loss was the inability of the defendants, caused by the injunction, to take care of and preserve that which was their own."

[1] McKeen v. Gammon, 33 Maine, 187.

* In McKeen v. Gammon, *supra*, the court remarked that the defendant had a life estate which could be taken for his debts. It would continue at least so long as both he and his wife might live, and after her death, if he became tenant by the curtesy. It was in the language of the statute, "the real estate of a debtor in possession," an estate of freehold, although it might not continue any longer than the life of the wife. By the levy of the execution, the plaintiff was clothed with the seizin of the premises, and he had the possession when the trespass was committed. The entry upon them was a violation of his possession, and the defendant, by such unlawful act, became a trespasser, and he was bound in law to pay all the damages which the plaintiff had sustained. The plaintiff, succeeding to all the rights of the defendant, was entitled to those which were incident to a life estate. He could not commit waste, but was entitled to fire wood, fencing, and building materials. But whatever appertained to the inheritance, excepting what the tenant for life might take, belonged to the wife of the defendant. The plaintiff could recover no more damages than he had sustained, nor for the taking and carrying away the property of the defendant's wife. As in the case of a lease, if the lessor fells the trees, the lessee may maintain an action of trespass against him, and will be entitled to recover damages adequate to the loss of his particular interest, and also for the entry into his land. But the interest of the body of the trees remains in the lessor, as parcel of his inheritance, who may punish the lessee in an action of waste, if he fells or damages any of them. It has also been held that if the creditor injure the inheritance of the wife, where an execution against the husband has been levied upon her land, by cutting down and selling the trees, an action on the case lies against him, in which the husband must join. If then the plaintiff in McKeen v. Gammon had recovered damages for the timber and wood, he would have obtained what belonged to the wife of the defendant. If wood enough for fire wood, fencing, and building materials, were left in a situation as convenient and easy of access as before the trespass, the injury would appear to have been confined to the breaking and entering (per Wells, J., citing Liford's Case, 11 Coke's R. 48 *a*; Babb & Wife v. Perley, 1 Greenl. 6).

may demand them at another place of one having them there, and in an action of trover, recover the value of them there. But in trespass, the rule is different.[1] The damages must, however, be commensurate with the injury, notwithstanding the plaintiff relies upon possession alone.[2] Where A. had an estate for life, in possession, in a term for ninety-nine years, B. had an estate in the remainder, for the residue of the term after the death of A., and A. had the reversion after the expiration of the term, it was held, in an action of trespass brought by A. against a third person for entering and cutting down and carrying away trees, that A. was entitled to recover the entire value of the timber, although B., in an action on the case, might recover damages for the same act as lessening the value of the expectancy.[3] *

[1] Barker v. Wheeler, 8 Wend. 505; Morgan v. Powell, 3 Adol. & El. N. S. 278; Martin v. Porter, 5 M. & W. 351.

[2] Cutts v. Spring, 15 Mass. 137; Look v. Norton, 55 Maine, 103.

[3] Burnett v. Thompson, 7 Jones Law, N. C. 407.

* In Plumer v. Prescott, 43 N. H. 277, the plaintiff had contracted for the sale of all the wood and timber on certain land belonging to him, with a right to take it off until the first day of September. The wood and timber were all cut before that time, and all the timber and part of the wood hauled off, leaving a part piled up in various places upon the land, which was hauled off after October 1, by the defendants. It was held that the title to the wood cut during the time fixed, was not lost or forfeited by neglecting to remove it within the time. The court said: "The question is, whether, in an action of trespass for breaking and entering this tract of land after October 1, the plaintiff is entitled to include in his damages the value of the wood thus hauled off. Assuming that the sale was limited to such trees as were cut during the time specified, still, it does not follow that the vendee acquires no property in such trees as he had cut before the expiration of the time limited, although he permitted them to remain until after. Until cut they may be regarded as part of the soil in which they are rooted; and it might well be held that no interest remained to the vendee in the land, or in the trees which are parcel of it, after the time limited in the contract. Otherwise, we should be driven to hold that the interest of the vendee in the land was not governed by the contract, but was extended beyond it indefinitely, by an assumption that a property in the trees, as chattels, and not as parcel of soil, was vested in the vendee, and at the same time giving him the use of the land for their support. When, however, these trees are lawfully cut by the vendee within the time limited by the contract, they cease to be parcel of the land, and become the personal property of the vendee; and unless it can be considered that he has waived or forfeited his title to the timber by neglecting to remove it within the time, it must stand, for aught we can see, upon the footing of any other personal property of the vendee, which, by his fault or neglect, and without any fault of the vendor, is upon the land of the latter. It is very clear, we think, that, having been lawfully severed from the land, it has become personal property, and at any period before the expiration of the time limited, at least, the title is vested in the vendee as fully as any other chattels. If this is the case, it is difficult to see how the title can be lost by the neglect to remove

§ 1101. In an action for injuring the inheritance by cutting trees, the plaintiff is entitled to recover for the diminished value of the estate;[1] and in such case, the comparative value of the premises to the inheritance, with or without the wood and timber, is a proper test.[2] It has been held, under the statute of New York, awarding treble damages for injury to the inheritance by cutting timber, that the acts complained of must be essentially acts of trespass.*

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it. The vendee, in this case, having paid to the plaintiff the full value of the wood, and having expended his money in cutting it, has a strong equitable claim, notwithstanding his neglect to remove it; and it is a satisfaction to the court to find, upon careful consideration, that neither authority nor principle requires that the plaintiff be allowed to hold both the wood and the price of it. We hold then, that the plaintiff is not entitled to include the value of the wood in the amount of his damages; although having been left there by his own neglect, and without the fault of the plaintiff, he might not be able to justify an entry to remove it after the expiration of the two years—not at least without a previous request and an offer of amends. Whether such entry could be justified at all, need not now be settled, but we are satisfied that the title to the wood still remained in the vendee."

In Pease v. Gibson, 6 Greenl. 81, the contract was regarded as a sale upon condition that the trees were cut and carried away within two years; but the reasons assigned chiefly apply to their being suffered to remain standing upon the land, and not only incumbering it, but taking from it the means of growth and support. So, in Putney v. Day, 6 N. H. 430, it is spoken of as a sale of such timber as might be taken within two years. But it is obvious that in neither case was the attention of the court directed to any distinction between the severing of the trees from the land after the expiration of the license, and the title to them when lawfully severed during the time limited. In Kemble v. Dresser, 1 Metc. 271, it was held that no title to the wood cut, but not removed during the time fixed, vested in the vendee; but the sale was with an express condition that the wood should be "got off and removed within two years, and not afterward." In Nelson v. Nelson, 6 Gray, 385, the plaintiff claimed wood under a sale like the one in Plumer v. Prescott, *supra*. The wood had been cut and was lying upon the ground, when the defendant, the owner of the land burnt it; and it was decided that the defendant was answerable for its value to the plaintiff, "because it did not appear that the time within which it was to be taken from the land, had expired before it was burnt, nor that it was to be forfeited to the defendant if not taken off within that time." This evidently recognizes a distinction between the sale there and in the case of Kemble v. Dresser, which, as we have seen, was expressly upon condition that the wood should be removed within two years.

[1] Achey v. Hull, 7 Mich. 423; Harder v. Harder, 26 Barb. 409.

[2] Van Deusen v. Young, 29 Barb. 9; 29 N. Y. 9.

* In an action of trespass under the statute (of New York), giving treble damages, if the jury find the defendant guilty of the trespass as alleged in the act, they are to assess single damages, and it is then the duty of the court to treble them. It is for the jury also to determine whether the defendant has brought himself within the provisions of the second section, namely, that the trespass was casual and involuntary, this not being a question to be settled by the court on affidavit (King v. Havens, 25 Wend. 420). The provisions of the New York Revised Statutes on this subject do not essentially differ from the old law. Newcomb v. Butterfield, 8 Johns. 342, was a motion by the plaintiff in

They must be forcible, unlawful and unauthorized acts. They need not be preceded by an unlawful entry upon the

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the New York Supreme court, that the damages assessed by the jury in several actions of trespass be trebled according to the statute. The actions were brought pursuant to the act of February 17th, 1810 (Sess. 33, ch. 5), which authorized the supervisors and assessors of the towns in Clinton county to sue in the name of the supervisor for trespasses committed within their respective towns, upon lots set apart for the support of the gospel and schools; and the damages, when recovered, were to be applied to the use of schools and for the support of the gospel (Sess. 31, ch. 218). The act giving the treble damages directed that the suits for trespasses upon lands belonging to the people of the State, should be brought by the overseers of the poor of the town in which such trespasses were committed, for the use of the poor. The present actions were not brought by the overseers of the poor, and the damages were not to go to the support of the poor. There being, therefore, no conformity to the statute, either in the party who sued, or in the destination of the fund, the case was not within the statute giving treble damages, for that being a penal act, was to be taken strictly, and not to be extended by equity. The court, in denying the motion, remarked that though the plaintiff was not entitled in these cases to have the damages trebled, it might not be an unfit occasion to suggest the mode in which the damages under the statute were to be ascertained and trebled. "It is no doubt competent," proceeded the court, "for the court to treble the damages in cases in which they are not trebled by the jury; but the jury must find the facts by which it is to be determined whether the defendant be liable to such damages. The act provides that if, upon the trial, it shall appear by evidence that the defendant was guilty through mistake, or had probable presumption to believe that the land on which the timber was cut was his own, the court shall give judgment for single damages only. The measure of damages in cases coming within the act is treble the value of the timber cut and carried away, and the facts on which the court are to treble this value, ought to appear upon the *postea*. The declaration should refer to the act, so that the defendant may be apprised of the extent of the demand; and unless the defendant upon the trial shall bring himself within the proviso, the jury find him guilty of the trespass alleged and assess the single value of the timber, and upon the return of the *postea* with this finding, the value is to be trebled by the court." The rule laid down in the foregoing case, was changed in the revision of the statutes of New York of 1830, by which the offender is to forfeit and pay to the owner of the land, treble the amount of the damages assessed for the trespass.

The provisions of the existing statute of New York, in relation to treble damages in case of trespass upon land, are as follows:

"Every person who shall cut down or carry off any wood, underwood, trees, or timber, or shall girdle or otherwise despoil any trees on the land of any other person, without the leave of the owner thereof, or on the land or commons of any city or town, without having any right or privilege in such commons, and without license from the corporation or proper officers of such city or town, shall forfeit and pay to the owner of such land, or to such city or town, treble the amount of the damages which shall be assessed therefor in an action of trespass by a jury, or by a justice of the peace, in cases provided by law. If, upon the trial of any such action, it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that such wood, trees or timber were taken for the purpose of making or repairing any public road or bridge, by the authority of a commissioner or overseer of highways, judgment shall be given to recover only the single damages assessed by the jury. Nothing in either of the preceding sections shall authorize any person to recover more than the just value of any timber taken for the making or repairing any public roads or bridges. If any person be disseized, ejected, or put out of any lands or tene-

lands, for which trespass *quare clausum fregit* would lie, but unlawful acts upon, and appropriations of the property after an entry is made. The entry may be lawful or illegal, peaceable or forcible; but the lawful and peaceable character of the entry does not necessarily impart the same character to the subsequent proceedings. The question is to be treated as one of substance, and not of mere form; and if the essential character of the act is illegal and forcible, it has all the substantial elements of trespass, and must be so regarded.[1]

§ 1102. Although as standing trees are part of the inheritance, and the severing them from it is deemed an injury to the freehold, for which trespass *quare clausum fregit* is the appropriate remedy, yet the party may waive that ground of recovery, and claim the value of timber only thus severed and carried away. In the one case the entering and breaking of the close is the gist of the action; in the other, the taking and carrying away of the property. In the latter case the action is transitory and not local.[2] *

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ments in a forcible manner, or being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the damages assessed by the jury or by a justice of the peace, in cases provided by law" (N. Y. Rev. Sts. 5th ed. vol. 3, p. 624, sects. 1, 2, 3, 4). An action of trespass under the foregoing statute will lie by one of two adjoining proprietors of land against the other for cutting trees standing on the division line (Relyea v. Beaver, 34 Barb. 547; aff'd 25 N. Y. 123)

In Missouri, the statute which gives treble damages for trespass on land, does not take away the common law remedy (Tackett v. Huesman, 19 Mo. 525). In that State, where, in an action for the wrongful entry on land, and for timber cut and carried away, there was a general verdict for the plaintiff, and an entire assessment of damages, but there was no finding of the value of the timber, it was held that the damages could not be trebled under the Statute R. C. 1845 (Ewing v. Leaton, 17 Mo. 465; s. p. Labeaume v. Woolfolk, 18 Mo. 514).

[1] Van Deusen v. Young, 29 Barb. 9; s. c. 29 N. Y. 9.

[2] Shank v. Cross, 9 Wend. 160.

* It is sometimes a nice question to determine precisely where the line is to be drawn between cases in which a party may waive a tort and bring an action of assumpsit, and where he is not permitted to do so. In Simpson v. Bowden, 33 Maine, 549, the defendant cut and carried away trees from land of which A. B. was tenant for life and the plaintiff the reversioner entitled to the land upon the determination of the life estate. It appeared that the acts of the defendant were done openly, and under such circumstances that both the tenant for life and the plaintiff had an opportunity to see them committed, and that since those acts the life estate had been determined by the death of the tenant. It was held

§ 1103. In an action for injuries received from a ferocious animal, the jury may take into consideration the bodily suffering of the plaintiff, together with the cost of surgical attendance and all other reasonable and necessary expenses which have been incurred in consequence of the injury. But where the action is for damage done by cattle, and it appears that the plaintiff, without pursuing the directions of any law authorizing distress *damage feasant*, shut the cattle up, he is not entitled to have the cost of their keeping included in the damages.[1]*

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that the action, which was assumpsit, could not be maintained. Tenney, J., in delivering the opinion of the court, said: "There is no evidence of any express contract between the parties for the purchase of the timber, and the case shows a wrongful taking of it. The plaintiffs contend that they may waive the tort and maintain their action as on an implied contract. The law will not imply a contract where an express contract is proved. Nor will the law imply a contract in a case where the parties cannot legally make an express contract. The plaintiffs had no present interest in the land where the defendant cut and converted the timber. They could not legally contract for the severance and sale of the timber there standing. The parties being legally incapable of entering into an express contract of that character, the law cannot imply one."

Where trees are cut and carried away without the owner's permission, he cannot waive the tort and sue in assumpsit unless the wrong-doer has sold the trees (Jones v. Hoar, 5 Pick. 285; see note, 5 Pick. 285 *et seq.*)

Where a guardian gave a person permission to cut timber on the land of his wards, and received a part of the pay therefor, which was afterward recovered by them of the guardian, it was held that as the wards had thus waived the tort they could not maintain an action of trespass against the person who cut the timber for the balance of the pay (Burnett v. Beasley, 5 Jones Law, N. C. 335).

An action of trespass cannot be maintained against a military officer who, with the implied assent of the owner of an unoccupied field to use the same for a drill ground, cut down saplings which interfered with the use of the field for that purpose (Law v. Nettles, 2 Bailey, 447).

[1] North v. McDonald, 47 Barb. 528.

* In this case, which was an action for damage done by hogs, the court said: "The justice erred in receiving evidence of what it would cost to keep the hogs. That was no legal element of damages which the plaintiff had the right to recover in an action for the trespass. The law had furnished him a full remedy for such keeping, if he had chosen to avail himself of it; instead of which, he resorted to the common law action of trespass. This he had the right to do, but in that case all that he could lawfully recover would be the actual damages for the trespass of the hogs. He had no right to keep the hogs in his possession indefinitely, and then recover for their keeping. It cannot be claimed, on the part of the plaintiff, that he had pursued the directions of any law, statute or common, authorizing distress taken *damage feasant*. By shutting up the hogs in his own pen, and keeping them there, he became a trespasser *ab initio*. It was his own voluntary act, without the knowledge or consent of the defendant. Assuming that the verdict is no larger than the evidence shows the damages for the trespass of the hogs really was, it is impossible for us to say whether it was not all, or some part of it, for the keeping of the hogs."

In an action to recover for damage done by the defendant's cattle, horses and sheep to the plaintiff's crops, the plaintiff testified that he owned one and three quarter acres of buckwheat on his land in 1861; that in the fall of that year, the

§ 1104. The distinction between damages which are proper and such as are remote and purely speculative, sometimes presents a nice question. But by keeping steadily in view the consideration that the plaintiff is only entitled to recover for the injury which he has actually and not for such as he may possibly have sustained, there will be little difficulty in arriving at the true rule. Where the trespass consisted in removing a few rods of fence, it was held that the jury were rightly instructed that the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop arising from the want of the fence.[1] If a trespasser destroy a mill dam, or the sluiceway to a mill, he is liable not only for the value of the materials, but also for such injury as the plaintiff has sustained from not being able to use the dam or sluice from the time it was broken up to the time of the commencement of the action.[2] In an action

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defendant's four horses "got in after the buckwheat was cut, and tore it to pieces, and ate what they wanted." His counsel then said: "State, if you can, what portion of the buckwheat the defendant's horses destroyed in the fall of 1861?" The witness answered: "I think one-fifth part. I have usually raised buckwheat every year. I think it would have produced twenty to twenty-five bushels had it not been injured by the defendant's horses. Buckwheat was worth five shillings a bushel in the fall of 1861." It was held that the question and answer were proper; the witness being a farmer, and his experience as such rendering him competent to answer the question. The plaintiff further testified, that fifteen cattle went into one acre of his peas in 1864; that the cattle destroyed two-thirds of them; that they were worth $4 per bushel. His counsel then asked: "If that piece of peas had not been injured by the stock, how much would it have produced that season?" The witness answered: "Twenty-five bushels. I got seven bushels." It was held that the estimates or calculations of the witness were competent, for the reason that he was familiar with the subject, and the evidence was necessary to ascertain the amount of damages the defendant's cattle did to the peas; and further, that a question put to the witness, as to what portion of his corn that was destroyed in the fall of 1853 was destroyed by the defendant's cattle, was competent in connection with the other facts to which he had previously testified. The plaintiff also testified that in July, 1860, the defendant's hogs destroyed all his peas; that they were good peas and podded when destroyed. He was then asked what the ground would have produced, had the peas not been destroyed by the defendant's hogs; to which he replied that the ground would have produced three bushels, worth twelve shillings per bushel. Held, proper. It was further held that the testimony of a son of the plaintiff, who helped harvest the oats, and saw the defendant's cattle in them, was competent to show what proportion of the crop of oats was destroyed by the defendant's cattle a week before they were cut (Seamans v. Smith, 46 Barb. 320).

[1] Loker v. Damon, 17 Pick. 284.

[2] Hammatt v. Ross, 16 Me. 171; White v. Moseley, 8 Pick. 356.

for breaking a dam which kept water out of a coal mine, injuring the plaintiff's railroads, destroying the iron and throwing their hands and stock out of employ, it was held that proof of the amount of coal each miner would produce, and the cost of keeping mules during the suspension of labor in the mine, was proper on the question of damages.[1] But it is error to charge the jury that "if the mine was rendered entirely useless, the profit that might have been made out of the coal would be a fair basis for estimating the damage.[2] In an action of trespass for seizing wood and timber floating and moving from place to place over the land of the plaintiff, it was held that he was entitled to recover the value of his chance to seize and enjoy the wood and timber of which chance he was deprived by the defendant.[3] *

§ 1105. Where the result of a trespass is the ouster of the plaintiff from the remainder of his term, he may show

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[1] Douty v. Bird, 60 Penn. St. R. 48.

[2] McKnight v. Ratcliff, 44 Penn. St. 156. [3] Rogers v. Judd, 5 Vt. 223.

* In the above case, the court laid down the rule of damages as follows: "In assessing the damages for this violation, it is for the jury to find what the plaintiff lost by the defendant's infringing his exclusive right. The plaintiff did not lose the wood and timber, for these were never his. But he lost the chance of seizing the wood and timber on his own land and converting them to his own use, if the true owner did not prevent it. The jury should inquire what this chance was worth to the plaintiff; for so much he lost by the defendants' trespass. If the plaintiff's chance to seize the wood and timber was positively certain, the value of this chance was much less than the value of the wood and timber on the land —the plaintiff having absolute property in the same. The difference was the expense of seizing and drawing the wood and timber out of the water upon the land, and the risk of losing the same by the owner. But the plaintiff's chance to seize was not positively certain, but depended upon contingencies which rendered his chance uncertain and lessened its value. If the defendants had not seized the wood and timber when they did, the water might have carried them out of the eddy and the plaintiff would have lost his chance to seize. This contingency of water carrying wood and timber out of the eddy had happened, and might again, which rendered the plaintiff's chance to seize in some degree uncertain and of less value. In high water, as often as once in every ten or fifteen minutes, wood and timber in the eddy form a complete circle, which is partly over the defendants' land and partly over the plaintiff's land. Now, if the defendants on their land had as good a chance to seize the wood and timber in question when floating in this circle, as the plaintiff had on his land, then the plaintiff's chance to seize was lessened one-half, and was worth only one-half as much as it would have been, if the defendants had no chance to seize on their own land. It was for the jury to have found the value of the plaintiff's chance to seize and enjoy the wood and timber that were taken by the defendants on his land, and as they found the value of his chance, all circumstances considered, so should have been their verdict for damages on account of the defendants' depriving the plaintiff of his chance."

that the premises were of peculiar value to him, on account of the business he had established therein, and the resort of customers thereto, and that his business fell off in consequence of his being compelled to remove elsewhere. If the amount of profits lost can be shown with reasonable certainty, they constitute thus far a safe measure of damages. Where the plaintiff's business was the sale of jewelry, it was held that he might prove the amount of his profits previous to the trespass, not as an exact measure of damages, but to be considered by the jury in their sound discretion.[1]

§ 1106. Insult or indignity to the plaintiff, the fact that the trespass was committed in the night, the situation of the plaintiff's family, as well as the degree of fault or malice on the part of the defendant, would be legitimate subjects of consideration by the jury on this question.[2] If the entry is made after notice or warning not to trespass, or is a willful and impertinent intrusion upon a man's domestic privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable.[3] Where the plaintiff was shooting upon his estate, and the defendant, a member of parliament, went up to him and told him that he would join his shooting party, and the plaintiff declined, and ordered him off of his land, and gave him notice not to shoot there, but the defendant swore he would shoot there, and did so, and threatened and defied the plaintiff, and the jury gave 500*l.* damages, the court declined to set aside the verdict. Gibbs, Ch. J., said: "I do not know upon what principle we can grant a rule for a new trial in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and

[1] Allison v. Chandler, 11 Mich. 542. [2] Ellsworth v. Potter, 41 Vt. 685.

[3] Merest v. Harvey, 5 Taunt. 443; Goodwin v. Cheveley, 4 H. & N. 631; Perkins v. Towle, 43 N. Hamp. 220; Greenville &c. R. R. v. Partlow, 14 Rich. 237.

down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done?' would that be a compensation?"[1] * It was said by the court, in a recent case in Pennsylvania,[2] that if there be evidence from which a jury may conclude that the trespass was malicious as well as willful, the court ought not to be too stringent in excluding evidence as to damage, but should rather wait and instruct the jury as to the true rule to be given upon the whole evidence.

§ 1107. In an action for trespass to land, exemplary damages can only be awarded when the trespass was wanton, willful, or malicious.[3] But to entitle the plaintiff to such damages he need not prove actual malice,[4] nor that the defendant's conduct was rude and insulting.[5] † Where a landlord entered upon leasehold premises without asking the permission of the tenant, and sold the timber trees standing in the hedge rows, and caused them to be felled, cut up, and removed, and the growing crops of the tenant were greatly damaged, and the latter brought an action against the land-

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[1] Merest v. Harvey, *supra*. [2] Douty v. Bird, 60 Penn. St. R. 48.

[3] Stillwell v. Barnett, 60 Ill. 210.

[4] Devaughn v. Heath, 37 Ala. 595; s. c. 1 Ib. 523. [5] Ibid.

* Exemplary damages cannot be recovered from the estate of a deceased trespasser (Wright v. Donnell, 34 Texas, 291).

In Armstrong v. The Iowa Falls & Sioux City R. R. Co. 34 Iowa, 502, it was doubted by the court whether the plaintiff could, in any case, recover exemplary damages in an action for trespass to land.

† In an action of trespass *quare clausum* for breaking and entering a dwelling-house then occupied by the plaintiff, a tenant at will, and ejecting him and his family and removing his furniture, it is error to charge that the jury may find, in addition to the damage to the furniture, "a reasonable compensation to the plaintiff and wife for the injury done to their feelings in being removed from the premises" (Smith v. Grant, 56 Maine, 255). Kent, J.: "The action is in the name of the husband alone. There is no allegation of loss to him by injury done to the wife. The rule given was not the one allowing vindictive or exemplary damages, but confined to the injury to the feelings of each. The instruction in terms authorized the jury to give a compensation in this action to the wife for injury to her feelings independently of the husband. The jury, however, found specially that the injury to the furniture was twenty-five dollars, and to the plaintiff and wife fifty dollars. There can be no apportionment of this last sum."

lord and recovered £100 beyond the net value of the whole of the crops, the court declined to have the damages reconsidered.[1]

§ 1108. One who is only a tenant at will, if in the actual occupancy of land and crops growing thereon, may recover exemplary damages from trespassers who wrongfully enter on the land and trample down and injure the crops. But as the injury is twofold—to a temporary right in the lessee and to the permanent freehold of the lessor—the damage must be awarded with reference to their several interests.[2] *

§ 1109. A few cases will sufficiently indicate the rule with reference to motive as a ground for damages. In an action of

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[1] Williams v. Currie, 1 C. B. 847. [2] Attersoll v. Stevens, 1 Taunt. 194.

* In an action by a tenant against his landlord for wrongfully ejecting the plaintiff from the premises, he is entitled to damages for the value of vegetables and grape vines which he has planted (Fox v. Brissac, 15 Cal. 223) But as the gravamen of the action is the injury to the person, goods, and chattels of the tenant, the landlord may avail himself of his title to the premises in mitigation of exemplary damages (Reeder v. Purdy, 41 Ill. 279).

In Massachusetts, in an action for breaking and entering the plaintiff's close and taking and carrying therefrom his goods, damages for the conversion of the goods, alleged by way of aggravation, will be barred by a previous discharge of the defendant in insolvency (Bickford v. Barnard, 8 Allen, 314)

The statute relied upon by the defendant in Bickford v. Barnard, *supra*, is explicit that "all demands against the debtor for or on account of goods or chattels wrongfully obtained, taken or withheld by him, may be proved and allowed as debts" to the amount of the value thereof; and it is also provided, in St. 1838, ch. 163, § 7, Genl. Sts. of Mass. ch. 118, § 76, that such demands shall be barred by the discharge granted to the debtor. It was remarked by the court that, "When trespass is of mixed character, and the claim for damages includes an injury caused by the breach of a close as well as by a taking of chattels, there can be no embarrassment in distinguishing between these two elements of damage and making a severance of them, so that the party injured may prove his claim for the conversion of personal property and retain his right of action for injury to the realty. They are distinct substantive grounds of damage, having no necessary connection with each other, and readily susceptible of being separately established by evidence. Nor would a satisfaction of one portion of the damage as a distinct ground of claim operate to discharge or release the others."

The case of Hapgood v. Blood, 11 Gray, 400, very widely differs from Bickford v. Barnard, *supra*. The former was an action in which the whole damages claimed were for injuries to land. The defendant set up his discharge in insolvency as a bar to a part of the plaintiff's claim, which embraced the value of timber which the defendant had cut down and carried away. But it was held that such a claim was not provable as a debt, nor barred by a discharge under the insolvent laws. It was not a demand in whole or in part for goods or chattels which the defendant had taken and converted, but solely for injury to real estate, which was clearly not included among the claims enumerated in the statute which could be proved against the estate of the defendant.

trespass for taking down and removing a building belonging to the plaintiff, the following instruction was held correct: That "if the defendant acted *bona fide* under a claim of right, doing no wanton or unnecessary injury, the value of the property destroyed was the proper and legal rule of damages; but if the transaction was wanton and malicious, the jury might find something more."[1] In an action for entering the plaintiff's premises and fastening a hand-bill to his door, it was held proper for the jury in estimating the damages to consider the nature of the hand-bill.[2] In Davenport v. Russell,[3] the declaration alleged that the defendant at twelve o'clock at night, in the absence of the plaintiff (which was known to the defendant), with force and arms broke and entered the plaintiff's dwelling-house with intent to ravish the plaintiff's wife, broke and entered the bedroom where his wife slept, drove her from the bedroom into the garret of the house, where to avoid the defendant she concealed herself; and then and there while in said house, with like force, pulled the children out of bed and threatened to kill them and burn the house unless the wife would appear and submit; and then and there broke the glass in the house and did much injury to the same, and greatly disturbed, terrified and injured the plaintiff's family, put his wife in fear and endangered her life and health. It was held that the foregoing was admissible in evidence to aggravate the damages. The court remarked that were it otherwise, the amount of damages must be the same for raising a latch and entering a house without license as for a like entrance accompanied with the most aggravating circumstances. Where trespass on land was committed by the defendant in a violent, high-handed manner, though under the belief that he had a right to go there, five hundred dollars was held not to be excessive damages.[4] On the other hand, in another case, the defendants being engaged in cutting timber on their own tract,

[1] Curtiss v. Hoyt, 19 Conn. 154; see Sutton v. Lockwood, 40 Conn. 318.
[2] Ogden v. Gibbons, 2 South. 518.
[3] 5 Day, 145.
[4] Golding v. Williams, Dudley, S. C. 92.

mistook their true boundary, and cut saw logs on the adjoining tract of the plaintiff. The logs having been driven to a boom in the Susquehanna river by the defendants, it was held that the measure of damages was the value of the logs in the boom, less the cost of cutting and hauling them to the river and driving them to the boom.[1] *

30. *Costs.*

§ 1110. Under a statute which provided that the courts, "in all actions triable before them, be authorized to limit and allow such bills of costs as law and justice shall require," it was held that where the plaintiff included several distinct trespasses in several counts in the same declaration, and prevailed as to part, and the defendant succeeded as to the residue, each party was entitled to the costs of the issues found for him.[2] † In Massachusetts, it is not sufficient to en-

[1] Herdic v. Young, 55 Penn. St. R. 176; and see Tahoola &c. Mining Co. v. Irby, 40 Ga. 479.

[2] Meacham v. Jones, 10 N. Hamp. 126.

* In Massachusetts, the statute (Rev. Sts. ch. 105, § 12) provides that "when any trespass on lands shall have been casual and involuntary, the trespasser may tender to the party injured sufficient amends before any action is brought on the same, and if afterwards sued for such trespass, he may in his plea disclaim all title to the land, and set forth the tender in the usual form, *bringing into court* the money so tendered; and if upon the trial the allegations in the plea shall appear true, and the damages assessed for the trespass shall not exceed the amount so tendered, the defendant shall recover his costs of the suit." In Warren v. Nichols, 6 Metc. 261, a point taken by the plaintiffs was, that although the tender of amends under the above statute was made before action brought, yet the money was not brought into the Court of Common Pleas until the second term of that court. The Supreme Court, per Shaw, C. J., in holding the tender sufficient, said: "We are of opinion that by the terms of the statute the defendant brings his money into court seasonably if he pays it in when he files his plea, and as it appears in the rules of the Court of Common Pleas, the general issue might be filed, and was filed at the second term, and the money was then brought in, the defendant did not lose the benefit of his tender by not bringing it in sooner. The defendant was undoubtedly bound to make good his plea by showing that he was always ready, from the time of the tender to the time of the plea. If the plaintiffs doubted his sincerity, or wished at any time to take the amount tendered, it was in their power at any time to demand it, and if the defendant had, on any reasonable demand, neglected or refused to pay it, he would have lost the benefit of it."

† In Meacham v. Jones, *supra*, the first count of the declaration was trespass *quare clausum fregit*, and the others for taking and carrying away hay and corn fodder. The counts were for separate causes of action on distinct tracts of land. As to part of the close described in the first count, the defendant pleaded soil and freehold, and thus justified the acts there alleged. Upon the trial, this issue was found for the defendant. The general issue was pleaded to the other

title the defendant to recover his costs under the statutes[1] which give costs to the defendant as well as to the plaintiff, in cases where a verdict is rendered upon one or more counts for the plaintiff, and for the defendant upon one or more counts, that there were several different counts in the declaration, and that he has prevailed in one or more of them. The statute only applies to cases where there are different counts upon distinct causes of action.[2]

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counts, and upon them the plaintiff recovered. Each party was allowed his costs upon the issues found for him. The Supreme Court, per Wilcox, J., said: "The rule adopted in the court below is manifestly the one demanded by the equity of the case. The plaintiff has tried several and distinct claims, and has failed in the most essential part. He ought not to be permitted to throw all the expense of this litigation upon the defendant. What justice requires is, that so far as the plaintiff has prevailed he should recover his costs; and so far as the defendant has succeeded he should have the same recovery. Are we restrained, by any inexorable and unquestioned rule of law, from thus doing exact justice to both parties? In this State, in replevin, where the plaintiff recovers as to part, and the defendant as to the residue, both parties are allowed their costs. And although this is said to be an exception to the general rule, yet we cannot perceive any substantial difference, in this respect, between the action of replevin and trespass for several trespasses entirely distinct and separate in their character.

Under the statute of Massachusetts (Rev. Sts. ch. 121, § 3), restricting the costs in actions brought in a court of record, where the amount recovered does not exceed twenty dollars, it has been held that the plaintiff, in bringing the action, must govern himself by the nature of the controversy. If he believes that it will turn on a question of title to real estate, and, in that case, involve a question of great importance, although his pecuniary damages are small, he may bring his action, in the first instance, in a court of record; and if, upon the trial, the question of title to real estate arises, the plaintiff, if he recovers anything, will be entitled to his full costs (Butterfield v. Caverly, 6 Cush. 275).

Willard v. Baker, 2 Gray, 336, was an action alleging damage to real estate, to wit, a building parcel of real estate, consisting of lands and buildings, of which the plaintiffs held title as reversioners, and averring that the defendant was tenant for years. The defendant, in his answer, admitted that he pulled down and removed the building, "but whether the same belonged to the plaintiffs he has no knowledge, and can neither admit nor deny, but leaves the plaintiffs to prove." The question was, whether or not the plaintiffs were entitled to full costs. The court remarked that some of the excepted cases in which full costs were allowed by statute were "actions of trespass on real estate, and all others in which the title to real estate may be concerned;" that they were inclined to think that this case came under the exception as an action of trespass to real estate; but if not, it came under the other exception as an action in which the title to real estate was concerned; and in either event the plaintiffs, though they had recovered a sum not exceeding twenty dollars, were entitled to full costs.

In an action of trespass for breaking and entering a dwelling-house, and taking and selling goods, the plaintiff is not entitled to recover the costs of setting aside a warrant of attorney and all subsequent proceedings under which the trespass was committed (Holloway v. Turner, 14 L. J. N. S. 143; 9 Jur. 160).

[1] Rev. Sts. of Mass. ch. 121, § 16. [2] Elder v. Bemis, 2 Metc. 599.

31. *The verdict must be certain.*

§ 1111. A verdict which is not sufficiently definite, will be set aside for uncertainty. Where, in an action for treading down and destroying the plaintiff's grass, the defendant justified under a right of way, and the plaintiff traversed the right of way, and newly assigned other trespasses committed in other and different parts of said close, it was held that a general verdict of guilty was bad.[1] To a declaration for trespass on land, the plea was, 1, the general issue; 2, *liberum tenementum* with a justification. It was held that a verdict of guilty on the first issue, and not guilty on the second, must be set aside for uncertainty.[2] *

§ 1112. Although a distributee may recover his share of the land against a trespasser, and may, if he sue for the whole, recover the portion to which he is entitled, yet the verdict must state with certainty what is found for the plaintiff. Where, therefore, the verdict was as follows: "We find for the plaintiffs their undivided distributive portions of the land in dispute as described in a certain resurvey plot, dated, &c.; it was held too indefinite, and a new trial was granted.[3] But a verdict reciting that the relator was possessed as tenant for years, is sufficient without setting forth the term.[4]

§ 1113. The finding of a justification of the acts of trespass where the only answer is a denial, is error. Where, therefore, under such an answer and trial, there was a finding

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[1] Cheswell v. Chapman, 42 N. Hamp. 47. [2] Turner v. Beatty, 4 Zab. 644.

[3] Jones v. Owens, 5 Strobh. 134; but see Taylor v. White, 1 Monr. 37.

[4] Sherrill v. Nations, 1 Ired. 325.

* Mooers v. Allen, 2 Wend. 247, was an action of trespass for cutting and carrying away timber. The declaration contained four counts, one of which was under the statute. A general verdict was rendered. Upon a motion by the plaintiff for treble damages, and treble costs, the court, per Marcy, J., said: "The verdict being general, the court cannot say that the jury found the defendant guilty on the count under the statute. The plaintiff does not, therefore, show that he is entitled to treble costs. The motion must be denied with costs."

If the plaintiff die after verdict in his behalf, but before judgment, the judgment will be entered as of the term in which the verdict was rendered (Goddard v. Bolster, 6 Maine, 427).

of the acts of trespass and the amount of the plaintiff's damages, but that two of the defendants were supervisors of highways acting under an order to open a highway, and that the other two were acting under their authority, and that therefore the defendants were not liable, the judgment was reversed with costs.[1]

§ 1114. A mistake which is merely formal, made by the jury in rendering their verdict, will be disregarded. In an action of trespass the jury rendered the following sealed verdict: "The evidence adduced by the plaintiff is not sufficient to prove to the jury beyond a doubt that there was a breach made in the plaintiff's close." The judge thereupon told the jury that if it was their intention to find a verdict for the defendants, it must be that they were not guilty, and that if such was not their intention, they had in fact found no verdict. The verdict of not guilty was then presented to the foreman and signed by him. The plaintiff's counsel requested that the jury might be polled. It was not done in form; but the verdict was distinctly read to them and affirmed by them collectively. Held that there was no error.[2]

32. *Verdict where the trespass was on part only of the premises.*

§ 1115. Where the plea is *liberum tenementum*, the plaintiff will recover if he show a trespass committed on any part of the close described in the declaration, to which the defendant does not show title; and the defendant, although he has pleaded title to the whole, will succeed if he show title to that part upon which he has trespassed, notwithstanding he has no title to the remainder of the close. And if the plaintiff shows trespasses on different parts, and the defendant title to some of them, the defendant will have judgment as to those parts to which he has title, and the plaintiff as to the others.[3] The plaintiff declared in trespass for

[1] Johnson v. Cuddington, 35 Ind. 43. [2] Ropp v. Barker, 4 Pick. 239.
[3] Tapley v. Wainwright, 5 B. & Ad. 395; Smith v. Royston, 8 M. & W. 381;

breaking his close, and set out the close by abuttals. The defendant justified, alleging that the said close in which, &c., was part of an allotment of six acres made by commissioners duly authorized, for certain purposes, in execution of which he entered. The plaintiff denied that the close in which, &c., was part of the six acres in the plea supposed to have been allotted; and thereupon issue was joined. It appeared that the close set out by abuttals was not all in the allotment, but that the part in which the actual trespass occurred was within it. It was held that the justification was made out.[1] Where the issue in trespass *quare clausum fregit* was, whether "the close in which, &c., was a certain close known by the name of Burgey Cleave Garden, and that the same for thirty years last past and upwards had been separated from a certain common," and the jury found that part of the garden had been inclosed within thirty years, and that the alleged trespass had been committed in the inclosed part, it was held that the defendant was entitled to a verdict, whether the words of the issue, "the close in which," &c., constituted an entire or a divisible allegation. If it was an entire allegation, it comprehended the whole of the inclosure, and in that case the plaintiff was bound to prove that the whole of the garden had been inclosed upwards of thirty years; or if it was a divisible allegation, it was confined in its meaning to the spot in which the trespass had been committed; and the jury having found that that spot had not been inclosed thirty years, it was immaterial whether the rest had been so or not.[2]

33. *Verdict in case of several defendants.*

§ 1116. If the action be against two, one may be acquitted and the other found guilty.[3] Two persons were sued

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Rich v. Rich, 16 Wend. 663; King v. Dunn, 21 Ib. 253; Dunckle v. Wiles, 6 Barb. 515; 5 Denio, 296; 11 N. Y. 420.

[1] Bassett v. Mitchell, 2 B. & Adol. 99.

[2] Richards v. Peake, 4 D. & R. 572; 2 B. & C. 918.

[3] Blackburn v. Baker, 7 Port. 284.

jointly for breaking and entering the plaintiffs' close, and cutting down and carrying away timber. The jury found that the defendants were joint trespassers in entering the plaintiff's close for the purpose of division or partition; and that as to the cutting and carrying away of the wood and timber after partition, they were distinct and independent acts of trespass committed by the defendants separately. It was held that the plaintiffs might elect either to enter a *nol. pros.* as to one of the defendants, and take judgment against the other, or they could have judgment against both for nominal damages.[1] And where, in trespass against A., B. and C., a verdict was rendered against all of the defendants, and on a motion in arrest of judgment, and for a new trial, the verdict was set aside as to A., and the motion denied as to B. and C., it was held that there was no error.[2]

34. *When the verdict should be entered distributively.*

§ 1117. Where in an action of trespass *quare clausum fregit* the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea is to be regarded distributively. If therefore a right of way with cattle or on foot only be found by the jury, a verdict will pass for the defendant in respect of such of the trespasses proved as are justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as are not so justified. The defendant in his third plea justified under an alleged right of way with horses, carts, and carriages for the purpose of fetching goods and water from a navigable river. The jury affirmed the right set up so far as it related to the fetching of water, but negatived it as to the rest. The court directed the verdict to be entered distributively, for the plaintiff as to the goods, and for the defendant as to the water.[3] But where the defend-

[1] Bosworth v. Sturtevant, 2 Cush. 392.

[2] Terpenning v. Gallup, 8 Clarke, Iowa, 74.

[3] Knight v. Woore, 5 Dowl. P. C. 201; 3 Scott, 336; 3 Bing. N. C. 3.

ant pleaded a right of way on foot, and with horses, cattle, carts, wagons and other carriages at all times for the convenient occupation of his close K.; replication traversing the right; and the jury found that the defendant had a right for the purpose of carting timber and wood only from K.; it was held that the plaintiff was entitled to the entire verdict, and that the defendant could not enter it distributively for such right as the jury found. The court, however, granted the defendant a new trial on the particular issue in question, on payment of costs, with leave to both parties to amend the pleadings.[1]

§ 1118. Where the defendant pleads a right of common of pasture for divers kinds of cattle, *e. g.*, horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict will pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified. And in all actions in which such right of way or common, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they are to be taken distributively. In an action of trespass for breaking and entering three closes, describing them by abuttals, the defendant pleaded that the said closes in which, &c., were the closes, soil and freehold of one T. L., and justifying as his servant. Replication that before the said times when, &c., and before the said T. L. had anything in the said closes in which, &c., one R. T. and his wife, in right of his said wife, one A. L. and one E. K. were seized in their demesne as of fee, of, in and to, undivided third parts, &c., of and in the said closes, in which, &c., and one A. R. was also then seized in her demesne as of fee, of and in, the other undivided third part of and in the said closes in which, &c. And the said R. T., and M., his wife, being so seized, afterwards, and

[1] Higham v. Rabbett, 5 Bing. N. C. 622.

before the said T. L. had anything in the said closes, in which, &c., to wit, on, &c., at, &c., a certain fine was had and levied of *inter alia*, the parts, shares, and interest of the said R. T. and M., his wife, of and in the said closes in which, &c., which fine was then had and levied *inter alia* to the use of P. M. C. and his heirs, during the life of the said M. T.; by virtue of which fine, the said P. M. C. became seized in his demesne as of freehold, for the term of the life of the said M., of and in the said parts, &c., of the said R. T. and M., his wife, of and in the said closes, in which, &c. And the said P. M. C., A. L., E. K., and A. R. being so seized, afterwards, and before the said T. L. had anything in the said closes in which, &c., and before the said times when, &c., demised to the plaintiff, who thereupon entered and was possessed until the defendants wrongfully broke and entered therein, &c. Rejoinder traversing the seizin of R. T. and M., his wife, A. L., E. K., and A. R. in the said closes, in which, &c.; on which issue was joined. At the trial the plaintiff proved a case as to two of the closes, but offered no evidence as to the third. It was held that the issue was distributable, and that the plaintiff was entitled to a verdict as to the two closes, and the defendant as to the third.[1]

35. *Effect of recovery in relation to title.*

§ 1119. A judgment for the defendant in an action of trespass *quare clausum*, does not necessarily settle anything beyond the particular facts of the trespass sued for. It may be rendered upon the failure of the plaintiff to prove the acts alleged, or upon his failure to prove his right of possession. Either would be sufficient to sustain the judgment for the defendant. If the proofs should make it appear that the issue by which the case had been determined was upon the right of possession, still the judgment would only determine the right of possession at the time of the commission of the trespass set forth in that case. It would

[1] Phythian v. White, 1 Mees. & W. 216.

not be conclusive upon the title, because the right of possession only, and not the title, is involved in the action of trespass. It would not be conclusive upon the right of possession even, at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or the right which the defendant had at the time of the former trial.[1] * In this respect it is un-

[1] Morse v. Marshall, 97 Mass. 519.

* M'Coy v. Hyde and Griffin, 8 Cowen, 68, was an action of trespass brought by M'Coy against Hyde and Griffin for turning him out of the possession of certain premises which were held by him under a lease from Hyde. The defendants pleaded separately and justified under the act of New York, of April 13th, 1820, authorizing summary proceedings by landlords to oust their tenants. It was proved that on the 25th of April, 1826, the defendant Hyde made an application to the other defendant Griffin (who was a judge of the county), and made the affidavit required by the act, before him. Griffin thereupon issued his notice to the tenant M'Coy, the present plaintiff, to remove from the premises, or show cause before him the next day. On that day M'Coy appeared, and by his affidavit denied the allegations in the affidavit of Hyde as to his holding over and not paying his rent. Griffin thereupon issued a venire as required by the act, and the jury, having appeared and heard the proofs and allegations of the parties, found in favor of the tenant M'Coy. After the verdict, and on the same day, Hyde again presented the same affidavit, which was the foundation of the first proceeding, to Griffin, who thereupon issued a new notice to the tenant M'Coy, who again appeared, and by his affidavit again denied the holding over, &c., upon which a new venire was issued by Griffin, returnable the next day. The jury having heard the cause, and found in favor of Hyde the landlord, Griffin issued a warrant of restitution, and M'Coy was turned out of possession, which was the trespass for which the present action was brought. The plaintiff, in the present action, contended that the issuing of the second notice, after the first verdict in his favor, and all the subsequent proceedings, were *coram non judice* and void; that it was a continuance of the original application, and not the institution of a new proceeding under the act, being founded on the original affidavit; and that, in order to authorize the issuing of a second notice, and to give the judge jurisdiction for that purpose, there should have been a new oath in writing. The judge at the circuit so charged the jury, who found a verdict for the plaintiff for $300. The defendant excepted to the charge of the circuit judge, and upon that exception, the case went to the Supreme Court. The latter court said: "The question is not whether the verdict of the jury in favor of the tenant on the first trial, was a bar to any further proceedings on the part of the landlord, but admitting the right of the landlord to institute new proceedings immediately upon a new affidavit, whether such proceedings are void as being founded on the original affidavit again presented to the judge but not sworn to anew. The act makes no provision for the entering of a judgment upon the verdict of the jury, but simply provides that if the verdict shall be for the landlord, the judge shall issue a warrant to put him into possession, but giving no directions as to what shall be done where the verdict is for the tenant, nor declaring what shall be its effect. It is undoubtedly the duty of the magistrate to preserve, as records in the cause, the affidavits of the respective parties. They are the pleadings out of which the issue or issues to be tried by the jury arise. These proceedings, like all other proceedings before inferior magistrates, are subject to be reviewed, and the magistrate may be called upon to make a return of everything that took place before him. It would seem, therefore, that the affidavit of the landlord, when once made and presented to the magistrate,

like the action of ejectment and other real actions. Yet the title may be litigated as a matter directly involved in the issue; and when that question is adjudicated and a judgment rendered in this form of action by a court of competent jurisdiction, the judgment will conclude the parties and operate as an estoppel if the matter appears on the face of the record, or as evidence conclusive in relation to the title in any subsequent litigation of the matter between them.[1] But when the defendant in ejectment seeks to show title in himself, to the premises in dispute by means of the estoppel created by the recovery in the former action, he is bound to show affirmatively that the title to those premises was passed upon in that action. When it has been apparently necessary to pass upon that question before the judgment could have been given, the record will be *prima facie* evidence for the defendant, and will be conclusive as an estoppel against the plaintiff unless evidence has been given on his part to contradict and overcome this presumption. When, however, the issue upon the title relates only to the particular spot in which the trespass is proved to have been committed, without evidence of the locality, the record cannot conclude either party; and the *onus* is upon him who seeks to avail himself of the judgment, when sufficient does not appear on the face of the record, to show by proof *aliunde*, that the title sought to be litigated in the action of ejectment was directly in controversy in the former action.[2]

§ 1120. An absolute title to the *locus in quo*, not being essential in an action of trespass *quare clausum*, the defend-

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ceases to be under the control of the landlord; and whatever may be the issue of the cause, whether the verdict may be for him or for the tenant, the affidavits, as pleadings, are a part of the proceedings in that cause, which it is the duty of the magistrate to preserve, and which cannot be used by the landlord as the foundation of a new suit or proceeding under that act. If so, then the issue of the second notice by the magistrate, and all the subsequent proceedings, were *coram non judice* and void, and the charge of the judge was correct."

[1] Saund. on Pl. & Ev. 866; 1 East, 244; Burt v. Sternburgh, 4 Cowen, 559; Small v. Haskins, 26 Vt. 209.

[2] Dunckel v. Wiles, 11 N. Y. 420; rev'g s. c. 6 Barb. 515, per Allen, J.

ant cannot be considered as admitting it to be in the plaintiff by consenting to a default; nor is he thereby estopped afterward to assert that the title was then in himself, or in another, whatever may have been the form of pleading. By submitting to a default, unless under special stipulations, he in effect withdraws the issue from the court and jury, and yields to the claim of the plaintiff without surrendering other rights.[1] * But a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded upon the same injury, but operates also as an estoppel to any action for an injury to the same supposed right of possession. This is shown in the elaborate opinion of Lord Ellenborough, in Outram v. Morewood,[2] where the whole doctrine is discussed.

§ 1121. If but one close is set out and described, and judgment passes against the defendant upon the sole plea of

[1] Dunlap v. Glidden, 34 Maine, 517; s. c. 31 Ib. 510. [2] 3 East, 346.

* In the above case, it appeared that in a former action of trespass upon the close, described in the declaration in this case between the present parties, the defendant pleaded the general issue and filed a brief statement of title in Messrs. Brann and Harriman, and that by their authority he did the acts complained of. He, however, failed to prove any such authority. In the present action, the defendant claimed to have acquired the title of Brann, and placed his defense upon it by pleading the general issue and title in himself. The question now presented was, whether he was estopped to set up that title by the adjudication in the prior suit, and it was held that he was not. The court said: "It cannot be determined by the record of the judgment, that the title of Brann was passed upon and considered in confirming the default in the prior suit. Or at most it would not afford conclusive evidence of a prior adjudication of the title, and proof *aliunde* is admissible to show that it was not, in fact, considered in the former action. And it appears that that case turned upon other considerations than the title of Brann. The defendant failed to show any evidence of license or authority under the alleged owners, and their title was of no importance to him. He had no connection with it, and it could not have afforded him any protection, whatever may have been its character. It was not material to the result, was not presented for consideration by the defendant, and could not have been determined by the court."

In Morrison *et al.* v. Chapin, 97 Mass. 72, which was an action of trespass on land, the plaintiffs claimed under a deed from one Morrison, and introduced evidence to show that they and he had acquired title to the land by adverse possession for more than twenty years. It was held that the record of an action of trespass for an alleged injury to the premises in which Morrison was defaulted previous to his conveyance to the plaintiffs, was admissible in connection with oral testimony, that the default was agreed to in writing by Morrison, as tending to contradict his testimony, and also in the nature of an admission in disparagement of title by one with whom the plaintiffs claimed to be in privity as grantees of the estate in controversy (citing Doe v. Pettett, 5 B. & Ald. 223; Brattle Square Church v. Bullard, 2 Metc. 363, 368).

liberum tenementum, the record is *prima facie* evidence of title in the plaintiff. It may be fairly presumed in that case that there is unity of title to the whole close, and consequently a presumption against the defendant having title to any part of it. And on the other hand, if a general verdict be in favor of the defendant, the same presumption arises in his favor. In both cases, however, the presumption may be rebutted by showing what was actually in controversy on the trial under this plea.[1] But where the declaration alleges that the defendant wrongfully entered upon the plaintiff's land, and sets out the close by abuttals, and describes it as containing a given number of acres, and the plea avers that the place where the alleged trespass was committed is his soil and freehold, and the issue is found in favor of the plaintiff, it does not prove that the title to the entire close was in question and adjudged in favor of the plaintiff, but only that part of the premises was found and adjudicated in his favor, and what this part was must be established by proof.[2] * Although the sole question tried was the title to the premises, the judgment will not bar another action unless it be shown that the localities of the two successive trespasses are identical.[3] †

[1] Dunckle v. Wiles, 6 Barb. 515.

[2] Ibid. 11 N. Y. 420.

[3] Morse v. Marshall, 97 Mass. 519.

* In Dunckle v. Wiles, *supra*, Allen, J., in delivering the opinion of the New York Court of Appeals, said: "The plea of *liberum tenementum* only put in issue the title to that part of the close described in the declaration upon which the alleged trespass was committed. Neither party was called upon in that action to show title to the whole close described in the pleadings, but it was enough to show title to the part in which the trespass was committed. The allegation of title was divisible. The plea admitted a trespass somewhere in the close, but not in every part of it, and upon showing title to any part it would have devolved upon the plaintiff to prove that the trespass was committed in some other part of the close, to which the defendant had not title, and upon showing this he would have entitled himself to recover." Reference was made in the foregoing opinion to the remarks of Lord Tenterden, in Bassett v. Mitchell, 2 B. & Ad. 99, that "the record under these circumstances will not be decisive evidence in a future action, nor will it as to the whole land in question, but either party may show by evidence what part it was that was affected by the result of the cause." Littledale, J., in the same case, said: "The record would be evidence of a former decision as to part of the place in dispute, and it must be shown by proof which part that was."

† Where in an action of trespass and ejectment to recover land, the facts as allowed by the judge, and conceded by both parties, show a fatal defect in the

36. *Effect of recovery as a bar to another action.*

§ 1122. A verdict in favor of the plaintiff in one action for trespass to land is conclusive in another between the same parties, of the fact and date of the trespass, and of the plaintiff's possession at that time; and his possession will be presumed to continue unless the contrary be proved.[1]

§ 1123. Where there is but one count in a declaration alleging several acts of trespass upon land, resulting in particular injuries, a judgment for some of the acts will be a bar to an action afterward brought to recover damages for the others. Goodrich v. Yale[2] was an action for wrongfully closing the plaintiffs' gate at their reservoir dam, and shutting back the water from their mill, to which the defendant pleaded a former recovery for the same cause of action. It appeared that the tort complained of in the previous action was, that on divers days the defendant entered upon the land of the plaintiffs, without right, and raised the gates of their dam, and caused the water to flow down and waste their reservoir, and at times to flood their mill, and that then by shutting the gate he took away the water from the mill. The conduct of the defendant which caused the damage was stated as a series of connected acts, occurring while the defendant was a trespasser, by entering, without right, upon the plaintiffs' land; and the answer of the defendant so treated it, denying the allegation that he had entered upon the plaintiff's land without right, and denying all the acts alleged as wrongs connected with the trespass. Upon the issues thus joined, that case was referred to assessors, "to assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court;" and judgment was entered upon their report. It was now claimed that

title of the plaintiff, and which if noticed at the trial could not have been obviated by further proof on the part of the plaintiff, courts have felt authorized to consider the point as still open upon a motion for a new trial, and to dispose of the case in such a manner as justice seems to require (Fitzpatrick v. Fitzpatrick, 6 R. I. 64, per Ames, C. J., citing Slater v. Rawson, 1 Metc. 450, and referring to Maynard v. Hunt, 5 Pick. 240).

[1] Stean v. Anderson, 4 Harring. 209. [2] 8 Allen, 454.

this judgment was not a bar to the present action, because the court did not submit to the assessors the specific ground of damage now alleged, and did not direct them to assess damages for shutting down the plaintiffs' gate. It was, however, held that the judgment in the former case was equally a bar to the present action, whether the plaintiffs recovered damages for all the acts alleged or not.

§ 1124. But when the trespasses constitute distinct causes of action, and the particular tort, the subject of the second action, was not embraced in the declaration in the first action, a recovery in the latter will not bar the former. In an action for tearing up part of a mill dam belonging to the plaintiff, it appeared that the dam extended from the land of the plaintiff, on the north side of the stream, to land on the south bank, which the plaintiff did not own, but had a right to occupy. It was proved that the defendant crossed the stream below the mill lot, and having torn up the south end of the dam, recrossed and went upon the mill lot and about the mill. It was held that the tearing up of the dam and the entry upon the mill lot were distinct trespasses, so that a recovery for one would not bar an action for the other.[1] A judgment for the recovery of land and for damages for being kept out of it, will not bar an action for the destruction of timber or other property on the same land.[2] And a recovery in an action for mesne profits will not bar an action of trespass for the removal of the rails of a fence during the period of use and occupation by the defendants.[3] *

[1] White v. Moseley, 8 Pick. 356. [2] Burr v. Woodrow, 1 Bush, Ky. R. 602.

[3] Gill v. Cole, 1 Har. & J. 403.

* Stevens v. Taft *et als.* 8 Gray, 419, was an action of trespass for breaking and entering the plaintiff's close, to which the defendants pleaded the recovery by them of a judgment on a writ of entry brought by the plaintiff to recover the same land, since which the plaintiff had acquired no new title. It was held that although the judgment in the writ of entry was conclusive evidence of the title, yet that it was not a bar to the present action. The court said: "The gist of the present action is the injury to the plaintiff's possession. The plaintiff may be entitled to possession of the estate, although he is not the owner and the defendants are. For example: The plaintiff may be in possession of the premises, under the defendants, as tenant at will or for a fixed term. He may have become so since the former judgment was rendered. Such tenancy would be en-

A judgment for trespass to land will not bar a second action for injury caused by the same trespass, but which had not accrued at the time of, and was not included in, such former judgment.[1] The recovery in forcible entry and detainer of a part of certain land will not bar an action of tresspass commmitted on another part of the same land.[2]

37. *Injunction to stay trespass.*

§ 1125. Courts of equity do not ordinarily restrain by injunction the commission of a trespass which is a source of mere temporary annoyance or discomfort, there being a

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tirely consistent with the ownership of the estate by the defendants, as determined in the former suit. A lessee, although entitled to possession of the premises as against his landlord, could not maintain a writ of entry against him for a disturbance of that possession; and, on the other hand, the landlord, although the owner in fee, could not justify a trespass on the premises leased to his tenant, by proof of his title. It follows, therefore, that although no change of title, strictly speaking, has taken place since the rendition of the former judgment, there may be facts shown to exist which may well support this action, and which were not litigated or drawn in question in the former suit" (citing Merriam v. Whittemore, 5 Gray, 316; Sawyer v. Woodbury, 7 Gray, 499).

There has been said to be a difference between real actions and personal actions, as to the conclusiveness of a judgment. In a personal action, as debt, account, &c., the bar is perpetual. For the plaintiff cannot have an action of a higher nature, but his remedy is by writ of error. But if a plaintiff be barred in a real action by judgment on a verdict, demurrer, confession, &c., he may still have an action of a higher nature, and try the same right again, because it concerns the freehold and inheritance (Dunckle v. Wiles, 6 Barb. 515, per Willard, J., citing Outram v. Morewood, 3 East, 359). The case of Wade v. Lindsey, 6 Metc. 407, seems to have been decided upon this distinction. It was a writ of entry, averring that the demandant was seized within thirty years, and had been disseized by the tenant. At the trial, the demandant gave in evidence a judgment recovered by him in May term, 1839, against the tenant in trespass for breaking and entering the demandant's premises, and pulling down a building thereon, and converting the materials to his own use. In that action, the defendant (tenant in this) pleaded the general issue, and filed a notice that he also claimed title to the premises described in the plaintiff's declaration. The jury found the defendant guilty, and assessed the damages at sixteen dollars and fifty cents, and they also found that the defendant had no title to the land, and that the soil and freehold were in the plaintiff. The demandant relied upon the judgment, among other things, to establish his title in this writ of entry. The court said: "This undoubtedly is good evidence of the demandant's right of possession; but it is not conclusive proof of his right of property, or of his title to maintain a writ of entry."

Where the defendant, in an action of ejectment, seeks to show title in himself to the premises, by means of an estoppel created by the recovery and judgment in a former action of trespass, he is bound to show affirmatively that the title to the premises in question was passed upon by the court and jury in the action of trespass (Dunckle agst. Wiles, 11 N. Y. R. 420).

[1] Hagan v. Casey, 30 Wis. 553. [2] McDonald v. Lightfoot, Morris, 450.

remedy at common law for such injuries.[1] Accordingly, where upon a bill in equity it appeared that the only injury which the plaintiff had sustained at the hands of the defendant was mud thrown upon his land in clearing out a basin, it was held that, as the plaintiff had an ample remedy at law, the court would not interfere by injunction.[2] And for the same reason the court will not interfere by restoring the party to possession, that is because he has an adequate remedy at law. But if it should think it expedient to interfere on the ground that there is not a sufficient legal remedy, it will do so by a decree the indirect effect of which will be to compel the defendant to surrender the premises.[3]

§ 1126. An injunction will, however, be granted when there is some great vexation from continued trespasses, or some irreparable mischief which cannot easily be measured by damages, as the destruction of the inheritance or of the property in the character in which it has been held and enjoyed, or where it is necessary to prevent a multiplicity of suits.[4] * A trespass is irreparable when from its nature it is impossible for a court of law to make full and complete reparation in damages, as, for example, when the trespasser is insolvent, or when, from the nature of the trespass, it is impossible to prove the damages occasioned by it.[5] Where the defendant threatened to remove part of the complainant's house, which he alleged projected upon his lot, and served a

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[1] Mortimer v. Cottrell, 2 Cox, 205; Atty. Genl. v. Hallett, 16 M. & W. 581; James v. Dixon, 20 Mo. 79; Hodgman v. Richards, 45 N. Hamp. 28.

[2] Mulvany v. Kennedy, 26 Penn. St. R. 44.

[3] Stevens v. Beekman, 1 Johns. Ch. R. 318; Jerome v. Ross, 7 Ib. 315; Hart v. Mayor &c. of Albany, 3 Paige, 213; s. c. 9 Wend. 571.

[4] Lanahan v. Gahan, 37 Md. 105; Messeck v. Board of Supervisors of Columbia County, 50 Barb. 190; Echelkamp v. Schrader, 45 Mo. 505; Weigel v. Walsh, Ib. 560; Seymour v. Morgan, 45 Geo. 201.

[5] Coulson v. Harris, 43 Miss. 728; Richardson v. Scott, 47 Ib. 236; Justices of Pike County v. Griffin, 11 Geo. 246; Bolster v. Catterlin, 10 Ind. 117; Pitt v. Cosby, 5 Jones Eq. N. C. 254.

* Where a mere trespasser digs into and works a mine, to the injury of the owner, an injunction will be granted, especially if the trespasser is insolvent (Lockwood v. Lunsford, 56 Mo 68; Mercel Mining Co. v. Fremont, 7 Cal. 317; More v. Massini, 32 Ib. 590; Thomas v. Oakley, 18 Vesey, 184).

formal written notice that he intended to do so, it was held that as a man ought not to be disturbed by force in his dwelling-house until the title was settled, which could be done and the possession recovered by ejectment, that this, though a mere trespass, was an injury of the kind that equity would restrain.[1]

§ 1127. The following are a few of the numerous cases which illustrate the general rule: A railway company became, by conveyance from a canal company, owners of a canal with lands acquired for the formation of a reservoir from which to supply water to the canal, the right of fishing and sporting over the reservoir, and for no other purpose, being reserved to the former owners. The company projected and held a regatta with aquatic sports on the reservoir, ran cheap trains, and thereby got together a concourse of persons who trespassed on the park which surrounded the mansion of a lady that adjoined the reservoir, and injured her right of fishing and sporting over the greater part of the reservoir. Notwithstanding the remonstrances of the lady, the company announced a second regatta. Upon motion in a suit by her against the company, the latter undertaking not to hold another regatta for a limited period, the court permitted the plaintiff to try her right at law against the company, and she recovered nominal damages. The undertaking having expired, the company announced another regatta on the reservoir, and the lady again moved for an injunction, which was granted.[2] In Gilbert v. Arnold,[3] the bill which was filed by the trustees of Goshen meeting-house, and the ministers and preachers appointed to have the pastoral charge of the same, alleged that one Pigman, on the 14th of August, 1790, conveyed to certain trustees and their successors an acre of land, "including a certain edifice built and set apart for divine worship therein by a society of

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[1] De Veney v. Gallagher, 20 N. J. Eq. 33.

[2] Bostock v. North Staffordshire R. R. Co. 5 De G. & S. 584.

[3] 30 Md. 29.

Christians called Methodists;" that since the execution of said deed, for a period of more than seventy years, the said meeting-house had been in the use and occupancy and under the control of the ministers and preachers of said society; that shortly after the complainants had entered upon the discharge of their duties, the defendants, and others in concert with them, not members of said religious society, commenced an unauthorized and unjustifiable use and occupancy of said meeting-house, whereby they hindered, obstructed, interrupted, and interfered with said ministers in the due progress and prosecution of their duties; that these disturbances had emboldened evil disposed persons to impede and obstruct the gospel work of said ministers by stirring up prejudices and hostility against them, threatening to take said church entirely from their control; and that without the aid of a court of equity they would suffer an indefinite continuance of the burdens under which they labored, irreparable mischief to said meeting-house, and a destruction of the same in the character in which it had been held and enjoyed. It was held that as the wrongs complained of were not trespasses of an ordinary character, for which adequate and compensatory damages could be obtained by an action at law, but were continuing, tending to deprive the complainants of their rights in the future as the past, and subversive of the plainly declared purposes of the trust upon which the church was donated, the complainants were entitled to the relief prayed. On the other hand, where the court below had granted a perpetual injunction restraining the defendant from removing certain enumerated articles of property from a hotel which the defendant claimed pursuant to a purchase of them by him at a sheriff's sale, the Supreme Court reversed the decree with costs, it being a trespass which could be adequately redressed at law.[1] * Gentil v.

[1] Clark's Appeal, 62 Penn. St. R. 447.

* Where the lessee of a farm took a part of the soil and wood for the manufacture of brick which were intended for sale, it was held that the landlord was entitled to an injunction restraining him (Livingston v. Reynolds, 2 Hill, 157).

Arnaud [1] was a controversy as to the right to the possession of a tin roof on a building in New York. The plaintiff alleged in her complaint that she had hired the whole of the second floor of the building with the privilege of using the tin roof, which was on a line with such second floor, and upon which, with the permission of the landlord, she had constructed an apartment; that the defendants, who occupied the same building, were about to cut through the tin roof and erect a sky-light therein to the injury of the plaintiff. The defendants claimed the right to the possession of the tin roof as tenants. It was held not to be a proper case for an injunction. The court remarked that the act complained of would at most be a mere trespass; that if the plaintiff had the best right to the tin roof, the defendants must pay damages for the use of it, or if the landland, after leasing to the plaintiff, gave another lease to the defendants, it might amount to a constructive eviction which would relieve the plaintiff from the payment of rent; that the parties must be left to a court of law, especially as the injury to the plaintiff was not claimed to be irreparable, nor the defendants alleged to be unable to respond in damages.

§ 1128. Courts of equity originally declined to interfere for the purpose of restraining waste or trespass, where the right was doubtful, or the defendant was in possession claiming by an adverse title. But they have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land, even where the title is in dispute, and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. The commission of waste of every kind, such as the cutting of timber, pulling down houses, working mines, &c., is a very frequent ground for the exercise of the jurisdiction of courts of equity, by restraining the waste until the rights of the parties are determined. The interference by in-

[1] 1 Sweeny N. Y. Sup. Ct. 641.

junction in these cases is placed upon the ground of preventing irreparable mischief and the destruction of the substance of the inheritance.[1] In Spear v. Cutter,[2] the case of Storm v. Mann[3] was cited in support of the proposition, that as the defendant was in possession claiming adversely to the plaintiff, and as the title was in dispute, an injunction to stay waste could not be sustained. But in the latter case the defendant had been in possession of the premises a long time, and was in possession at the time of the filing of the bill. The plaintiff had commenced an ejectment at law, and the defendant had joined issue with him on the question of title, the action was pending, and there was no allegation of the insolvency of the defendant, or that the waste which he was committing would be an irreparable injury to the premises.

§ 1129. When, however, the right or title to the place in controversy, or to do the act complained of, is doubtful and denied in the answer, a perpetual injunction will not usually be granted until a trial at law is had, settling the contested rights and interests of the parties.[4]* In Echelkamp v. Schrader,[5] the line dividing the respective lots of the plaintiff and defendant, passed, as they supposed, through the center of a double house, one-half of which was believed by them to be on the plaintiff's lot, and the other half on the defendant's, thus affording to each party a connected but independent tenement. At the commencement of the suit, the plaintiff had been in the peaceable possession of his lot about seventeen years. The house was standing on the premises at the time of the plaintiff's purchase. It was claimed, however,

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[1] Livingston v. Livingston, 6 Johns. Ch. R. 497, and cases cited; Shipley v. Ritter, 7 Md. 408; West Point Iron Co. v. Reymert, 45 N. Y. 703.

[2] 5 Barb. 486. [3] 4 Johns. Ch. R. 21.

[4] Stewart v. Chew, 3 Bland Ch. 440; Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165.

[5] 45 Mo. 505.

* Although an interlocutory injunction is in the discretion of the court, yet the discretion is not arbitrary or capricious, but is regulated by well established rules. It should not be granted unless the right is free from reasonable doubt, and the injury pressing (Gentil v. Arnaud, 38 How. 94).

that a survey showed that the plaintiff's half of the double house was in fact three feet on the defendant's ground or on ground embraced within the limits of his original lot. The defendant wishing to remove his share of the house for the purpose of rebuilding, gave the plaintiff notice of his intention to sever the house on the line dividing their respective lots. The work of sawing through the house on the alleged line of division between the lots was commenced; whereupon a temporary injunction was granted, which was afterward made permanent. It was held on appeal that only a temporary injunction should have been granted, to await the event of an action at law to test the title.

§ 1130. An injunction will be granted when it is proved that the defendant has erected an obstruction to the serious injury of the plaintiff, which is permanent in its character, so that the injury is continuing, where complete remuneration cannot be awarded in damages, or to obtain complete redress at law several suits may become necessary, or where the injury is otherwise irreparable.[1] The following facts were held to entitle the plaintiff to an injunction: That the defendant, without the plaintiff's consent, had constructed, and for several years maintained, a boom upon the river, and had confined and held therein, by means of piers and the river bank, the bank being on the plaintiff's land, large quantities of logs which naturally floated and piled together in the boom, in large masses against and upon the shore and land of the plaintiff; and that during the time the shore and bank of the river were so occupied and encumbered by the logs in the boom, the plaintiff was deprived of the free and uninterrupted use thereof, and of free access to the water of the river; and that by the action of the boom upon the water of the river, the logs were naturally forced and driven over the banks and upon the land of the plaintiff, causing damage to the same and to the herbage and trees

[1] Winnipisseogee Lake Co. v. Worster, 9 Fost. 433; Davis v. Lambertson, 56 Barb. 480.

thereof, and that the effect of the logs lying against the bank and running over the same upon the land from year to year, was naturally calculated to injure and wear away the soil and surface of the river bank.[1] *

[1] Cotton v. Miss. & Rum River Boom Co. 19 Minn. 497.

* In Barrow v. Richard, 8 Paige, 351, where the owner of a piece of ground in the city of New York divided it into lots, and sold the lots from time to time to different individuals, and the conveyances of the lots contained mutual covenants between the grantor and grantees respectively, against the erection of any livery stable, slaughter house, glue factory, &c., upon any part of the lots conveyed, or the carrying on of any manufactory, trade or business, which might be in any wise offensive to the neighboring inhabitants; it was held that the covenants in the deeds of the different lots, were for the mutual benefit of all the purchasers of lots on the block; and that although a previous purchaser from the owner of the block could not sue at law upon the covenant in the deed to a subsequent purchaser, the Court of Chancery might protect him by injunction, against the carrying on of any noxious business or trade upon the lot of such subsequent purchaser.

The jurisdiction of a court of equity to restrain by injunction a nuisance, exists for the purpose of protecting a legal right, and is not an original jurisdiction; and where no reason is shown why a plaintiff has not in the first instance proceeded to establish his right at law, the court will not, on conflicting affidavits, try the question of nuisance (Semple v. Lond. & Birmingham R. R. Co. 1 Railw. Cas. 120).

The continuance of a nuisance will be restrained whenever substantial damages might be recovered in respect to it, by action (Crump v. Lambert, 3 L. R. Eq.) A nuisance, against which a court of equity will grant an injunction, must be a material injury to property or to the comfort of those who dwell in the neighborhood. Smoke unaccompanied with noise or with noxious vapor, noise alone, and offensive odors alone, although not injurious to health, may severally constitute a nuisance. The material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence (Luscombe v. Steer, 17 L. T. N. S. 229). The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside of grounds in which entertainments with music and fire works are being given for profit, is a nuisance for which the giver of the entertainment is liable to an injunction, even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way to the satisfaction of the police (Walker v. Brewster, 5 L. R. Eq. 25).

The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of those who engage in them is, that due regard shall be had to fitness of locality. But an offensive trade or manufacture may call as legitimately for the interference of equity as any other nuisance. The right, however, to have such a business restrained, is not absolute and unlimited, but subject to reasonable limitations with reference to private interests. In cases of unquestioned public nuisance, a court of equity will not interfere by injunction, except where there is special and serious injury to the complainant distinct from that suffered by the public at large (Bigelow v. Hartford Bridge Co. 14 Conn. 565). Mere diminution of the value of the property of the party complaining, will not furnish any foundation for equitable relief (Irwin v. Dixion, 9 How. U. S. 10; Zabriskie v. The Jersey City & Bergen R. Co. 2 Beas. 314; Robeson v. Pittenger, 1 Green's Ch. R. 57). In Gilbert v. Showerman, 23 Mich. 448, the complainant had been the owner of a four story brick building in the city of Detroit for twenty years or more, the lower story of which he rented as a store, and occupied the upper stories as a dwelling-house with his family, using the roof as a place for drying clothes. Next adjoining, was another four

§ 1131. Railroad companies and other similar corporations will be restrained from taking the land or property of individuals until they have first acquired the title or paid compensation, when that is called for either by the constitution or by their charter.[1] In Bonaparte v. The Camden & Amboy R. R. Co.,[2] the court said: "That the complainant may recover damages at law is no answer to the application for an injunction against the permanent appropriation of his property for the road under a claim of right. This is deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for its interference." And when a railroad company obstructs a street in such a way as to subject the owner of a lot fronting thereon to a special injury not common to, but distinct and different from that suffered by the public, and for which he cannot be adequately compensated by damages at law, he is entitled to an injunction.[3]

§ 1132. A court of equity will entertain jurisdiction in cases of confusion of boundaries to establish lines. Although

story brick building which the defendants had fitted up as a steam flouring mill. The complainant averred that the use of the building as a mill caused great inconvenience and damage to him in the occupation of his building, and endangered its safety; that the motion of the machinery in the mill shook the complainant's building, weakened and permanently damaged the walls, and caused the doors, windows, crockery, and any other fixtures or articles that were loose in complainant's house, to rattle continuously; and that the fires of the boiler and steam engine generated large quantities of soot and cinders which were thrown upon the roof of complainant's house; that the steam condensed and fell thereon, keeping the same and the air above it foul. It was held not to be a proper case for an injunction.

In Pennsylvania, under the statute (of 1836, § 13), the courts have jurisdiction to restrain public nuisances. The mere fact that there is a remedy at law by indictment or action, will not alone prevent the exercise of the power, but the equitable jurisdiction will be confined to cases of a very plain character, where the injury is irreparable and cannot await the slow progress of legal redress. A wall of stone and timber built across a road, temporary in character, presents a case where the plaintiff should seek his redress in a court of law, and not equity (Bunnell's Appeal, 69 Penn. St. R. 59).

The defendant, after the institution of the suit for equitable relief, cannot deprive the complainant of complete redress by a partial abatement of the nuisance, thus mitigating but not removing the evil, upon the ground that the effects of such portion of the nuisance as still remained, were not of sufficient consequence to entitle the complainant to that perfect relief to which he had a right when he sought his remedy (Carlisle v. Cooper, 21 N. J. Eq. 576).

[1] Stevens v. Paterson & Newark R. R. Co. 20 N. J. Eq. 126.

[2] Baldw. 205.

[3] Balt. & Ohio R. R. Co. v. Strauss, 37 Md. 237.

they never entertain a simple suit to fix boundaries between individuals, where courts of law have jurisdiction, yet when the question is connected with matters that require the interference of equity in order to prevent multiplicity of suits, they will entertain jurisdiction and settle the boundary.[1]

§ 1133. An injunction ought not in general to be granted when the benefit secured by it to one party is of but little importance, while it will operate oppressively and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of the benefit of any consideration as to its injurious consequences.[2] In Morris & Essex R. R. Co. v. Prudden,[3] it appeared that a railroad was laid in Dickerson street, in the village of Dover, upon which Prudden's wheelwright shop and dwelling-house were situated, and the injury complained of was, that the rails so obstructed access to the front of his premises that wagons could not conveniently stand there to load and unload. But a cross street leading from Dickerson street ran alongside his premises and gave him access to the side of his lot, and thus through the rear of the lot to the back side of his house and shop, and as it did not appear that the exigencies of his business imperatively required the use of the street in front of his house or shop, it was held that he was not entitled to an injunction. But where a stream has been wrongfully diverted, a mandatory injunction will be granted to compel the wrong-doer to restore the water to its natural channel, although such restoration will be a great damage to the defendant and of small benefit to the plaintiff.[4]

§ 1134. When the court is asked to prevent the enjoyment of a privilege, such as a right of way claimed on one

[1] De Veney v. Gallagher, 20 N. J. Eq. 33.

[2] Jones v. City of Newark, 3 Stockt. 452; Hackensack Improvement Commission v. N. J. Midland R. Co. 22 N. J. Eq. 94; Hinchman v. The Paterson Horse R. R. Co. 17 N. J. Eq. 75.

[3] 20 N. J. Eq. 530.

[4] Corning v. Troy Iron &c. Factory, 40 N. Y. 191; s. c. 39 Barb. 311.

side and denied on the other, it will not grant an injunction, but will leave the parties to their legal remedy. Where, therefore, a tramroad had been made by the defendants across the farm of the plaintiff with the leave of his tenant, but without the plaintiff's knowledge and consent, who lived at a distance, the court refused to grant an injunction to restrain the defendants from entering on the land and using the tramway.[1] * But where it was agreed by parol that a water-course might be made through the defendant's land in consideration of a certain sum to be paid therefor, and the water-course was made and used for some time, and the parties failing to agree upon the amount to be paid, the defendant stopped up the water-course, the defendant was enjoined from interfering with the plaintiff's use of it, and it was referred to a master to ascertain the amount that ought to be paid.[2]

§ 1135. A court of equity will not sustain an injunction filed merely to prevent the removal of timber wrongfully cut, or for an account for waste already committed, as the plaintiff has an ample remedy for such injury at law. † But where the bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or for an account for

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[1] Deere v. Guest, 1 Myl. & Cr. 522.

[2] Devonshire v. Eglin, 20 L. J. Ch. 495.

* In Deere v. Guest, *supra*, the Lord Chancellor said: "The thing here complained of has been done. The tramroad has, with the leave of the tenant in possession, been completed, and the court is asked by the bill to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it, and from interrupting the servants and workmen of the plaintiffs in their attempts to destroy it. In other words, the court is virtually asked to eject the defendant and authorize the plaintiffs themselves to take possession of the tramroad. The case originally may have been a case of waste—waste occasioned by the cutting of the tramroad and the laying of the iron rails over the plaintiffs' land; but what is now claimed by the defendants is simply a right of way, and if they are not entitled to that right they are mere trespassers, and the plaintiffs have their proper legal remedy against them as such."

† It is obvious that an injunction cannot be maintained for past injuries or trespasses, the only remedy for them being an action at law for compensation in damages (Owen v. Ford, 49 Mo. 436).

Where in an action of trespass the defendant claims under a third party who comes in under a cross petition, the action will be stayed until a decision on the petition (Massie v. Stradford, 17 Ohio, 596).

waste already committed, the court, to avoid multiplicity of suits, will allow an account and satisfaction for what has been done, and where the mischief to the plaintiff will be irreparable, will also enjoin the defendant from removing the timber already cut.[1]

§ 1136. The court will restrain one tenant in common from the willful destruction of the common property. But where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property, which at law had been held to be an ouster, the court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, though the rent agreed to be paid by the company was three times the former rent.[2]

§ 1137. The collection of a fraudulent tax will be enjoined whenever the case is such that the motive can be legally inquired into.[3] But a tax will not be enjoined merely because it has been improperly assessed, and real estate has been levied upon and is about to be sold for its payment; nor because a sale of the land will cast a cloud upon the title.[4] Until the complainant has been compelled to pay the tax, he has sustained no injury; and when he has paid it, he can recover it back in an action at law, which furnishes an adequate remedy.[5] To give a court of equity jurisdiction to restrain the collection of an illegal tax,[6] it must be

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[1] Watson v. Hunter, 5 Johns. Ch. R. 169; Spear v. Cutter, 5 Barb. 486.

[2] Durham and Sunderland R. R. Co. v. Wawn, 3 Beav. 119.

[3] Merrill v. Humphrey, 24 Mich. 170; McBride v. City of Chicago, 22 Ill. 574; County of Cook v. Chicago &c. R. R. Co. 35 Ib. 460.

[4] Greene v. Munford, 5 R. I. 472.

[5] Brewer v. City of Springfield, 97 Mass. 152.

[6] First National Bank of Hannibal v. Meredith, 44 Mo. 500; Coulson v. Harris, 43 Miss. 728; McCoy v. Chillicothe, 3 Ohio, 370; Hine v. Stephens, 33 Conn. 497; Williams v. Mayor of Detroit, 2 Mich. 560; Burns v. Mayor &c. of Atchison, 2 Kansas, 454; Deane v. Todd, 22 Mo. 90; Sayre v. Tompkins, 23 Ib. 443; Lockwood v. City of St. Louis, 24 Ib. 20; State v. Parkville &c. R. R. Co. 32 Ib. 496; Robinson v. Gaar, 6 Cal. 273; De Witt v. Hays, 2 Ib. 469; Ritter v. Patch, 12 Ib. 298; Munson v. Minor, 22 Ill. 602; Susquehanna Bank v. Board of

averred in the bill, and shown by the facts set out therein, that a sale will be an irreparable injury to the complainant.*

§ 1138. Whatever may have been the original equities of a party, if although fully apprised of his rights, he has lain by and permitted the expenditure of large sums of money in contravention of his rights, without making complaint or objection during the progress of the work, he will thereby preclude himself from relief by injunction.[1] † In Wood v. Sutcliffe,[2] which was an application to restrain the defendants from interrupting a water right of the plaintiffs, the Vice-Chancellor said: "The principal ground upon which I conceive that I must refuse this injunction is, that the plaintiffs have not used due diligence in vindicating their rights. They stood by whilst the defendants constructed their works, and they suffered the defendants to use their works after they were constructed, from the beginning of 1845 until the beginning of 1850, a period of nearly five years, without giving them any hint that they were doing anything that they had not a lawful right to do." In Birmingham Canal Co. v. Lloyd,[3] the plaintiffs had the use of certain reservoirs, and the defendants, who owned coal mines, gave notice that they intended to make a level on their mines, the effect of which would be to draw off the water in the reservoirs; and the defendants having commenced their

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Supervisors, 25 N. Y. 312; Mutual Benefit Life Ins. Co. v. Supervisors of N. Y. 33 Barb. 322; Wilson v. Mayor, 4 E. D. Smith, 675; Crevier v. Mayor &c. of N. Y. 12 Abb. N. S. 340; White Sulphur Springs Co. v. Holly, 4 W. Va. 597.

[1] Parrott v. Palmer, 3 Myln. & K. 640; Cotching v. Bassett, 32 L. J. Ch. 286; Maxwell v. Hogg, L. R. 2 Ch. 307; Great Western R. R. Co. v. The Oxford, Worcester, and Wolverhampton R. R. Co. 3 De G. M. & G. 358; Balt. & Ohio R. R. Co. v. Strauss, 37 Md. 237.

[2] 2 Sim. N. R. 163.

[3] 18 Vesey, 515.

* An injunction will not be granted to the owner of land to restrain a stranger from vexatiously distraining on, or otherwise molesting his tenants in possession, unless the defendant is a pauper, and the wrongful acts are such that the recovery of damages at law will not constitute an adequate remedy (Hodgson v. Duce, 2 Jur. N. S. 1014).

† Where the legal right is settled, and the aid of a court of equity is required for complete relief, delay is no ground for a denial of its interposition, unless it is coupled with such acquiescence as deprives the party of all claim to equitable relief (Carlisle v. Cooper, 21 N. J. Eq. 576).

work and expended about two thousand pounds, the plaintiffs moved for an injunction. Lord Eldon said that the plaintiffs ought to have commenced their opposition when they could have done so with justice, and that as they had not applied until nearly two years after the notice was received, they must take their chances at law.

§ 1139. A court of equity will not interfere by injunction to stay the trial of an action of trespass, on the ground that the defendant has a title to the land; but it will stay the execution when an equitable element is involved, until the equities of the parties to the action at law are ascertained and adjusted. The defendant will not be allowed to take his chances in two actions respecting the same matter in controversy. He must submit to a judgment in the action of trespass before he invokes the equitable jurisdiction of the court.[1]

[1] Johnson v. McArthur, 64 N. C. 675.

CHAPTER VII.

ACTION OF TRESPASS TO TRY TITLE.

1. Nature of the action.
2. Parties.
3. Declaration.
4. Plea.
5. Evidence for the plaintiff.
6. Evidence for the defendant.
7. Verdict and judgment.
8. Writ of possession.

1. *Nature of the action.*

§ 1140. At common law, trespass *quare clausum* is not properly an action to try titles, and the question of title does not necessarily arise. But it may do so when the ownership of the premises is in dispute, and it becomes material to show who has the rightful possession. After a recovery against a person in an action of trespass, he cannot bring an action to try the title.[1] Where, however, the matter is not regulated by statute, the decision of an action of trespass settles nothing in regard to the title beyond the action tried.[2] In some of the States all fictitious proceedings in the action of ejectment are abolished, and an action of trespass is expressly given by statute to try and settle titles to real estate. But the principles of equity which are administered in ejectment are still the rules of construction for the courts in the action of trespass to try title.[3] *

2. *Parties.*

§ 1141. The person in possession may bring trespass to try title for every entry on his land by another.[4] A deed as

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[1] Thomas v. Geiger, 2 N. & M. 528.
[2] Chandler v. Walker, 1 Fost. 282.
[3] Hough v. Hammond, 36 Texas, 657.
[4] Watson v. Hill, 1 Strobh. 78.

* The statute of Texas confining the time to one year within which a second action of trespass to try title may be brought, is a statute of limitation (McMillian v. Werner, 35 Texas, 419).

follows: "I do hereby rent and lease unto the said A. one hundred acres, where he now lives, for the unexpired term of the general lease which I now hold in trust for the use of B. during her life, and to the heirs of A. after the death of the said B.," was held to vest such a legal interest of the term in A. as to enable him to maintain an action of trespass to try title, although B. had been dead several years.[1]

§ 1142. The action may be brought upon an equitable title.[2] But as a mortgage is only a security for the debt, an action of trespass to try title, cannot be maintained by the mortgagee against the mortgagor.[3] Nor can the action be brought by the assignee under an assignment of land not under seal.[4] Where the plaintiff has, *prima facie*, a good title at the time of bringing the suit, he may protect himself by buying in an outstanding title, even after the joinder of issue.[5]

§ 1143. One of several tenants in common may maintain the action against a stranger without joining his cotenants.[6] So likewise, one who buys from one of several coheirs, may maintain trespass to try title without joining the other coheirs.[7] The widow of an intestate may maintain the action to try title to the land of her deceased husband, without joining her coheirs; and objection to her suing alone, can only be taken advantage of, by plea in abatement.[8] If the action be brought by two, the discontinuance of it by one of the coplaintiffs, will not abate the entire suit, or prevent a recovery by the other plaintiff; nor will it be a ground for the reversal of the judgment, that it was rendered for one only of the plaintiffs on proof of his title.[9]

§ 1144. Where the sheriff sells land under execution as the property of a person who has no interest in the land,

[1] Johnson v. High, 3 Strobh. 141.
[2] Martin v. Parker, 26 Texas, 253.
[3] Duty v. Graham, 12 Texas, 427.
[4] Ansley v. Nolan, 6 Port. 379.
[5] Martin v. Parker, *supra*.
[6] Grassmeyer v. Beeson, 18 Texas, 753; May v. Slade, 24 Ib. 205.
[7] Perry v. Walker, 1 Brevard, 103.
[8] M'Faddin v. Haley, 1 Brevard, 96.
[9] Biencourt v. Parker, 27 Texas, 558.

but only resides on it with the owner, a joint action of trespass to try title cannot be maintained by the purchaser against the party as whose property the land was sold and the owner. The sheriff's deed not being an estoppel against the owner, it does not in a joint action operate as an estoppel against the party as whose property the land was sold.[1] A. as the heir of B. recovered against the executor of C. one-half of certain land, the executor to have the right of choice. The heirs of C. divided the tract, and then partitioned the south half among themselves, A. taking the north half. It was held that A. could maintain trespass to try title against one of the heirs who had come on his half.[2]

§ 1145. Where the entry is by a tenant, the action may be maintained against the landlord.[3]* If the action be brought against the tenant, the court may grant the landlord leave to be made a codefendant with his tenant to defend his title. But the court cannot dismiss the original wrong-doer and substitute a stranger in his stead without the consent of the injured party.[4] When the action is against a mortgagor in possession, the mortgagee, if he have the right of entry, may be made a party defendant.[5] Where a landlord through collusion, fraud, or otherwise, has had no notice of an action of trespass to try title against his tenant, he will be permitted to come in within a reasonable time after judgment against the tenant and have a new trial.[6]

3. *Declaration.*

§ 1146. The declaration must describe the land with particularity.[7] It need not, however, describe the close by

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[1] Bauskett v. Holsonback, 2 Rich. 624.

[2] Shannon v. Taylor, 16 Texas, 413.

[3] Binda v. Benbow, 11 Rich. 24.

[4] Evans v. Hinds, 2 Hill, S. C. 527.

[5] Noble v. Coleman, 16 Ala. 77.

[6] Hough v. Hammond, 36 Texas, 657.

[7] Sturdevant v. Murrell, 8 Port. 317.

* In Alabama, in an action of trespass to try title to land, the person in possession must be made defendant, and it is no defense that he holds under a will for the benefit of others (Bonner v. Greenlee, 6 Ala. 411).

its abuttals, or give it any precise identity, though it is better to do so.[1] Reference to adjoining surveys and the map of the county will be sufficient.[2] After plea pleaded, an insufficient description cannot be objected to unless it is carried into the verdict and judgment.[3] Where the declaration avers that the plaintiff was seized of the land on a specified day and month, without stating the year, it will be presumed that the time of the seizin was before the commencement of the suit.[4] In Alabama, under the statute making trespass to try title to land a substitute for ejectment, a declaration for trespass *quare clausum* containing no averment of title, or assertion that the action is to recover possession or try title, is proper.[5]

4. *Plea.*

§ 1147. The defendant need only plead the general issue, but if he claims an independent equitable right not involved in the issue of title, he must make the proper allegations and bring the necessary parties before the court.[6] * A denial of the trespass admits the plaintiff's title,[7] but a general denial puts in issue the plaintiff's right to recover.[8] If the defendant does not claim the land, he may confess the trespass, disclaim title and tender damages. But if he pleads the general issue he cannot avoid the consequences of the action.[9] He cannot set up a paramount title in a third person for the purpose of defeating a purchaser of his own title at a sheriff's sale,[10] nor can an equitable title be set up against a legal title.[11] Pleas in right of the defendant's wife as heir, and

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[1] Broughton v. Broughton, 4 Rich. 491.

[2] Croft v. Rains, 10 Texas, 520. [3] Ware v. Bradford, 2 Ala. 676.

[4] Whiteside v. Branch Bank at Decatur, 10 Ala. 249.

[5] Thrash v. Johnson, 6 Porter, 458; Carwile v. House, 6 Ala. 710.

[6] Ayres v. Duprey, 27 Texas, 593. [7] McCarron v. O'Connell, 7 Cal. 152.

[8] Hartan v. Haynie, 9 Texas, 459. [9] Watson v. Hill, 1 Strobh. 78.

[10] McElwee v. Beason, 2 Rich. 26. [11] Williman v. Robertson, 1 Brevard, 201.

* In Texas, a plea of the general issue in an action of trespass to try title answers the whole petition and admits of any defense in law or equity (Ragsdale v. Gohlke, 36 Texas, 286).

also as tenant by prescription under the statute of limitations, are not inconsistent.[1] To enable the defendant to introduce evidence of improvements, there must be a suggestion of them in the pleadings.[2]* In Alabama, the death of one of several of the parties who would have been a co-plaintiff before suit brought defeats the action, and may be pleaded either in abatement or in bar.[3]

5. *Evidence for the plaintiff.*

§ 1148. It is a rule in actions of trespass to try title that the plaintiff must recover on the strength of his own title, and not on a defect in the title of the defendant.[4] Where the plaintiffs and defendants derived their title from the same person on the same day, one by virtue of a judgment lien, and the other under a deed, and the plaintiffs failed to prove that their judgment was recorded before the execution of the deed, and consequently failed to show that at the time of the execution of the conveyance to the defendants there was any lien upon the land, it was held that they could not recover.[5] In Tally v. Thorn,[6] the defendants put in a general demurrer and general denial. Judgment by default having been rendered against them, a jury impaneled to assess the damages returned the following verdict: "We the jury find for the plaintiffs, damages at three thousand one hundred

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[1] Smith v. De La Garza, 15 Texas, 150.

[2] Rogers v. Bracken, 15 Texas, 564; Stephens v. Westwood, 25 Ala. 716.

[3] Crump v. Wallace, 27 Ala. 277.

[4] Simpson v. McLemore, 8 Tex. 448; Dalby v. Booth, 16 Ib. 563; Kinney v. Vinson, 22 Ib. 126; Harlock v. Jackson, Const. R. 135; Gambling v. Prince, 2 N. & M. 138.

[5] Hillman v. Meyer, 35 Tex. 538.

[6] 35 Tex. 727; Paschal's Digest, arts. 5292, 5293.

* In Texas, it has been held that the defendant must aver a title from some person competent to make title before he will be entitled to compensation for improvements made in good faith (Powell v. Davis, 19 Texas, 382; Ragsdale v. Gohlke, *supra*).

In Alabama, under the statute for the relief of tenants in possession against dormant titles (Dig. 652), when the defendant in an action of trespass to try title to land is in possession under color of title, he may offset the value of permanent improvements against the value of the use and occupation (Hollinger v. Smith, Ala. 367).

and eighteen dollars;" upon which the court rendered judgment that plaintiffs have and recover of the defendants the land described in their petition, and also the sum of three thousand one hundred and eighteen dollars and all costs. Held error, there being no proof or finding by the jury that the plaintiffs had title to the land. Where the defendant has not obtained possession by a tortious eviction or actual disseizin, the plaintiff must make out a perfect title;[1] but as already intimated,[2] it is sufficient if he establish a mere equitable title.[3]

§ 1149. The plaintiff need not go back of the source from which both he and the defendant claim.[4] In Iowa, the statute makes a duplicate receipt or certificate from the land office *prima facie* evidence of title.[5] Where the boundaries of the land were in controversy, it was held that the declarations and admissions of the former owner made previous to his sale of the land to the plaintiff were admissible, not for the purpose of changing the survey, but in order to determine what were the true boundaries of the sale as made.[6] When the plaintiff relies on adverse possession, the full statutory time must have run before the commencement of the action.[7] If the plaintiff gives in evidence a deed, the deed may be avoided by proving that it was obtained by duress or fraud, or that it was given for compounding a felony.[8] Where the defendant pleaded not guilty, and introduced in evidence a deed of the property from the plaintiff, it was held that the plaintiff might prove by parol that the conveyance was in fact a mortgage, but that he could not recover possession without paying up the mortgage.[9] *

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[1] Young v. Watson, 1 M'Mullan, 449.
[2] *Ante*, § 1142.
[3] Miller v. Alexander, 8 Tex. 36.
[4] Martin v. Raulett, 5 Rich. 541.
[5] Burlerson v. Teeple, 2 Greene, Iowa, 542.
[6] Bird v. Pace, 26 Tex. 487.
[7] Hood v. Palmer, 7 Rich. 138.
[8] Price v. M'Gee, 1 Brevard, 373; Mounce v. Ingram, Ib. 55, *contra*.
[9] Hannay v. Thompson, 14 Tex. 142.

* In action of trespass to try title, the plaintiff may give in evidence a notice of his title served by him on the defendant and of his intention to claim rent (Herbert v. Hanrick, 16 Ala. 581).

§ 1150. Where the plaintiff claims under a sheriff's sale, he must prove title in the judgment debtor; proof of the judgment sale and conveyance by the sheriff, and that the party was in possession, and was the reputed owner of the land at the time of the sale, not being enough. But evidence of adverse possession in such party will be sufficient to sustain the action.[1] If the plaintiff claim under an execution sale, and introduce an authenticated copy of the judgment on which the execution issued, the original execution is admissible in evidence.[2] In such case the sheriff's return, showing that there has been no sale, is not admissible to contradict the plaintiff's deed; and proof that the purchase money has not been paid is irrelevant, for the reason that it does not affect the title, and concerns only the sheriff, the purchaser, and the judgment creditor.[3] A subsequent purchaser at a sheriff's sale may prove that a prior sheriff's sale of the same land was fraudulent and void, notwithstanding no proceedings in equity have been taken setting aside such prior sale.[4] The action cannot be maintained on a sheriff's deed which is dated after the commencement of the action, although the sale was made previous thereto.[5]

§ 1151. Although when the action is against a tenant the owner of the land may, by leave of court, come in and defend, yet the plaintiff need not produce any other evidence than would have entitled him to recover against the original defendant until the party coming in has shown a title out of the defendant and in himself.[6] The plaintiff must in general show an actual trespass,[7] but proof of a threat to prevent the enjoyment of the land has been held sufficient.[8] That the plaintiff was in possession on the first of the month, and that

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[1] Sims v. Randal, 1 Brevard, 85.
[2] Stevelie v. Lowry, 2 Ib. 135.
[3] Hairston v. Hairston, 1 Ib. 305.
[4] Martin v. Raulett, 5 Rich. 541.
[5] Bank of the State v. South Car. Manf. Co. 3 Strobh. 190.
[6] Crosby v. Floyd, 2 Bailey, 116.
[7] Corneil v. Bickley, 1 M'Cord, 466; Underwood v. Sims, 2 Bailey, 81.
[8] Massey v. Trantham, 2 Bay, 421.

the defendant entered on the second, constitutes a sufficient possession at the time of the ouster.[1] *.

6. *Evidence for the defendant.*

§ 1152. Actual peaceable possession at the commencement of the suit, is a sufficient defense against any and all claims unsupported by a complete title.[2] The defendant may prove that the plaintiff's survey did not include the land claimed.[3] Under the general issue, he may give in evidence special matter of defense.[4] Under such issue, he may show a lease to him from the grantor of the plaintiff, executed previous to the conveyance to the plaintiff.[5] Proof of a lease from the plaintiff's devisor to the defendant, which had terminated several years before the commencement of the suit, of part of the land, was held to be such an admission of the plaintiff's title, as to cast the burden of proof upon the defendant.[6] Where it appears that the defendant entered as a purchaser in fee from the plaintiff, he need not go beyond the source of the plaintiff's title, though he may prove an independent title if he choose.[7] If the action be brought by a tenant in common against a cotenant who is rightfully in possession, it may be shown that the title of the plaintiff has passed from him to a stranger, although the defendant does not claim under such stranger.[8] Where the action is against a landlord and his tenant, declarations made by the tenant when he first went into possession of the land, against his title, are admissible in support of the title of his landlord.[9]

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[1] Parker v. Haggerty, 1 Ala. 632.
[2] Linthicum v. March, 37 Texas, 349.
[3] Dalby v. Booth, 16 Texas, 563.
[4] Punderson v. Love, 3 Texas, 60.
[5] Anderson v. Harris, 1 Bailey, 315.
[6] Gourdin v. Davis, 2 Rich. 481.
[7] Hill v. Robertson, 1 Strobh. 1.
[8] Jones v. Perkins, 1 Stew. 512.
[9] Wallace v. Wilcox, 27 Texas, 60.

* In an action of trespass to try title to land, brought by the vendee of land sold on execution, possession of the land, accompanied by acts of ownership by the defendant in execution previous to the possession by the defendant in trespass, having been proved, it was held that the court properly instructed the jury that the possession and improvements of the defendant in execution vested in him such a legal title as would enable him to maintain trespass against one ousting him (Badger v. Lyon, 7 Ala. 564).

7. *Verdict and judgment.*

§ 1153. When all the issues have been submitted to the jury, the court cannot inspect the evidence in order to determine what judgment to render, but are to look alone to the verdict, which must constitute the basis of the judgment.[1] In an action of trespass to try title, the jury rendered the following verdict: "We, the jury, find for the defendants." The court could infer nothing from the foregoing, other than that the plaintiffs had failed to make out a title on which they could recover; and that the defendants had also failed to establish a title under their plea. The verdict left the parties in the situation they were in before they came into court, except that the defendants were entitled to costs. The following judgment was therefore held erroneous: "It is considered, adjudged, and decreed by the court, that the said plaintiffs take nothing by their said suit; and that the said defendants do have and recover of the said plaintiffs all costs in this behalf expended. It is further considered, ordered, and decreed by the court, that the titles set up by the said plaintiffs, except the patent for the land issued by the government, do form and cast a cloud and shadow upon the title of the said defendants, and that the same are ordered to be canceled and declared to be of no validity, and for nought held; and that the said patent be delivered up to the said defendants. And it is further ordered that the said defendants have leave to withdraw from the papers in this cause, all the deeds, titles, and evidence of titles filed by them upon leaving with the clerk of this court and filing certified copies of the papers so withdrawn."[2]

§ 1154. When the verdict does not describe the land with reasonable certainty, the judgment will be reversed.[3] A verdict that "the land belongs to the plaintiff" was held sufficient on error to support a judgment for damages and costs,

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[1] Claiborne v. Tanner's Heirs, 18 Texas, 68.

[2] Johnson v. Newman, 35 Texas, 166. [3] Bennet v. Morris, 9 Port. 171.

and the award of a writ of possession.[1] If the plaintiff establish a title to any part of the land, he may have judgment for that part.[2] Where the jury find for the plaintiff a part of his claim, the verdict amounts to a finding for the defendant as to the remainder, and he may plead the former recovery in bar to a second suit on the same cause of action.[3] Accordingly, the jury having found in favor of the plaintiff "for two undivided thirds of the land in the declaration mentioned," it was held that the damages found were for detaining the two-thirds, and not the whole.[4]

§ 1155. If a verdict be rendered in favor of the plaintiff, he is entitled to rent from the time the defendant has been in possession; and a new trial will be granted if the jury only find nominal damages.[5]* Where the plaintiff has a right to recover for the rents accruing up to the time of the verdict, the judgment is conclusive that they were recovered; and it makes no difference, if the landlord was a party, that the action was against a tenant whose term expired before the entry of the judgment.[6] Where the defendant, while the action was pending, purchased, at sheriff's sale, under executions against the plaintiff, the land in dispute, it was held that the plaintiff was entitled to the damages he had sustained previous to the sale.[7] In Alabama, the plaintiff may recover beyond the amount laid in the writ and declaration;[8] but he cannot rectify an error in the amount of damages, by releasing damages and leaving the judgment for the land recovered.[9] In Texas, mesne profits may be recovered, and they may be thus denominated in the petition, although not so called in direct terms in the petition.[10]

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[1] Stephens v. Westwood, 25 Ala. 716.
[2] Scott v. Rhea, 5 Texas, 258.
[3] Dyson v. Leek, 5 Strobh. 141.
[4] Hines v. Greenlee, 3 Ala. 73.
[5] Duff v. Hutson, 2 Bailey, 215.
[6] Shumake v. Nelms, 25 Ala. 126.
[7] Stockdale v. Young, 3 Strobh. 501, note.
[8] Bumpass v. Webb, 3 Ala. 109.
[9] Hollinger v. Smith, 4 Ala. 367.
[10] Biencourt v. Barker, 27 Texas, 558.

* Damages may be claimed for trespasses committed on the land (Hillman v. Baumbach, 21 Texas, 203).

§ 1156. Where the defendant claims in right of his wife, and the land is adjudged to her, she not being a party to the record, there is no error, as it is considered that the issue is made upon the answer in which her right is asserted.[1] A finding for the defendant under the general issue is only *prima facie* evidence in his favor. It may be rebutted by parol proof that the verdict was rendered on the ground that no trespass was proved.[2]

8. *Writ of possession.*

§ 1157. Where the plaintiff recovers for only an undivided part of the land, the correct form of the writ of possession is to command the sheriff to put the plaintiff in possession of the said undivided part.[3]

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[1] Smith v. De La Garza, 15 Texas, 150.

[2] Sumter v. Lehie, Const. R. 102; see Coleman v. Parish, 1 M'Cord, 264.

[3] Dorn v. Beasley, 6 Rich. Eq. R. 408.

CHAPTER VIII.

ACTION OF TRESPASS FOR MESNE PROFITS.

1. Nature of the action.
2. When the action may be maintained.
3. Right of recovery.
4. Defense.
5. Allowance for improvements.

1. *Nature of the action.*

§ 1158. "The action of trespass for mesne profits, although a separate action, has always been considered as connected with the action of ejectment, and treated as such."[1] Anything more than a brief and cursory treatment of it here, would therefore scarcely be expected. "The mesne or intermediate profits of land are those received while the property is withheld from its rightful occupant; and when he recovers possession, the right to the mesne profits follows his recovery."[2] Under the mode of proceeding by ejectment invented by Chief Justice Rolle, and introduced at an early day into this country, the plaintiff recovered the term as laid in his demise, and nominal damages only. When by this method he recovered the possession, in fiction of law, he was remitted to his original seizin, and being so, had an action of trespass to recover the mesne profits for the whole time he was out of possession. In his declaration he laid as his cause of action his original possession, and his subsequent eviction, with a *continuando*. The effect of this was, that as every day's unlawful occupancy by his adversary was a new trespass, he recovered damages for the whole time laid, no matter how long that might be before he regained the possession. The rule that an action for trespass to land may be maintained

[1] Bouv. Inst. v. 4, p. 76.

[2] Sedgwick on Damages, 6th ed. p. 138.

upon an actual possession against a mere wrong-doer, or one who cannot show a better title in himself, is not applicable to an action of trespass for mesne profits which, as we have seen, is a supplemental remedy to the action of ejectment.[1]

2. *When the action may be maintained.*

§ 1159. The action being consequent upon a recovery in ejectment, the plaintiff is not entitled to it until after judgment in the ejectment suit; though it is not a valid objection that proceedings in error upon the ejectment are pending;[2*] but the plaintiff must have taken possession.[3]

3. *Right of recovery.*

§ 1160. The plaintiff to entitle himself to recover is bound to show: 1. That at the time the trespass mentioned in the declaration was committed, he had actual possession of the premises, or that he then had a title to them. 2. That the defendant, by some person or persons acting for him and by his authority, entered upon the possession of the plaintiff and expelled him and kept him out of possession. 3. That the defendant, by his agent or tenant, received the rents and profits of the premises while the plaintiff was kept out of possession. 4. That previous to the commencement of the action, the plaintiff had re-entered.[4†]

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[1] Brown v. McCloud, 3 Head, Tenn. 280.

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

[3] Caldwell v. Walters, 22 Penn. St. R. 378; Fry v. The Branch Bank at Mobile, 16 Ala. 282; Carson v. Smith, 1 Jones L. N. C. 106; Stancill v. Calvert, 63 N. C. 616.

[4] Ainslie v. The Mayor of N. Y. 1 Barb. 168.

* In Maryland, actions of trespass for mesne profits are within the provisions of the Code, art. 54, requiring that actions of trespass shall be commenced within three years (Tongue v. Nutwell, 31 Md. 302).

† "It would provoke much useless litigation, and be attended with great practical mischief, if an owner out of possession were suffered to harass the actual occupant with an action for every blade of grass cut or bushel of grain grown by him, instead of being compelled to resort to the action for mesne profits after a recovery in ejectment by which compensation for the whole injury may be had at one operation" (Lewis, C. J., King v. Baker, 25 Penn. St. R. 186; citing Powell v. Smith, 2 Watts, 126).

§ 1161. The judgment in ejectment is conclusive evidence of the plaintiff's right to the possession of the premises and his right to mesne profits from the service of the writ, and also that the defendant was in possession when the writ was served, and estops him from denying that he had possession, or that his possession was tortious. It is not conclusive evidence, however, of his possession after the service of the writ, and will not prevent him from showing that he abandoned or surrendered the possession to the plaintiff, or did not have it after the writ was served. But it is *prima facie* evidence that he continued in possession down to the time the writ of *habere facias possessionem* was executed.[1] Although the recovery in ejectment determines the plaintiff's right to mesne profits to the date only of the demise laid in the declaration, yet he is entitled to the rents and profits for the whole time the possession has been wrongfully withheld by the defendant, unless barred by the statute of limitations.[2] Where a person had a right to the possession of premises until the payment of a mortgage, and pending the trial of an ejectment against him by the purchaser of the title, the latter paid into court the amount of the mortgage, which the defendant declined to receive, but prosecuted a writ of error to the judgment against him, and the judgment was affirmed, it was held that the defendant was liable for mesne profits from the time of the payment into court until the surrender of the possession.[3] The tenant of a mortgagor under a lease made after the giving of the mortgage, from whom the mortgagee has recovered possession in ejectment, is only liable to the mortgagee in an action of trespass for mesne profits from the actual entry by the mortgagee.[4]

§ 1162. Where a recovery in ejectment is obtained on

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[1] Lane v. Harrold, 72 Penn. St. R. 267, and cases cited.

[2] Avent v. Hord, 8 Head, Tenn. 458; Holmes v. Davis, 19 N. Y. 488; Buntin v. Duchane, 1 Blackf. 56; Lloyd v. Nourse, 2 Rawle, 49.

[3] Zimmerman v. Eshbach, 15 Penn. St. R. 417.

[4] Sanderson v. Price, 1 N. J. 637, the chancellor and five judges concurring, four judges dissenting.

the demises of two of several tenants, in an action of trespass afterward brought for mesne profits, the mesne profits which those two tenants were entitled to can alone be recovered, whether the action be brought in the name of the fictitious lessee or of his lessors.[1] The action may, however, be maintained against a landlord who received the rents and profits and resisted the recovery in ejectment, although he was not a defendant on the record, but another person defended as landlord.[2] *

§ 1163. Under a declaration in ejectment charging the defendant with having expelled the plaintiff from the premises, taking the whole profits to himself, the plaintiff will not be allowed to prove such acts of trespass as arose from the wanton misconduct of the defendant, with a view to increase his claim for mesne profits, and which injured the intrinsic value of the premises without any benefit resulting from them to the defendant.[3] †

§ 1164. Where, in an action of trespass for mesne profits, the defendant does not plead the statute of limitations, the plaintiff is entitled to recover from the time of the demise laid in the declaration, although he would have been barred for a portion of the time, if the statute had been pleaded.[4] The statute will run from the date of the injury, although the injury was committed after the commencement of the ejectment, and the defendant prevented judgment in the ejectment suit after verdict, by an injunction.[5]

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[1] Holdfast v. Shepard, 9 Ired. 222. [2] Chirac v. Reinicker, 11 Wheat. 280.

[3] Walker v. Hitchcock, 19 Vt. 634.

[4] Buller's N. P. 88; 1 Chitty's Pl. 196; Hill v. Meyers, 46 Penn. St. R. 15.

[5] Morgan v. Varick, 8 Wend. 587.

* After the plaintiff in ejectment has obtained judgment, trespass cannot be maintained against a person who was not a party to the suit without proving an actual trespass (Alexander v. Herbert, 2 Call, 508).

† Where a tenant in common recovers in ejectment against his cotenant, and brings an action for mesne profits, the plaintiff is entitled to damages for use and occupation by the defendant, from the time the plaintiff's title vested (Critchfield v. Humbert, 39 Penn. St. R. 427).

In an action of trespass for mesne profits for a ferry landing, it is sufficient for the plaintiff to show title to the landing without proving authority for the ferry (Averett v. Brady, 20 Geo. 523).

4. *Defense.*

§ 1165. In an action for mesne profits, after recovery by default in ejectment, the defendant is precluded from setting up any defense of which he might have availed himself in the original action. Consequently he cannot be permitted to prove that he was not in possession when the declaration was served.[1] Nor can he plead in bar of the action that the rents and profits, &c., do not exceed the value of his improvements, unless such value was assessed by the court in the action of ejectment.[2]* The defendant may prove in mitigation of damages, that his possession was under a judgment.[3]

5. *Allowance for improvements.*

§ 1166. A disseizor, against whom a recovery is had in a writ of entry, has no remedy for any expenditures upon the land, even for rendering it more valuable. Whatever he does is in his own wrong, and when he is obliged by law to yield the possession, he must surrender the land in its improved state, if he has improved it.[4] It would be unjust to permit a person to enter into land without right, and make such improvements as he saw fit, and when he was called upon for the use of the property, reply that he had improved the land by the erection of buildings thereon, and thus force the

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[1] Jackson v. Combs, 7 Cow. 36.

[2] Chesround v. Cunningham, 3 Blackf. 83; Bailey v. Hastings, 15 N. Hamp. 525.

[3] Buntin v. Duchane, 1 Blackf. 56. [4] Russell v. Blake, 2 Pick. 505.

* Trespass for mesne profits between the 10th of July, 1826, and the commencement of the suit. Pleas, 1. That the plaintiff was not possessed of the premises *modo et forma;* 2. That the premises were the soil and freehold of the defendant during all the time, &c. Replication by way of estoppel to each plea, that after the 10th of July, 1826, the plaintiff commenced an action of ejectment for recovery of the same premises on a demise laid July 10th, 1826, for fourteen years, and a demise laid December 26th, 1831, for seven years, and an ouster on the 27th of December, 1831, and had judgment to recover his said terms, concluding with a prayer of judgment if the defendant ought, during the said terms, to be admitted, &c. It was held, on general demurrer, that the replication was good, and that a rejoinder stating that no writ of execution was ever issued, nor had the plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad (Doe v. Wright, 2 Per. & D. 672).

owner to pay for them. Such a rule, besides being inequitable, would furnish unscrupulous persons a strong inducement to trespass.[1] In an action of trespass for breaking and entering the plaintiff's close, and cutting and taking away timber, it was objected to the ruling of the judge that he excluded certain depositions offered by the defendant, relative to his labor, expenses, and improvements on the land where the trespass was committed. It was held that such evidence as an offset to the trespass was clearly not admissible.[2]

§ 1167. But the party in possession at the time of the trespass complained of is entitled to an allowance for the value of improvements made in good faith to the extent of the rents and profits claimed.[3] * In Mississippi, where in an action of ejectment the amount of the rents and profits due to the plaintiff's lessor, and also the value of the improvements made by the defendant were assessed, and the latter exceeded the former, it was held that the judgment should

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[1] Bailey v. Hastings, 15 N. Hamp. 525.

[2] Loomis v. Green, 7 Me. 386; and see Abbott v. Abbott, 51 Me. 575.

[3] King v. Baker, 25 Penn. St. R. 186; Jackson v. Loomis, 4 Cowen, 168.

* The owner of land having been disseized thereof, the disseizor alleged that the premises were holden by virtue of a possession and improvement for more than six years before the commencement of the action, and filed a claim to have the jury find the increased value of them by reason of any buildings and improvements. A verdict was found for the demandants, and the jury also found the value of the land and of the improvements. The demandants made their election and paid the tenant for the improvements. It appeared that certain mill logs were cut while the premises were held by virtue of that possession and improvement. But they were not cut by the tenant, or by his consent or connivance. It was held that the tenant would become the owner of wood or timber cut on the premises during that time by him or by his agency. For, all his proceedings in the management of the estate must be taken into consideration to estimate the value of the improvements or benefits to the estate. All questions respecting them would be adjusted by the finding of the jury, and no action for mesne profits could be maintained against the tenant for his acts during that time. But he could not in that estimate be made responsible for the illegal acts of others committed without his knowledge or connivance on the premises, although their value might thereby be materially diminished. The jury were not required to consider or find what damage had been occasioned by the acts of others without the fault of the tenant. The loss occasioned by such acts must, in any event, fall upon the owner of the land. Should he elect to pay for the improvements, he would receive his land diminished in value by them. Should he abandon it to the tenant the price obtained for it would have been fixed at a less sum by reason of them (Brown v. Ware, 25 Maine, 411).

have been for the defendant for such excess, and the writ of possession stayed until it was paid.[1] *

[1] Abbey v. Merrick, 27 Miss. 320.

* The statute of New Hampshire (1 N. H. Laws, 180), provides that in actions for the recovery of real estate, if the tenant "holds by virtue of a supposed legal title under a *bona fide* purchaser, and which land the occupant, or person under whom he claims, has been in the actual peaceable possession or improvement of for more than six years before the commencement of the action, the jury which tried such action, if they find a verdict for the plaintiff, shall also inquire, and by the verdict ascertain the increased value of the premises by virtue of the buildings and improvements made by such person or persons, or those under whom he or they claim, and no writ of possession is to issue until said sum is paid."

It was held in Massachusetts in Jones v. Carter (12 Mass. R. 314), under a statute somewhat similar to the foregoing, that an allowance for improvements was a bar to any recovery for mesne profits.

The civil law in similar cases made no allowance for improvements, and permitted no recovery of mesne profits. This, in some instances, might be equitable. But where the improvements were small and the mesne profits great, or *vice versa*, they would prove a disproportionate set-off to each other. The foregoing statute of New Hampshire is much more equitable, requiring as it does the improvements, whatever their amount, to be paid for on the one hand, and leaving the mesne profits, whatever their amount, to be paid for on the other hand. The law of Massachusetts, as construed in Jones v. Carter, *supra*, is not so equitable as the civil law, for it subjects the actual owner of the land both to pay for the improvements and to lose all the mesne profits. Moreover, it would be impossible for a jury in estimating the value of the improvements always to effect justice by deducting from their estimate the mesne profits, because the permanent improvements may not have exceeded ten dollars in value and the mesne natural income or profits of the land may have amounted to ten hundred dollars (Woodbury, J., in Withington v. Corey, 2 New Hamp. 115).

In Russell v. Blake (2 Pick. 505), which was an action of trespass for mesne profits, the question was, whether the defendant was entitled to be allowed for work on a well which he repaired by digging it deeper and stoning it over again after the commencement of the present actions. The Supreme Court, per Parker, C. J., in deciding in the negative, said: "There may be cases in which a defendant in an action of trespass for mesne profits may have an allowance for expenses incurred in maintaining the tenements in a condition to yield a profit, for it is the net rents and profits only which the plaintiff ought to recover. Keeping up fences to preserve the grass for mowing, labor upon land to make it productive, &c., would probably be deducted from the gross amount of profits. But new erections, or changing the character of the soil, are not of this description. The deduction claimed by the defendant in this action is for repairing a well, digging it deeper, &c. This cannot be allowed, for it is altering and making anew the well, which if the defendant chose to do it must be at his own cost, especially as he incurred this expense after the action in which the possession was claimed of him was commenced. He ought to have surrendered the possession instead of retaining it, and he has no claim in law or equity to a reimbursement of expense which he has thus voluntarily incurred."

CHAPTER IX.

PROCEEDINGS IN FORCIBLE ENTRY AND DETAINER.

1. Origin.
2. Nature.
3. Possession.
4. What constitutes offense.
5. Who may maintain.
6. Who liable.
7. Complaint.
8. Evidence for the complainant.
9. Defense.
10. Verdict.
11. Damages.
12. Judgment.
13. Appeal.
14. Writ of restitution.

1. *Origin.*

§ 1168. By the English common law, if a man had a right to enter on land, he might do so with force and arms, and retain possession by force. This state of things existed for a period of nearly three hundred years from the Norman conquest. Such practices were in accordance with the social polity of the Conqueror and his immediate descendants, but there seems to be no authentic account of their existence previous to that time. They are more in conformity with a tenure of land of some superior, whose will is the law of the tenure, converting the tenant into a menial or dependent, than with the tenure of free and common socage where the tenant is as much a freeman as the landlord, and where the rights of the humblest are as much respected and as readily vindicated by the authority of the state as are those of the most powerful.

§ 1169. As men advanced toward equality, and claimed to have their rights respected and guaranteed to them and

more carefully defined, such acts of violence became intolerable, and were among the first to be abrogated by the British parliament. The resistance of Wat. Tyler and his associates to Richard II compelled the king and the extensive landholders to consent to the statute against forcible entry into lands, even by those having a good title, and as a correlative, compelled those whose titles had expired to make summary surrender. It was accordingly enacted by 5 Richard II, that "none thenceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner." Hawkins,[1] in showing the object and necessity for the foregoing statute, says: "But this indulgence of the common law" (permitting forcible entries into lands withheld from the rightful proprietors) "having been found by experience to be very prejudicial to the public peace by giving an opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors, it was thought necessary, by severe laws, to restrain all persons from the use of such violent methods of doing themselves justice." In Fitzherbert's *Natura Brevium*, which is one of the earliest commentaries on this subject, it is said: "If a man entereth with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out of those lands or tenements, now he who is so put out by force shall not maintain an action of forcible entry against him who had title or right of entry, because that entry, at common law, or the statute of Richard II, is not any disseizin of him. But he may indict him for his entering by force, and by this indictment he shall be restored to his possession again. And in this action of forcible entry, under the statute of Henry VI, the plaintiff shall recover treble damages, as well for the occupying of the land as for the first entry." Lord Hale, in his note upon this passage, says: "He shall not maintain

[1] Vol. I, ch. 64, § 1.

an action on the statute of Richard II, but may by the statute of Henry VI. For upon examination it will be found that the statute of Richard II gave no action to the party aggrieved by being forcibly put out, and no power to the justices to make restitution, but only to fine the offender." *

2. *Nature.*

§ 1170. Proceedings under the statute to prevent forcible entry and detainer are of a peculiar and anomalous kind. They are of a mixed nature, being in substance a civil and in form a criminal prosecution. The original statutes on the subject were solely criminal in their character, and designed only to preserve public peace and restrain all persons from the use of violent means of doing themselves justice. And though in process of time, by the gradual addition of provisions looking to the restitution of the property forcibly taken or detained, the remedy has become a private rather than a public one; still the form of proceeding, and the rules of law which govern it, remain to a great degree unchanged. In New York, the statute provides that "the jurors shall be summoned, returned and impaneled in the same manner as provided by law in civil actions before justices of the peace."[1] In Illinois, the nature of the action has been changed from a criminal to a civil proceeding, solely to regain the possession,[2]

[1] Rev. Sts. of N. Y. 5th ed. v. 3, pp. 832, 833.

[2] Robinson v. Crummer, 5 Gilman, 218.

* "All the English common law writers and judges agree that under the statute of Henry VI the party thus forcibly expelled is entitled to restitution of the possession, even against him who has good title and right of possession. But they seem to have confounded what Littleton, Fitzherbert and Lord Hale say in regard to one who has no title maintaining an action for being thus forcibly expelled, against him who had the title and right of possession, and to have understood these writers as speaking of the statute of Henry VI. Or rather, they seem not always to have noted that these writers who were almost contemporary with the statute say that under the statute of Henry VI the party aggrieved may have his action for treble damages against the party expelling him by force, without regard to the title or right of possession. But as under the first English statute of Richard II no such remedy was given to the party, in many elementary writers it is said generally that no action will lie against the party making a forcible entry who has good title to enter and possess, which seems to have been inadvertently copied from the early authors, who evidently referred only to the statute of Richard II" (Redfield, J., in Dustin v. Cowdry, 23 Vt. 631).

and no limitation has been prescribed.[1] * In California, the jurisdiction of justices of the peace in forcible entry and detainer arises from the quasi criminal character of such cases which come under the head of special cases, as that term is employed in the State Constitution;[2] and the jurisdiction is not limited in amount as in civil cases.[3] But it is deemed a civil action within the statute,[4] which provides that "all persons holding as tenants, joint tenants, or coparceners, or any number less than all, may, jointly or severally, bring or defend any civil action for the enforcement or protection of the rights of such party."[5] † In Michigan, it is a substitute for the proceeding by indictment in England, and being criminal in its nature, requires the same proof.[6] The statute of forcible entry and detainer being in derogation of the common law, must be strictly construed.[7]

3. *Possession.*

§ 1171. It may be said that any possession is a legal possession as against a wrong-doer.[8] Thus, an intruder upon the king's possession may have an action against a stranger;[9] and *a fortiori* he may have a writ of forcible entry and de-

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[1] Thompson v. Sornberger, 59 Ill. 326. [2] Small v. Gwinn, 6 Cal. 447.
[3] Hart v. Moon, 6 Cal. 161. [4] Sts. of Cal. of 1857, p. 62.
[5] Bowers v. Cherokee Bob, 45 Cal. 495.
[6] Harrington v. Scott, 1 Mann. 17.
[7] Farrington v. Morgan, 20 Wend. 207; The People v. Smith, 24 Barb. 16; House v. Keiser, 8 Cal. 499.
[8] 2 Greenlf. Ev. 618. [9] Johnson v. Barret, Aleyn's R. 6.

* Under the statute of Illinois of 1861 (Gross, 301), the action is extended to "all cases between vendor and vendee, where the latter has obtained possession of the land under a contract by parol or in writing, and before obtaining a deed of the same, fails or refuses to comply with such contract to purchase. Where it appeared that the plaintiff loaned a sum of money to the defendant, and instead of a mortgage in form took an absolute deed of the defendant's land, and gave him back a contract to reconvey upon the payment of the sum loaned within one year, the money not having been paid at maturity, it was held that the relation of vendor and vendee did not exist, and that an action of forcible detainer could not be maintained (West v. Frederick, 62 Ill. 191).

† In California, causes of action under the statute concerning forcible entries and unlawful detainers, and the landlord and tenant act, are distinct and cannot be joined (Polack v. Shafer, 46 Cal. 270).

tainer against him.[1] Where a party occupies as a mere intruder, he will be confined to the land actually possessed; and where the reliance is on possession only, without exhibiting or claiming authority or title, he will be restricted to what he actually occupies.[2] A person having no possession or title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not thereby acquire possession, but may be forcibly expelled by him on discovering the fraud; and in such case, if assaults are committed in consequence, the question for the jury will be whether there has been an excess of violence.[3]

§ 1172. Although a tenancy may have expired, or a contract of purchase been forfeited, yet the occupant, until he has been expelled by lawful proceedings, may claim to be in possession seized of his original estate. And it has been held that all entries by the owner upon the lands in possession of a tenant, whose tenancy has expired, by such force as to subject him to an action for a forcible entry, are unlawful, within the meaning of the statute; and that the owner himself may, by these proceedings, be required to restore what he has thus acquired by force and violence. In such a case, he may be guilty of either forcible entry or detainer. When, however, the occupant was never in as tenant or purchaser, but by the mere license of the owner, it is clear that his occupancy does not draw to itself any estate or interest which the law recognizes as entitling him to restoration. If so, any trespasser might defy the owner when required to relinquish his occupancy.[4] *

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[1] Olinger v. Shepherd, 12 Gratt. 462.

[2] Van Horne v. Tilley, 1 Monr. 50; Hardisty v. Glenn, 32 Ill. 62; Prewitt v. Burnett, 46 Mo. 372; Harris v. Turner, Ib. 438; Ross v. Roadhouse, 36 Cal. 580.

[3] Collins v. Thomas, 1 F. & F. 416.

[4] The People v. Fields, 1 Lansing, 223; s. c. 52 Barb. 198.

* Occupancy does not necessarily embrace possession (Wright v. Mullens, 2 Stew. & Port. 219).

In Mississippi, in order to maintain an action for unlawful detainer, the wrong-doer must have entered under the plaintiff. Where, therefore, certain

§ 1173. The question of possession is a mixed one of law and fact. In The People v. Van Nostrand,[1] it was held that a party in the peaceable and actual possession of lands at the time of the forcible entry, or in the constructive possession thereof at the time of a forcible holding out, is entitled to proceed under the statute of forcible entries and detainers, although he is neither seized of a freehold nor possessed of a term of years in the premises; and also, that proof of actual possession is sufficient to support the allegation in the inquisition that the complainant was possessed in fee simple. The court remarked that the new provisions then recently introduced into the Revised Statutes of New York had brought back the statute of forcible entry and detainer to the original intent and purpose for which the numerous English acts—of which the old statute of New York was a copy—were passed, to wit, to prevent individuals from doing themselves right by force, and to protect persons in the peaceable occupation of lands from a forcible dispossession without the authority of law. In New York, previous to the Revised Statutes, the relator, to entitle himself to this remedy, was required to show that he had an estate in the premises for at least a term of years. Now, he must have an estate of freehold or for a term of years, or some other right to the possession. A tenant at will or sufferance has an estate or interest in the land, and although he occupies beyond his term he is deemed to be in possession of the estate or interest of which he was originally seized. Such a tenant may be dispossessed by summary proceedings after the expiration of the statutory notice; and if he afterward attempt to hold possession by force, the landlord may proceed against him for a forcible detainer. But the statute contemplates that the possession of the complainant shall be founded upon some right or interest in the land to entitle him to its protection.[2] For all the purposes of the

lands were sold in trust to secure a debt, and were conveyed under a power of sale by the trustees, it was held that the purchaser could not maintain such an action against the owner (Burford v. Nolan, 30 Miss. 427).

[1] 9 Wend. 50. Approved in The People v. Carter, 29 Barb. 208.

[2] The People v. Fields, *supra*.

statute, the person in possession of a building must be deemed to be also in possession of the land on which the building stands.[1] But in Maine it has been held otherwise as to a shop which is the personal property of the occupant.[2]

§ 1174. In Virginia any possession that will sustain trespass will be sufficient to maintain proceedings for forcible entry and detainer. Therefore, the jury may find for the plaintiff, although the deed under which he claims confers no title—he being only required to prove that he was forcibly dispossessed.[3] The action may, however, be maintained under the Code,[4] although the sole question is as to the validity of the title under which the defendant claims; but it only determines the right of possession.[5] In Mississippi the complainant need not have had actual possession of the premises if he have the right of possession.[6] In Tennessee A.'s tenant, upon the demand of B. and the sheriff, under a writ, attorned to B., mistakenly supposing that B. was entitled to the possession. It was held that B. could not maintain forcible entry and detainer against A.[7]

§ 1175. In New Jersey, Kentucky, South Carolina, Alabama, and California, the proceeding can only be maintained by the person who was in the actual possession of the premises at the time of the inquiry;[8] the fact of possession, and not the right to it, being the subject of inquiry.[9] Where the purchaser of land leased the same to his vendor, and at the expiration of the lease repudiated the purchase, it was held

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[1] The People v. Fields, *supra*.

[2] Field v. Higgins, 35 Maine, 339.

[3] Olinger v. Shepherd, *supra*.

[4] Code of Va. ch. 134, § 1.

[5] Corbett v. Nutt, 18 Gratt. 624.

[6] Spears v. M'Kay, Walker, 265; Holt v. Mills, 4 Sm. & Marsh. 110.

[7] Beaty v. Jones, 1 Cold. 482.

[8] Bennet v. Montgomery, 3 Halst. 48; Mairs v. Sparks, 2 South. 513; Stewart v. Wilson, 1 A. K. Marsh. 255; Pogue v. M'Kee, 3 Ib. 127; Childress v. M'Gehee, Minor, 131; Lecatt v. Stewart, 2 Stew. 474; Singleton v. Finley, 1 Port. 144; Hay v. Connelly, 1 A. K. Marsh. 393; Mansfield v. Duvall, 2 Bibb, 582; Neely v. Butler, 10 B. Mon. 48; Rurt v. The State, 3 Brev. 413; Russell v. Desplous, 29 Ala. 308; Treat v. Stuart, 5 Cal. 113; Cummins v. Scott, 23 Ib. 526; Barlow v. Burns, 40 Ib. 351.

[9] Tucker v. Phillips, 2 Metc. (Ky. R.) 416.

that he could not maintain forcible entry and detainer against a third person who entered when the vendor left.[1] *

§ 1176. Leaving personal property on the land will not preserve the possession.[2] Neither will the nailing up of the doors of a house have that effect. Such an act might show an intention that others should not possess; but it could not be construed to be a continual possession.[3] † In California, where a person cultivated a lot, and had a stable thereon immediately adjoining the lot on which he lived, it was held that he had sufficient possession to enable him to maintain an action of forcible entry and detainer, although the lot was not wholly inclosed.[4] A. and B. owned farms which were inclosed by a common fence. B. entered on A.'s land to plow it, and upon A.'s objecting, B. threatened to shoot him. It was held that this constituted a forcible entry, and that no separate fence or cultivation of the land by A. was necessary in order to enable A. to maintain an action therefor.[5] In the same State, it was held that a person in possession of land belonging to the United States, in order to maintain forcible entry and detainer, must have actually inclosed

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[1] M'Cracken v. Woodfork, 3 A. K. Marsh. 524.

[2] 3 Bac. Abr. Forcible Entry, B. [3] Hopkins v. Buck, 3 A. K. Marsh. 110.

[4] Valencia v. Couch, 32 Cal. 339. [5] Hussey v. McDermott, 23 Cal. 413.

* In California, the right of possession cannot be put in issue or tried. A deed conveying to the grantee therein named all the right and title in the land which the grantor then held, does not show or tend to show any actual possession in the plaintiff, or any actual change of possession from the grantor to the grantee (Sanchez v. Loureyro, 46 Cal. 641).

In Missouri, there can be no inquiry into the title to the land, the law forbidding a forcible entry with or without title, and it is not material whether the intruder is a mere trespasser, or enters under a paramount title. For if he has the right to the possession, he must obtain it by process of law (Dilworth v. Fee, 52 Mo. 130, referring to Stone v. Malot, 7 Ib. 158; Warren v. Ritter, 11 Ib. 354; Spalding v. Mayhall, 27 Ib. 377; Beeler v. Cardwell, 29 Ib. 72; King v. St. Louis Gas Light Co. 34 Ib. 34; Harris v. Turner, 46 Ib. 438).

† A person who incloses land with a fence, and begins to erect a house, has not such an actual and peaceable possession of the land as to entitle him to maintain an action of forcible entry and detainer against a party who has the right of possession for going on to the land on the day the plaintiff entered, destroying the fence and house and driving him away (Hoag v. Pierce, 28 Cal. 187).

The mere entry upon land and cutting timber is not of itself sufficient to sustain an action of forcible entry and detainer. But in connection with other circumstances, it may form a material link in the chain of evidence going to establish possession (Rouse v. Dean, 9 Mo. 298; Bell v. Cowan, 34 Ib. 251; Powell v. Davis, 54 Ib. 315).

the land,[1] a fence designed to inclose public land commenced, but not completed, not being sufficient.[2] But where A. entered upon a portion of public land, under the "act prescribing the mode of maintaining and defending possessory actions for lands belonging to the United States," marked out the boundaries of the land, lived on it, and was ejected by B., it was held that A. might recover the land by an action of forcible entry and detainer.[3] In Missouri, it has been held that inclosing land by a fence, is such a possession as will support an action for forcible entry and detainer, even though the possession were acquired unlawfully; and that if the fence be swept away by a flood, any act indicating an intention to hold the land, will give the actual possession.[4]

§ 1177. There need not have been actual occupancy at the time of the wrongful entry.[5] * If the inclosures are kept up and the doors of the house shut so as to show that there is no abandonment, it is sufficient. Pasturing cattle on inclosed land is a possession.[6] The possession of an agent in the name of his principal is enough, although the premises which are vacant are locked, and the key in the possession of the agent.[7] Where the plaintiff inclosed a city lot with a fence, and planted several ornamental trees along two sides of it, two months before the defendant entered, it was held that the plaintiff was in the peaceable and actual possession of the lot within the statute.[8] And where a man entered upon a vacant quarter section of public land, built a house on it in which he slept several nights, and then locking the house and taking the key with him, went to an adjoining county for his family, but found his wife too ill to be re-

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[1] Preston v. Kehoe, 15 Cal. 315.
[2] Cummins v. Scott, 20 Cal. 83.
[3] Stark v. Barnes, 4 Cal. 412.
[4] King v. St. Louis &c. Co. 34 Mo. 34.
[5] Wall v. Goodenough, 16 Ill. 415; Fowler v. Knight, 5 Engl. 43.
[6] Hopkins v. Calloway, 3 Sneed, 11; Davidson v. Phillips, 9 Yerg. 93.
[7] Minturn v. Burr, 16 Cal. 107.
[8] Gray v. Collins, 42 Cal. 152.

* Neither a fence nor a residence upon the premises is essential to constitute the peaceable and actual possession (Goodrich v. Van Landigham, 46 Cal. 601).

moved, and she remained so several months; it was held that he had a sufficient possession to maintain an action of unlawful detainer against a person who entered in his absence and refused to surrender.[1] A person bought certain land, built a log house on it, and made rails. He was then absent a fortnight, leaving his tools in the house, which he intended to occupy soon. While he was away, another person who had hired the land from another claimant, entered upon it, finished the house, built a fence around it, and having deposited some articles of his own in it, locked it up and left. The first party then resumed possession. In an action of forcible entry and detainer brought by the other against him, it was held that the defendant's possession continued during his temporary absence, and that the entry and acts of the plaintiff were trespasses.[2] In The People v. Fields,[3] one Fish moved a building which he owned and occupied as a harness shop on to land belonging to the State. In 1862, Fish sold the shop to the complainant Cooper, but remained in it as a tenant of Cooper between eight and nine months, when he left, surrendering the key to Cooper. Cooper never occupied the shop or used it, but was about to put it in order to rent it. He was in it when Fish surrendered possession and gave up the key, and he then locked it up; and the day previous to the unlawful entry by the defendant, he again went into the building. It was held that under the circumstances, Cooper was to be deemed in actual possession.

§ 1178. A natural barrier, such as a deep stream, a precipitous cliff, the shore of the ocean, and the like, may serve as a portion of an inclosure. A salt marsh covered with water to the depth of two feet at the spring tides, incapable of cultivation and unfit for habitation, inaccessible to cattle, inclosed on three sides with a substantial fence and on the fourth side fronting on a bay, or on a mud flat in the margin of the bay over which cattle cannot cross, is a suffi-

[1] Wilson v. Shackelford, 41 Cal. 680.
[2] Haley v. Palmer, 9 Dana, 320. [3] 52 Barb. 198; s. c. 1 Lans. 222.

cient inclosure to constitute actual possession. Where land permanently covered with water or consisting of a marsh or mud flat incapable of habitation or use, but nevertheless substantially inclosed, is conveyed, and the vendee asserts his title, he has possession, although at the time of the wrongful entry he had not exercised actual control over the land.[1]

§ 1179. Where one is in actual possession of a part of a tract of land and holding the whole under claim and color of title, he will in law be deemed to be in possession of the remainder, and actual occupancy of the same will not be necessary to entitle him to an action of forcible entry and detainer. There may be possession in fact of unimproved and uncultivated land. Persons owning timbered land situated separate from their farms, who are accustomed to use it for wood and rails, manifest such *indicia* of possession as to justify the finding of actual possession.[2] Where, therefore, the plaintiffs under a claim of title were clearing portions of the land, and doing acts generally done by persons who are in possession of their own property, it was held that this was sufficient to take the case to the jury, and from which they might infer actual possession; and that the being so in possession and fitting a part for cultivation, accompanied with color of title, carried the possession to the whole tract.[3] *

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[1] Conroy v. Duane, 45 Cal. 597.

[2] Harris v. Turner, 46 Mo. 438; Prewitt v. Burnett, Ib. 872; Miller v. Northup, 49 Ib. 397.

[3] Powell v. Davis, 54 Mo. 315.

* In the above case both parties claimed title. The only question was, whether the plaintiffs were in such peaceable possession as would enable them to maintain forcible entry and detainer against the defendants for the subsequent ouster. It appeared that the land in controversy was a forty acre tract mostly timbered, and situated some distance from the plaintiffs' other land; that the plaintiffs cut wood and timber and made rails off of the land, and that they got a man to clear up some five or six acres under an agreement that he should occupy the part so cleared for a year for the purposes of cultivation; that while he was engaged in clearing the land the defendants entered during his absence, erected a small shanty, and placed a tenant therein, and the following day, when the plaintiffs' man returned to his work, he was ordered off. The following instruction was held correct: 1st. That if the jury believed from the evidence that the plaintiffs were at any time within three years before the commencement of the action in the peaceable possession of the land in controversy, and while so possessed thereof, and before the action was commenced, the defendants, without

§ 1180. It is not material for what purpose the plaintiff took possession. It is sufficient if he actually entered with that view, and that the purpose was lawful; and a temporary absence will not deprive him of his rights.[1] A. took forcible possession of premises occupied by B., while B. was away; and in A.'s absence B. soon after reoccupied, with force. It was held that the temporary occupancy of A. was not such quiet and peaceable possession as entitled him to maintain forcible entry and detainer.[2] Where it appeared that the plaintiff, six months before the commencement of the action, had deserted his family, and had not returned or been heard from, and that his whereabouts were unknown, it was held that, until it was made to appear affirmatively that there had been a change of possession, it was to be presumed that his possession continued as it was, and that his wife's occupancy was a possession under him and in his right.[3] In an action for trespass committed by a landlord against his tenant, it appeared that the plaintiff, having been removed with his family and effects from the premises, under a warrant from the town, to another dwelling, on account of apprehension that the plaintiff might spread the small-pox, the landlord, while he was away, entered the premises, and after he came back, which was as soon as he was allowed to do so, kept him out by force. It was held that, as the plaintiff's absence was

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the consent of the plaintiffs and against their will, entered into and took possession, then they should find for the plaintiffs. 2d. That in order to constitute such possession in the plaintiffs it was not necessary that they should reside on the land, or stay there or keep agents or servants there, but that any act done by them upon the premises indicating an intention to hold possession was sufficient. 3d. If the plaintiffs in 1871 went upon the land with the intention of holding the same and of clearing and fitting any part of it for cultivation, and cut and corded wood thereon, and had rails made and posts cut on the same for the purpose of fencing the land or any part of it for cultivation, and in the month of May, 1871, and prior to the 9th day of the month, were proceeding to have any portion of the land cleared to have the same cultivated, then the jury were authorized to infer the actual possession of the plaintiffs at the time referred to, and if they should so find and further believe from the evidence that the defendants about the 9th day of May, 1871, entered into the possession of the said land and withheld it from the plaintiffs against the plaintiffs' will, then they should find the defendants guilty of forcible entry and detainer as charged.

[1] DeGraw v. Prior, 53 Mo. 313.

[2] Harrington v. Scott, 1 Mann. 17.

[3] Davis v. Woodward, 19 Minn. 174.

temporary and brief, without design or consent, and with no purpose of abandoning any rights he had acquired as a tenant, but with the intention of returning to the same as soon as practicable and the law would permit, it did not materially differ from an absence with one's family at church or on a journey; that consequently, when the plaintiff returned with his family and his goods, and re-entered his house, he was in possession, in the same manner as if he had not been removed; and that the act of the defendant constituted a forcible entry and detainer.[1]

4. *What constitutes offense.*

§ 1181. The kind and amount of force essential to constitute a forcible entry is treated the same both on the criminal and civil side. It is summed up by Tomlins[2] thus: "A forcible entry is only such an entry as is made with a strong hand, with unusual weapons, an unusual number of servants or attendants, or with menace of life or limb. But an entry may be forcible, not only in respect of violence usually done to the person of a man, but also in respect to any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling-house. And though a man enter peaceably, yet, if he turn the party out of possession by force, or frighten him out of possession by personal threats or violence, this also amounts to a forcible entry; but not if he merely threaten to spoil the party's goods, or destroy his cattle, or do any injury which is not of a personal nature." We shall presently show that the foregoing definition of the offense has undergone very considerable modifications in several of the States.

§ 1182. With reference to the breaking open of the doors of a house, on a trial in the King's Bench, the jury came to

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[1] Larkin v. Avery, 23 Conn. 304.

[2] L. Dict. Forcible Entry, 1. And see 2 Burns' Justice, 176; Holmes v. Holloway, 21 Texas, 658.

the bar and asked: "If one break a house, and thus enter it, no person being in the house, whether that would be a forcible entry." The court resolved that it was; though it seemed to them that if he had entered at the window, or if he had opened the door with a key, it would not have been forcible.[1] A writer[2] suggests, apparently on the authority of the same case, that putting back a bolt, and drawing the latch of a door, would be a forcible entry. There is nothing of the kind in Rolle; and Hawkins[3] very justly questions whether such trifling circumstances, which daily pass between neighbor and neighbor, would amount to force within the statute. In New York, where the owner of an unoccupied house drew out the staple which held the lock that fastened the door, and entered, it was held that he must be deemed to have taken possession peaceably, notwithstanding the former occupant, who claimed title, had continued to use it as a storehouse.[4] In Massachusetts, in a late case, which was an action of forcible entry against two, it appeared that the premises consisted of a room in a mill, which was occupied by the plaintiff, the rest of the mill belonging to the defendants; that at the time of the alleged entry, no one was in the room, but it was locked by a padlock, and the key in the possession of the plaintiff's workman, near by; that the defendants went to the mill with an axe, taking with them a workman; that having demanded the key, which was refused, they ordered their workman to enter through the floor by a hole used for throwing out slabs, which he did; and that, assisted by their workman inside, they effected an entrance by removing the clasp from the door with the axe, took possession, and kept the plaintiff out. It was held that there was not a forcible entry within the statute.[5] In Indiana, in Evill v. Conwell,[6] it appeared that A. moved out of a house, leaving a few articles in the house and on the premises, and fastening the door, and that the second

[1] 2 Roll. R. 2.
[2] Dalt. Country Justice, 418, ch. 126.
[3] B. 1, ch. 28, § 26.
[4] Corey v. The People, 45 Barb. 262.
[5] Pike v. Witt, 104 Mass. 595; Genl. Sts. of Mass. ch. 137.
[6] 2 Blackf. 133.

night afterward B. entered the house, and put a tenant therein, directing him to prevent every one, and A. especially, from taking possession, and threatening to beat and prosecute any person who should enter the premises. There was no positive evidence that B. broke open the door; but it was proved that the door was fast the evening that B. entered. It was held that B. was guilty of a forcible entry and detainer.

§ 1183. In England, to constitute a forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or the detainer should be with such numbers of persons and show of force, as is calculated to deter the rightful owner from sending the persons away and resuming his own possession.[1] Hawkins[2] says that whenever a man either by his behavior or speech, at the time of his entry gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt if they do not give way to him, his entry is forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force. And the same circumstances of violence or terror which will make an entry forcible will make a detainer forcible. V. having been in possession of a house from May to October, the defendants called there, and insisting that V. had no title, proceeded to take the keys out of the room doors. Upon their doing so, V. gave them into custody for stealing the keys; but the magistrate refused to detain them. They then returned to the house, and having procured a sledge hammer, forced the inner door of the hall, and some having entered that way, and some by a staircase window, overpowering the prosecutor's opposition, and furnished with a hatchet and other weapons, after a struggle which caused a disorderly crowd to assemble, they ejected the prosecutor and his servants. From the commencement of the proceedings until the conclusion, a female servant was in the

[1] Milner v. Maclean, 2 C. & P. 17. [2] Tit. Forcible Entries, pp. 501, 502.

kitchen. Held, assuming that the prosecutor had no title, and that the defendants had acted under those who had a good title, that the evidence was sufficient to support a conviction for a forcible entry and riot.[1]

§ 1184. In New York, in order to make an entry or detainer forcible, it must be accompanied with some circumstances of actual violence or terror; and if there be no other force than such as is implied in every trespass, it is not within the statute.* Whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, will be deemed guilty of a forcible detainer, though no attempt be made to re-enter.[2] The law is the same in Connecticut.[3] Where there was a mere ordinary entry, under claim of title, with no great or unusual force—no terror—no unusual weapons—no acts of violence—no menaces, threats, signs, or gestures which could give any ground to apprehend injury or danger from standing in defense of the possession; it was held that the case was not within the words of the statute, or the mischief it was designed to prevent.[4] Where the party not only entered, but removed a building, having with him such a number of persons as rendered it unsafe for the complainant to go again on the land, and he was told that the defendant had now got possession of the land, and intended to maintain it; it was held for the jury to say what was the meaning of this language, in view of the conduct of the defendant in removing the building and entering and occupying the premises; that if he meant to say to the complainant, you must not attempt to come on this land. I will

[1] Reg. v. Studd, 14 W. R. 806.
[2] The People v. Smith, 24 Barb. 16.
[3] Gray v. Finch, 23 Conn. 495.
[4] The People v. Smith, *supra*.

* In New York, in order to maintain an action of trespass under the statute (Rev. Sts. 5th ed. v. 3, p. 624), giving treble damages for the forcible disseizin or ejectment of any person from lands or tenements, there must be something of personal violence or a tendency to it, or threats of personal violence, unless the entry or detainer be riotous. It is for the jury to determine whether there was such violence or other manifestation accompanying any act that was done as could be construed into the least tendency to alarm the plaintiff personally (Willard v. Warren, 17 Wend. 257).

hold it at all hazards by the use of whatever force and violence may be necessary, a forcible holding out was proved.[1] In Wisconsin, although actual force and violence must be proved greater than such as constitutes a mere trespass, yet there need not have been such force and violence as would sustain an indictment at common law for forcible entry.[2]

§ 1185. In New Jersey, there must be proved force, menaces or threats, or such an occurrence as tended to excite fear or apprehension of danger.[3] But it is not necessary that there should have been fear of personal injury. Entering with actual or controlling force is sufficient; and it is for the jury to determine whether the facts amount to actual force.[4] It is the same in Iowa.[5] In North Carolina, the complainant must have had reasonable ground to apprehend bodily harm.[6] In South Carolina, a surreptitious entry, if continued by force, will be deemed forcible.[7] In Georgia, the gist of the proceeding is force on the part of the defendant.[8] In Minnesota, it is not necessary to show that the entry was accompanied with circumstances of force and violence. It is enough that it was unlawful. But the detainer must have been by force and strong hand.[9] In Kansas, the proceedings may be had in all cases "where the defendant is a settler or occupier of lands or tenements, without color of title, and to which the complainant has the right of possession."[10] *

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[1] The People v. Fields, 52 Barb. 198. [2] Jarvis v. Hamilton, 16 Wis. 574.

[3] Butts v. Voorhees, 1 Green, 13; Hendrickson v. Hendrickson, 7 Halst. 202; Brick v. Middleton, Ib. 266.

[4] Berry v. Williams, 1 N. J. 423. [5] Harrow v. Baker, 2 Greene, Iowa R. 201.

[6] The State v. Pollok, 4 Ired. 305.

[7] Burt v. The State, 3 Brevard, 413; s. c. Const. R. 489.

[8] Curry v. Hendry, 46 Geo. 631; see De Lagal v. Wallace, 48 Geo. 408.

[9] Davis v. Woodward, 19 Minn. 174. [10] Price v. Olds, 9 Kan. 66.

* In New Jersey, there need not have been notice to deliver possession (Crane v. Dod, 1 Penn. 340).

In Iowa, the action may be maintained "where the defendant has, by force or intimidation, or fraud or stealth, entered upon the prior actual possession of another in regard to real property, and detained the same" (Stephens v. McCloy, 36 Iowa, 659).

The statute of Minnesota (Genl. Sts. ch. 84, § 2) is as follows: "Any justice of the peace has authority to inquire, as hereinafter directed, as well against those who may make unlawful or forcible entry into lands or tenements and de-

§ 1186. In Alabama, it must be proved that the defend ant has forcibly entered the plaintiff's premises, and that he actually detains the possession, either by himself in person, or by another to whom, after obtaining it by force, he has delivered it to be kept by him. The mere removal of a fence will not make the entry or detainer forcible, if the defendant takes possession peaceably.[1] Neither will the defendant's declaration to a third person, that he had possession of property that was his own, and he intended to hold it if he could, have that effect.[2] But the taking possession of another's land, and sending away his slaves, was held to constitute a forcible entry.[3] And threats of bodily harm to the plaintiff, communicated to him by third persons, constitute a forcible detainer; and the character for violence of the defendant may be shown to prove that the plaintiff was apprehensive.[4]

§ 1187. In Michigan, to constitute a forcible entry under the statute, the tenant must have been forcibly expelled,[5] though there need not have been any violent measures, terror or breach of the peace. If there be "apparent authority and threat of service of a writ," or if the wrongdoer, "obtaining entry by stealth or stratagem, or without real violence, evinces his purpose, on having entered, to be that of forcible expulsion, and this is followed by actual expulsion through personal threats, violence or superior force," it will be deemed a forcible entry.[6] But evidence of mere pounding on a door, and entering upon its being opened, will not be sufficient.[7] *

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tain the same, as against those who, having lawful or peaceful entry into lands or tenements, unlawfully and forcibly detain the same; and if it is found, upon such inquiry, that an unlawful or forcible entry has been made, and that said lands or tenements are unlawfully detained by force and strong hand, or that the same, after a lawful entry, are so held or detained unlawfully, such justice shall cause the party complaining to have restitution thereof."

[1] McGonegal v. Walker, 23 Ala. 361.
[2] Matlock v. Thompson, 18 Ala. 600.
[3] Botts v. Armstrong, 8 Port. 57.
[4] Ladd v. Dubroca, 45 Ala. 421.
[5] Hoffman v. Harrington, 23 Mich. 52.
[6] Seitz v. Miles, 16 Mich. 456.
[7] Harrington v. Scott, 1 Mann. Mich. 17.

* The statute of New York, derived from 8 Hen. VI, ch. 9, has been adopted

§ 1188. In Illinois, there need not have been actual force;[1] the entering on land in the possession of another against his will, however quietly, is deemed a forcible entry,[2] and the action may be maintained by a landlord against his tenant after the determination of the lease and notice to quit.[3] But in that State, to confer jurisdiction of the proceedings upon a justice of the peace, there must either be a forcible entry or the relation of landlord and tenant must exist.[4] In Mississippi, the defendant must have known that the plaintiff was the owner and withheld the possession.[5] In Arkansas, it is not necessary to show that the defendant entered by actual force, it being sufficient that he entered unlawfully.[6]

§ 1189. In Kentucky, unless the parties are landlord and tenant, there must have been actual force with a strong hand.[7] Where, however, the landlord bought the residue of the tenant's term, and after the tenant had left allowed the premises to remain unoccupied, it was held that the bare entry of another upon the premises, with or without title, amounted to a forcible entry.[8] The plaintiff in ejectment will commit a forcible entry if he take possession without the aid of the process of the court.[9] If after judgment for the plaintiff in ejectment and removal of the defendant the latter is again found on the land, a jury may infer that the last entry was

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in Michigan (Comp. L. of Mich. § 4717). Under statute of Hen. VI (N. Y. and Mich.), the force contemplated is not merely force used against or upon property, but force used or threatened against persons as a means or for the purpose of expelling or keeping out the prior possessor. Although the breaking into a dwelling-house occupied at the time, being of itself calculated to excite terror or the fear of personal violence, may come within the statute, yet the breaking the door of a barn or out-house, or the tearing it down and removing it, and the taking and remaining in possession, unaccompanied with any force toward any person actual or threatened, and without creating in some way an apprehension of personal violence, does not do so (Shaw v. Hoffman, 25 Mich. 162).

[1] Akinson v. Lester, 1 Scam. 407; Smith v. Hoag, 45 Ill. 250.

[2] Croff v. Ballinger, 18 Ill. 200; Robinson v. Crummer, 5 Gilman, 218.

[3] Mason v. Finch, 1 Scam. 495; Prickett v. Ritter, 16 Ill. 96.

[4] Steiner v. Priddy, 28 Ill. 179. [5] Wilson v. Pugh, 32 Miss. 196.

[6] Fowler v. Knight, 5 Eng. 43.

[7] Cammack v. Macy, 3 A. K. Marsh. 296; Grughler v. Wheeler, 12 B. Mon. 188.

[8] Brumfield v. Reynolds, 4 Bibb, 388. [9] Davis v. Lee, 2 B. Mon. 300.

tortious.[1] Where in the absence of the person who is in the actual possession of land, and no party or privy to a judgment in ejectment, the sheriff under a *habere facias* puts another in possession, but neither the latter nor any one for him remains in possession, and the first mentioned person returns and continues to occupy the land, he is not guilty of forcible entry or detainer.[2] A person who enters under A. and afterward agrees to hold under B. is not liable to forcible detainer for refusing to surrender to B. at the close of the term.[3] The refusal to restore the possession may be after as well as at the expiration of the lease.[4] Entering on improved land and fitting it for cultivation constitutes a forcible entry within the statute of Kentucky, and the statute of limitations begins to run from the date of the entry.[5]

§ 1190. In Tennessee, it has been held that in order to sustain process of forcible entry and detainer there must either be actual violence or circumstances which tend to excite fear of such violence, either to the person or to the goods, houses or inclosures. Taking possession of a vacant house or farm will not constitute the offense.[6] But force will be presumed from every unauthorized entry, and from every wrongful obstruction of peaceable possession. The erection of a fence will be deemed a forcible and unlawful seizure of the possession of the land inclosed and an ouster of the plaintiff's possession.[7] The action will lie where the defendant has obtained possession under a verbal contract of purchase, and afterward repudiates the contract and assumes to hold for himself.[8] Where possession of premises is taken and held under such circumstances as show that they will not be given up without a breach of the peace, it constitutes a forcible entry and detainer, although there be no violence or out-

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[1] Kercheval v. Ambler, 4 Dana, 166.
[2] Ib. 7 J. J. Marsh. 626.
[3] Nelson v. Cox, 2 A. K. Marsh. 150; Helm v. Slader, 1 Ib. 320.
[4] Gray v. Nesbet, 2 A. K. Marsh. 35.
[5] Humphrey v. Jones, 3 Mon. 261.
[6] Hopkins v. Calloway, 3 Sneed, 11.
[7] Gass v. Newman, 1 Head, 136.
[8] Beard v. Bricker, 2 Swan, 50.

rage to either person or property.[1] A school-house was occupied by permission of A., who claimed the land on which it stood. Before the end of the school B. took possession of the house, and said that if any person attempted to dispossess him he would shoot him. It was held that this was a forcible entry and detainer.[2] *

§ 1191. In Missouri, it is not necessary to prove either force or threats, the mere entry on the land against the will of the party in actual lawful possession being sufficient,[3] and no written demand is necessary.[4] The word "disseizin" in the statute is not used in a technical sense, but means any wrongful entry without force on the actual possession of another.[5] It does not, however, constitute the offense to enter on land and cut timber.[6] A., having leased certain land of which he was in possession to B., the lease was afterward canceled and the premises surrendered to A. Shortly afterward C. was found in possession, although A. had not surrendered his possession. It was held that upon the refusal of C. to deliver the premises on demand to A., the latter might maintain an action against C. of forcible entry.[7] Where, however, the action is brought for an unlawful detention only, there must be proof of the demand of possession in writing, and a refusal by the defendant.[8] The following instruction was accordingly held correct: That if the defendants, or either of them, wrongfully and without force,

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[1] Turner v. Lumbrick, 1 Meigs, 7. [2] Van Hook v. Story, 4 Humph. 59.

[3] Dennison v. Smith, 26 Mo. 487; Wunsch v. Gretel, Ib. 580.

[4] De Graw v. Prior, 53 Mo. 313.

[5] Spalding v. Mayhall, 27 Mo. 377; Cathcart v. Walter, 14 Ib. 17.

[6] Rouse v. Dean, 9 Mo. 298; Bell v. Cowan, 34 Ib. 251.

[7] Warren v. Ritter, 11 Mo. 354. [8] Drehman v. Stifel, 41 Mo. 184.

* It has been held, in Tennessee, that if a person takes possession of the land of another as a subtenant, if he entered wrongfully, an action of unlawful detainer will lie; but it is otherwise if he entered peaceably and for himself, without any connection with the owner or tenant, the premises being vacant (Bird v. Fannon, 3 Head, Tenn. 12).

Where a person promises to give up premises when requested, and upon demand made refuses to surrender, it will be a willful and unlawful holding under the statute of Tennessee of 1821, ch. 14, and the offender is not entitled to notice to quit (Trousdale v. Darnell, 6 Yerg. 431).

by disseizin, obtained possession of the land, and continued in possession of the same at the time alleged in the complaint, the jury would find for the defendants, unless a demand was made in writing for the possession by the plaintiffs before the institution of the suit, and the defendants refused or neglected to give such possession.[1] In May v. Luckett,[2] it appeared that the plaintiff was in the actual possession of the premises by his tenant, and while so in possession, the defendant bought the premises at execution sale against the plaintiff, and took a sheriff's deed for the same. He then applied to the plaintiff's tenant to attorn to him or to surrender the possession, which the tenant refused to do, but removed from the premises before the expiration of the lease, locking the door and leaving the key in it. The next day the defendant, without the plaintiff's consent, who was then absent in another State, took possession of the premises, and continued to hold the same after demand by the plaintiff in writing. It was held that, as the defendant wrongfully and without force, by disseizin, obtained possession, he could not protect his possession by the sheriff's deed, and when he refused to surrender possession on the written demand of the plaintiff, he was guilty of unlawful detainer within the statute.[3] Where the agent of A. surrendered premises to C., without the fraud of C. or any knowledge that the agent acted beyond the scope of his authority, it was held that forcible entry and detainer would not lie by A. against C.[4]

§ 1192. In California, actual force, threats, or violence in the entry, or reasonable fear of violence to the person, must be proved, unless the detainer be riotous.[5] It is, however, the policy of the statute to avoid nice distinctions as to what constitutes force in the entry on lands.[6] Circumstances of terror, no less than violence, strong hand, breaking open doors,

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[1] Powell v. Davis, 54 Mo. 315.
[2] 54 Mo. 437.
[3] Wagn. St. of Mo. 642, § 3.
[4] Moore v. Agee, 7 Mo. 289.
[5] Frazier v. Hanlon, 5 Cal. 156; O'Callaghan v. Booth, 6 Ib. 63.
[6] Moore v. Goslin, 5 Cal. 266.

&c., are within its prohibitions. Such is the case where the entry is made at an unusual time, by a number of men, in a hasty manner, accompanied by the firing of small arms.[1] It has been held in that State, that the action may be maintained under the following circumstances: 1. When the entry is forcible. 2. When the entry is simply unlawful, and the detainer forcible. 3. When the entry is lawful, and the holding over forcible.* To constitute a forcible entry there must be personal violence, either threatened or actual, or some ingredient of fraud or willful wrong on the part of the wrong-doer.[2] It constitutes the offense for four or five men to enter in the night a building which is occupied, take possession, remain and declare that they intend to keep possession;[3] and the same, when armed men enter an inclosure and begin to build a house, and refuse to give up the possession to the person who has been peaceably occupying the premises, making a show of resistance;[4] and the same, where several persons go on to land in the possession of another, and notwithstanding his protest, build a fence, and forcibly remove him when trying to prevent the fence from being built.[5] But entering premises merely to cut and take away the grass is not a forcible entry and detainer.[6] Neither does it constitute the offense to peaceably enter on the vacant land of the plaintiff which is inclosed, build a house thereon, and live in it, and tell the agents of the plaintiff that the defendant will not leave, and that it will take a pretty good force to put him off.[7] Where the court charged the jury, that if the entry was made in the night, while the plaintiff was in the actual and peaceable possession of the premises, and the

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[1] Gray v. Collins, 42 Cal. 152.

[2] Dickinson v. Maguire, 9 Cal. 46; but see McMinn v. Bliss, 31 Ib. 122; Buell v. Frazier, 38 Ib. 693; Wilbur v. Chery, 39 Ib. 660; Conroy v. Duane, 45 Cal. 597.

[3] Scarlett v. Lamarque, 5 Cal. 63.

[4] Watson v. Whitney, 23 Cal. 375.

[5] Valencia v. Couch, 32 Cal. 339.

[6] Merrill v. Forbes, 23 Cal. 379.

[7] Polack v. McGrath, 25 Cal. 54.

* In California the action cannot be maintained under the statute of 1850, where the entry was peaceable and lawful, although the detainer is forcible (Owen v. Doty, 27 Cal. 502).

defendant took possession with the avowed intention of keeping it, and actually did keep possession, it was sufficient proof of force to maintain the action, it was held error in not making a distinction between a forcible entry and a forcible detainer, and in omitting to connect the instruction with a demand made for possession, which was proved.[1] An action for forcible entry and detainer cannot be maintained against a person who entered on land, supposing that his entry was lawful.[2] In Townsend v. Little,[3] the evidence tended to show that the premises were public surveyed land of the United States; that the defendant was in all respects a qualified pre-emptor; and that before her answer was filed, she had filed in the proper United States land office, her declaratory statement for the land. It was held this, in the absence of proof to the contrary, was sufficient evidence that she entered in good faith, believing that she had a legal right so to do.*

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[1] Fogarty v. Kelly, 24 Cal. 317.

[2] Shelby v. Houston, 38 Cal. 422; Powell v. Lane, 45 Ib. 677.

[3] 45 Cal. 673.

* In Bowers v. Cherokee Bob, 45 Cal. 495, the court laid down the following propositions: The fact that others immediately after, or even at the time of the plaintiff's entry were awaiting an opportunity to enter, but made no effort to do so, nor attempted in any manner to resist the entry of the plaintiff, or to disturb his occupation afterwards, does not tend to prove that his entry was not peaceable and his occupation actual. If the occupation of the plaintiff was acquired and maintained by threats and force, as against a third party with whom the defendants were not in privity, that fact would afford the defendants no justification in law for invading the plaintiff's occupation; in other words, it is not for a defendant to say that a plaintiff whose actual possession he has invaded had not a peaceable occupation, because some third person had threatened also to invade it, or even had resisted his original entry. If A. be in the undisputed occupation of a dwelling-house, residing in it with his family, and if during the temporary absence of the family for an hour, B. should intrude into the possession, barricade the doors, and on the return of A. immediately after, should not only refuse to surrender the possession, but deter him from entering by threats and menaces; and if A. should quietly submit to the wrong, and should leave B. for some weeks or months in undisturbed possession, B. would have acquired a peaceable possession, even as against A., which would enable him to maintain an action of forcible entry and detainer, if afterwards forcibly expelled by A. But if A., instead of quietly submitting to the wrong, had immediately come with an armed force, and had endeavored to expel B., but had for a time been successfully repulsed, and without relaxing his efforts had eventually succeeded in driving B. from the premises, B. would not have such a peaceable possession as would enable him in an action of forcible entry and detainer to evict A. and recover the possession. If a person enter upon land in the actual and peaceable occupation of another, the possession which he acquires cannot be deemed to be peaceable

§ 1193. In order to sustain a complaint for forcible detainer, it need not be proved that the entry was unlawful.* A lawful possession will be converted into a forcible detainer by a refusal to surrender the premises on demand; and the notice to leave need not be in writing, unless there was a previous tenancy under which the possession was acquired.[1] Where it appeared that the plaintiff bought the land of the defendant, who continued in possession by agreement with the plaintiff, and afterward held over with a strong hand, it was held that a case of forcible detainer was made out.[2] In Arkansas, an action for forcible and unlawful detainer may be maintained against a person if he remains in possession an unreasonable time after demand, though he does not refuse to leave. He must show that his not leaving was caused by circumstances over which he had no control; and it is no defense that he left the premises before the execution of the writ, if by his delay he had already given the plaintiff a cause of action.[3] It does not constitute a forcible detainer in Kentucky for a tenant to hold over after the expiration of his term without a refusal, actual or constructive, to surrender the premises.[4] But where it was stipulated in a lease, that upon neglect for ten days to pay the rent, the landlord might re-enter or bring suit for forcible detainer, and that

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during the time when it has to be protected by fire-arms or other demonstrations of force, against an attempted or threatened re-entry of the former occupant, who manifests to the intruder by his words and acts, that he intends to re-enter at the earliest moment when he can do so without violence, and who is only prevented from entering by an exhibition of fire-arms or threats and menaces.

[1] Wright v. Lyle, 4 Ala. 112.
[2] Barton v. Osborn, 6 Blackf. 145.
[3] Floyd v. Ricks, 6 Eng. 451.
[4] Shepherd v. Thompson, 2 Bush, 176.

* It constitutes a forcible detainer to prevent with force the owner of land from watering cattle thereon (Foster v. Kelsey, 36 Vt. 199).

In Vermont, the action may be maintained, when the entry is unlawful but peaceable and the detainer is forcible, without a previous demand in writing; and the plaintiff is entitled to recover on proof of forcible detainer alone (Ib.)

Under the statute of Missouri (Rev. Code 1835, 278), an action for a forcible detainer lies where the plaintiff has been in lawful possession, and the defendant having peaceably obtained possession, refuses to surrender the premises after a demand made in writing. Therefore a purchaser at a sale under a deed of trust cannot maintain the action against the grantor in the deed of trust (Blount v. Winright, 7 Mo. 50). So, likewise, a purchaser at a sheriff's sale cannot maintain the action against the defendant in the execution (Hatfield v. Wallace, 7 Mo. 112).

the mere non-payment of rent for ten days should entitle the landlord to commence such proceedings without giving notice, it was held that the landlord might bring suit for forcible detainer without demand of rent or notice.[1]

§ 1194. We have seen[2] that the resumption of the possession of land and houses by the mere act of the party is sometimes permitted. A declaration in trespass alleged that the defendant broke and entered the plaintiff's workshop, in which he was then inhabiting and actually present, and while he was inhabiting and actually present therein, pulled down and leveled it with the ground. Third plea that the workshop was not the plaintiff's workshop. Fourth plea, that the workshop was the workshop, soil and freehold of the defendants, and therefore justified the alleged trespasses. It was held that the justification was maintainable, and that the allegation in the declaration, that the plaintiff was, at the time of the alleged trespasses, inhabiting and actually present in the workshop, was immaterial.[3] In New York and Indiana, it has been held that a person who has a right to enter, is not liable to an action of trespass for entering with force, although he may be prosecuted for a forcible entry.[4] The Supreme Court of the former State not long since very justly observed, that from the provisions of the New York statute, it was obvious that the legislature intended to prevent all persons, however good their title or right to the possession of premises, from forcibly acquiring possession of them; that the party entitled must resort to ejectment or other legal measure to acquire possession; and that no matter how invalid the occupant's right to possession might be, still if he was in the peaceable and quiet possession of the premises, such occupancy could not be forcibly

[1] Eichart v. Bargas, 12 B. Mon. 462.

[2] *Ante*, §§ 970, 971.

[3] Burling v. Reed, 11 Q. B. 904; 14 Jur. 395.

[4] Hyatt v. Wood, 4 Johns. 150; Ives v. Ives, 13 Ib. 235; Jackson v. Morse, 16 Ib. 197; Wilde v. Cantillon, 1 Johns. Cas. 123; Estes v. Kelsey, 8 Wend. 555; Willard v. Warren, 17 Ib. 257; Higgins v. State, 7 Ind. 549.

invaded.[1] * In Massachusetts, in Mugford v. Richardson,[2] it was held that after a tenancy had been terminated by notice, the owner, who had gained peaceable possession of a portion of the premises, might use as much force as was necessary to overcome the tenant's resistance to his taking possession of the residue. And in the absence of the occupant, the owner having the right to the possession, may enter by forcing open the door, though the occupant expects to return. But when the family or servants of the tenant are left in possession of a residence upon the land, it seems that the owner cannot, after gaining possession without opposition, forcibly expel them. The subsequent force, by relation, is considered as a part of the original force, and the owner may be proceeded against for a forcible entry and detainer, although this was doubted by some of the judges in Newton v. Harland.[3] In North Carolina, the owner of a school hired a steward and gave him lodging rooms in a house within the curtilage, but not connected with the dwelling-house of the owner of the school, for which rooms the steward did not pay. It was held that the house occupied by the steward was in law the dwelling-house of the owner of the school, and that the latter would not be liable for entering and ejecting the steward, if there was no injury to his person or other breach of the peace.[4]

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[1] The People v. Fields, 52 Barb. 198, per Mullin, J.; s. c. 1 Lans. 222.

[2] 6 Allen, 76.

[3] 1 Man. & G. 644; see Turner v. Meymott, 1 Bing. 158; State v. Pridgen, 8 Ired. 84; Mussey v. Scott, 32 Vt. 82; Livingston v. Tanner, 14 N. Y. 64.

[4] The State v. Curtis, 4 Dev. & Batt. 222.

* Whether an entry by force and in breach of the peace, when those circumstances are material, can be justified by showing that the defendant was entitled to the premises and the plaintiff an intruder, *quære* (Davison v. Wilson, 11 Q. B. 890).

In The King v. Wilson, 8 Term R. 357, it appeared that the landlord and eleven assistants entered a mill and lands after the tenant's title had expired, and with force and strong hand put the tenant out of possession. On demurrer to the indictment, Lord Kenyon said: "Whether or not these facts will be proved, is another question; but if they be proved as laid, God forbid that it should not be an indictable offense. The peace of the whole country would be endangered if it were not so." And in speaking of the importance and necessity of maintaining the indictment, he said: By so doing, "we shall not overrule any of the cases that have been cited, but we shall give effect to a part of the law that ought to be preserved, namely, *that no one shall with force and violence assert his own title.*"

§ 1195. In Vermont, under the statute of forcible entry and detainer, a person forcibly dispossessed, even by the owner of the land, is entitled to restitution, and the disseizor is liable to fine and threefold damages as a trespasser. The party ejected may, however, waive the penalty and maintain an action of trespass *quare clausum* against the disseizor, notwithstanding the person ejected was a tenant at will of a dwelling-house, and agreed to leave on a day named, and that if he did not, the landlord might put him out.[1] * A person cannot justify an entry, with violence, of premises which he owns, on the ground of a previous peaceable entry, unless he prove that he took actual peaceable possession on the prior occasion, which was maintained up to the time of his entry with violence; so that, in what was done, he stood in the attitude of defending his possession, and not of invading the occupant's possession with strong hand.[2]

§ 1196. In Kentucky, Missouri and California, where a person is in peaceable possession, and another forcibly enters upon him, he can maintain forcible entry and detainer though

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[1] Dustin v. Cowdry, 23 Vt. 631.

[2] Whittaker v. Perry, 38 Vt. 107.

* In Dustin v. Cowdry, *supra*, which was an action of trespass for forcibly breaking and entering the plaintiff's house and expelling him and his family therefrom, the county judge, before whom the cause was tried, instructed the jury that if the plaintiff's term had expired, and he, upon reasonable request, refused to leave the premises, the defendant had the right to put out the plaintiff and his family, and to use all the force that was necessary for obtaining the possession. A verdict having been found for the defendant, the Supreme Court, in reversing the judgment, said: "We not seldom hear it asserted on this side of the Atlantic, that it is absurd that one shall be held liable to an action of trespass for entering forcibly into possession of his own property, just as if it were a clear point that one might take possession of his own property in his own way, even at the expense of violating all laws, human and divine. And such a doctrine may have received some countenance from the decisions of this court. But, in my judgment, it is a most dangerous doctrine, come from whatever elevated source it may, and the sooner it is discountenanced by the courts, the better for the peace and quiet of the State. It is a doctrine which has grown up altogether, so far as I know, within the last twenty years, and has never, since the period of three hundred years subsequent to the Norman conquest, received the least countenance in England, or anywhere else out of this State, if we except only the State of New York—I mean to the extent of justifying such force in every civil action. It may have been often said that such a possession was legal, but to that extent even the doctrine is not maintainable."

the title is in the other.[1] * In Arkansas, it has been held that a bare possession without right will be protected and restored, if invaded by force.[2] In Illinois, the owner of land cannot lawfully make a forcible entry on a tenant holding over, or other person, but must resort to his action;[3] and if he oust another in peaceable possession, with his own hand, the law will compel him to restore the possession.[4] In an early case in Connecticut, the court said, that "no man, who hath right of entry into houses and lands, may enter but in a peaceable manner; and, if he cannot enter in that manner, he must resort to his own proper remedy by a suit at law."[5] Subsequently, in the same State, in an action of trespass for forcibly ejecting the plaintiff from land of which he was in the peaceable possession, the defendant attempted to justify the entry by command, and as the servant of the owner; but it was held that this was no defense.[6] †

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[1] Chiles v. Stephens, 3 A. K. Marsh. 340; Krevet v. Meyer, 24 Mo. 107; Michau v. Walsh, 6 Ib. 346; Fuhr v. Dean, 26 Ib. 116; Gibson v. Tong, 29 Ib. 133; Beeler v. Cardwell, 33 Ib. 84; Robinson v. Walker, 50 Ib. 19; McCauley v. Weller, 12 Cal. 500; and see Lorimier v. Lewis, 1 Morris, 253.

[2] McGuire v. Cook, 8 Eng. 448.

[3] Reeder v. Purder, 41 Ill. 279; Farwell v. Warren, 51 Ib. 467.

[4] Shondy v. School Directors, 32 Ill. 290.

[5] Bull v. Olcott, 2 Root, 472.

[6] Bliss v. Bange, 6 Conn. 78.

* In Kentucky, the common law right of entry, when made in a peaceable manner, is not affected by the statute in relation to forcible entry and detainer, excepting so far as it furnishes a remedy to regain the possession (Tucker v. Phillips, 2 Metc. Ky. R. 416).

† In Bliss v. Bange, *supra*, it was urged by the counsel for the defendant, that the English statute and that of the State of New York were similar to that of Connecticut, and that their courts had established the contrary doctrine, declaring that when it appeared on trial that the plaintiff had no title, an action of trespass could not be sustained. Daggett, J., in delivering the opinion of the court, said: "I decline an examination of these positions, because, in my judgment, our statute is perfectly unequivocal. It gives the action of trespass, in so many words, to the party aggrieved; and the party aggrieved is, by irresistible implication, the person forcibly ejected. The statute designedly excludes the examination and decision of the question of title, and on principles of public policy, prohibits forcible entries and detainers, authorizes the process of restitution, and the action of trespass."

Where a person is unlawfully put out of premises by a writ of restitution, in an action to which he is neither a party or privy, he has no right to forcibly eject the one who is thus in possession. His remedy is an action against the sheriff or party for the forcible entry (Horsefield v. Adams, 10 Ala. 9).

5. *Who may maintain.*

§ 1197. In New York, the proceedings must be instituted by the person who has the legal right to the possession. And the same in Michigan.[1] The provisions of the statute of New York are inapplicable to the servants or agents of the owner of real estate and to the officers and agents of a corporation, where it is the proprietor. Although the proceeding in forcible entry and detainer is not a regular action, but partakes rather of the nature of criminal proceedings, it is still to be prosecuted by and in the name of the party whose legal right of possession has been invaded, and not by the individuals who may have been charged with authorities or duties respecting it. Therefore, such proceedings cannot be maintained by the trustees of an incorporated religious society, but must be brought in the name of the corporation.[2]* In Ohio, a purchaser at a tax sale cannot maintain forcible entry and detainer against the owner in fee of the land,[3] but a purchaser at a sheriff's sale made under a decree in chancery may do so, after confirmation of the sale, although the sheriff has not executed his deed.[4]

§ 1198. In Illinois, it has been held that an action for forcible detainer where the entry was lawful must be

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[1] Hoffman v. Harrington, 22 Mich. 52.

[2] The People agst. Fulton, 11 N. Y. 94.

[3] Kelly v. Hunter, 12 Ohio, 216. [4] Barto v. Abbe, 16 Ohio, 408.

* In the People agst. Fulton, *supra*, Denio, J., in delivering the opinion of the New York Court of Appeals, said: "Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate; and while the officers have it under their control or dominion, whatever possession they have is the possession of the artificial person whose agents they are. Although called trustees, they do not hold the property in trust for the corporation or the religious society. The name is simply the title of their office, and their position respecting the corporate property would be the same if they were denominated directors or managers. Their right to intermeddle is an authority, and not an estate or title. They have no other possession than the directors of a bank have of the banking house. This would be so upon general principles relating to the legal nature of corporations, apart from the particular language of the act (of New York) concerning religious corporations. By the 4th section of that act, however, the trustees are in terms authorized by their corporate name and title 'to hold and enjoy,' among other things, all churches and meeting-houses, and all estates belonging to the society, as well as to sue and be sued."

brought after demand by the person who has the right of possession. The owner of land leased it to A., and at the end of the term let it verbally to B., who, with A.'s consent, entered and cultivated part of the land. A., having refused to leave, it was held that B. alone could maintain an action of forcible detainer against him.[1] But if the entry be unlawful, the action must be brought by the person whose possession has been disturbed, although subsequently thereto he has sold the land.[2] Where a person is in possession of land claiming a fee, the presumption is that he has a fee, and he may maintain the action for an entry thereon against any one not having the legal title or right of possession. But it will not lie against a person who has entered on vacant land under color of title in behalf of one who afterward invades his possession under a similar title.[3] One who gets possession of land which he has purchased by collusion with the tenant of an adverse holder, has only the same rights as the tenant, and the landlord can recover possession by forcible entry and detainer, whether entitled to keep it or not.[4] Where a tenant, upon giving up the premises upon notice, leaves therein goods belonging to the landlord, the latter has such a possession as will enable him to maintain the proceedings against an intruder.[5]* Under the statute[6] permitting the vendor of land to maintain an action of forcible detainer against the purchaser who does not fulfil the contract of sale, the proceedings do not rescind the contract, but the vendee can at any time get a decree for specific performance.[7]

§ 1199. In Kentucky, as the proceedings are purely legal, the warrant must be in the name of him who has the legal

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[1] Allen v. Webster, 56 Ill. 393.
[2] Dudley v. Lee, 39 Ill. 339.
[3] Brooks v. Bruyn, 18 Ill. 539.
[4] McCartney v. Hunt, 16 Ill. 76.
[5] Wall v. Goodenough, 16 Ill. 415.
[6] Sts. of Ill. of 1861.
[7] Wilburn v. Haines, 53 Ill. 207.

* In Illinois, under the act of 1865, the action may be maintained against a lessee for years holding over, by a person to whom a second lease has been made by the owner, to commence upon the determination of the first lease (Ball v. Chadwick, 46 Ill. 28).

title.[1] Forcible detainer may be maintained by an heir against the tenant of his ancestor,[2] but not by a landlord under whom the tenant did not enter.[3] If a tenant, or a subtenant, is disseized, he, and not the landlord, can bring the writ.[4] One who neither was in possession of, nor had title to the land when the entry was made on it, cannot, by reason of a subsequent purchase, maintain a warrant for the forcible entry.[5] Where the defendant entered under another landlord, and while so possessed accepted a lease from the plaintiff, it was held that the latter could not recover.[6] The purchaser of the reversion may maintain the proceedings against the tenant of his vendor. The writ will also lie in behalf of an agent in possession, and the fact that he commences such proceedings for a subsequent intrusion on the land is sufficient proof of his authority.[7] It cannot be maintained by a landlord for a forcible entry on his tenant in possession, even after the lease has expired.[8] But the proceedings will lie in favor of one tenant occupying a distinct parcel for the forcible entry of his cotenant.[9] And they may be brought by one of several tenants in common without joining his cotenants,[10] but not joint proceedings in favor of three when two only have title.[11]

§ 1200. In Missouri, the complainant must not only be entitled to the possession of the land,[12] but must have been once in lawful possession. Consequently, the action cannot be maintained by the assignee or vendee of a landlord

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[1] Sullivan v. Enders, 3 Dana, 66. [2] Turly v. Foster, 2 A. K. Marsh. 204.

[3] Norton v. Sanders, 7 J. J. Marsh. 12.

[4] Yoder v. Easley, 2 Dana, 245; Holderman v. Middleton, 6 Bush, 44, *contra*.

[5] Lewis v. Stith, 2 Litt. 294. [6] Gray v. Gray, 3 Litt. 465.

[7] Herndon v. Bascomb, 8 Dana, 113; Mason v. Bascomb, 3 B. Mon. 269.

[8] Kercheval v. Ambler, 4 Dana, 166.

[9] Pitman v. Davis, 1 Hemp. 29; Hudgen v. Temple, 12 B. Mon. 198; Hunt v. Wilson, 14 Ib. 44; Quertemus v. Breckinridge, 5 Dana, 125.

[10] Taylor v. White, 1 Monr. 37. See Mason v. Finch, 1 Scam. 495.

[11] Mason v. Bascomb, 3 B. Mon. 269; s. p. Turner v. Lumbrick, 1 Meigs, 7; Thomas v. Jones, 2 A. K. Marsh. 356.

[12] Furguson v. Lewis, 27 Mo. 249; Burns v. Patrick, Ib. 434.

against a tenant;[1] nor by a devisee against a tenant of his testator;[2] nor by a vendee against his vendor for the non-delivery of the land.[3] And the action will not lie by the landlord where the entry was with the consent of the tenant.[4]* A. having let part of a house to B., on condition that if he should afterward let the whole house to anybody, B. would give up possession as soon as he received notice, afterward let the whole house, notified B. that he had done so, and demanded possession, which B. refused to give. It was held that as A. had conveyed all his interest, he could ot maintain an action against B. for unlawful detainer.[5] When the vendor of a house removes from it, and delivers the keys to the vendee, with the intention of surrendering possession, the vendee may maintain the proceedings.[6]† The action survives on the death of one of the plaintiffs.[7]

§ 1201. In Alabama, it is sufficient that the plaintiff has the right to the possession.[8] The proceedings may be maintained by a tenant for years or at will,[9] although the lease under which he was in possession at the time of the defendant's entry expired before the trial;[10] but not by a landlord who has a right to the possession of premises by the determination of a lease for an entry made while the tenant was in possession.[11] In Texas, the action cannot be maintained by a landlord for the invasion of his tenant's possession.[12] It

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[1] Holland v. Reed, 11 Mo. 605.
[2] Picot v. Masterson, 12 Mo. 303.
[3] Wood v. Dalton, 26 Mo. 581.
[4] Reed v. Bell, 26 Mo. 216.
[5] L'Hussier v. Zallee, 24 Mo. 13.
[6] Hoffstetter v. Blattner, 8 Mo. 276.
[7] Keyser v. Rawlings, 22 Mo. 126; Carlisle v. Rawlings, 18 Ib. 166.
[8] Hightower v. Fitzpatrick's Heirs, 42 Ala. 597.
[9] M'Donald v. Gayle, Minor, 98; Mead v. Daniel, 2 Port. 86.
[10] Townsend v. Van Aspen, 38 Ala. 572.
[11] McKeen v. Nelms, 9 Ala. 507.
[12] Hays v. Porter, 27 Texas, 92.

* The tenant should bring the action for the disturbance of his possession, and not the landlord (McCartney v. Alderson, 49 Mo. 456; Powell v. Davis, 54 Ib. 315).

† In England, where a person used land as a garden for more than twenty years, by permission of the owner to do so, in order to keep it from trespassers, the owner from time to time going on the land and giving directions as to cutting trees, it was held that he did not have such a title as to enable him to sue a claimant under the owner for a forcible entry (Allen v. England, 3 F. & F. 49).

will not lie where the defendant was put in possession of the premises by an officer under a writ of possession, and the entry was peacefully acquiesced in by the plaintiff.[1] But one who has been deprived of his possession by a writ issued upon a decree to which he was not a party, may proceed by forcible entry and detainer to recover possession.[2] In California, the action may be maintained by a landlord against his tenant at any time before the surrender of the demised premises where the tenant has assigned the lease to his landlord, and an agreement in writing has been executed by both parties declaring the lease canceled and annulled, and the tenant released from all further responsibility under it.[3]*

§ 1202. In Missouri, Iowa, Georgia and Alabama, the action may be maintained by an administrator.[4] In Tennessee, the action abates on the death of either the plaintiff or defendant;[5] but it may be maintained by an administrator when the wrong was committed in the lifetime of the intestate, and the estate of the intestate was a chattel interest.[6] In West Virginia, the proceedings cannot be revived on the death of the plaintiff.[7] In Illinois,[8] a purchaser at a master's sale may maintain an action of forcible detainer.[9] In Maine, it may be maintained by the receivers of an insolvent bank against the execution debtor.[10]

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[1] Wyatt v. Monroe, 27 Texas, 268.

[2] Laird v. Winters, 27 Texas, 440.

[3] Kower v. Gluck, 33 Cal. 401.

[4] Lass v. Eisleben, 50 Mo. 122; Beezley v. Burgett, 15 Iowa, 192; Code of Ga. § 4005; Moody v. Ronaldson, 38 Geo. 652; Spear v. Lomax, 42 Ala. 576.

[5] Havins v. Bickford, 9 Humph. 673; see *post*, § 1206.

[6] Winningham v. Crouch, 2 Swan, 170.

[7] Moran v. Eldridge's Devisees, 2 W. Va. 574.

[8] St. of Ill. of 1861.

[9] Pensoneau v. Heinrich, 54 Ill. 271.

[10] Baker v. Cooper, 57 Maine, 388.

* In California, forcible entry and detainer cannot be maintained by a landlord when the demanded premises are in the possession of his tenant (Polack v. Shafer, 46 Cal. 270).

The agent of the owner of premises, who has been put in peaceable possession by a writ of restitution, cannot afterward maintain an action of forcible entry and detainer against a third person by reason of want of possession on his part (Mitchell v. Davis, 20 Cal. 45).

6. *Who liable.*

§ 1203. Forcible entry and detainer must be brought against the one in actual possession at the time of the commencement of the action,[1] or against him by whose direction, agency or procurement the forcible entry is made.[2] The following instruction was accordingly held correct: That "if the defendant was wrongfully maintaining his entry by force, and employing his servant so to do, he was liable for the act of his servant in maintaining such entry, although the servant used more force than his master had authorized."[3] A. having hired a piece of land of B., and dying about the time the lease expired, his widow refused to give up the possession, but placed her own tenant on the land. It was held that the tenant might be proceeded against by writ of forcible entry and detainer.[4] In Mississippi, the action may be maintained against one who is in possession under a parol contract of sale upon his refusal, or the refusal of his grantee in possession to complete the purchase.[5] In Michigan and Virginia it will lie in case of forfeiture by the grantee of his contract of purchase, a demand of possession having previously been made.[6] In Alabama, the defendant need not have been a tenant of the plaintiff, or a tenant of his tenant. It is sufficient that he holds under, from, by, or by collusion with the plaintiff's tenant.[7] In Kentucky, the action will lie against a tenant who denies that he holds under his landlord and refuses to pay rent,[8] whether the tenant derived possession of the premises from his landlord or became his tenant afterward.[9] A. was tenant of B. B. sold his interest to C., and C. to D. After D. bought, A. rented from him, and E.,

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[1] Orrick v. St. Louis, 32 Mo. 315; Rev. Sts. of Mo. of 1855, p. 787; Preston v. Kehoe, 10 Cal. 445.

[2] Minturn v. Burr, 16 Cal. 107; Bailey v. Bailey, 61 Me. 361.

[3] Barden v. Felch, 109 Mass. 154. [4] Fogle v. Chaney, 12 B. Mon. 138.

[5] McKissack v. Bullington, 37 Miss. 535.

[6] Raynor v. Haggard, 18 Mich. 72; Williamson v. Paxton, 18 Grat. 475; Code of Va. 608, ch. 134.

[7] Snoddy v. Watt, 9 Ala. 609; Russell v. Desplous, 25 Ala. 514; Clay's Dig. p. 251; Pamphlet Acts 1847–8, p. 99.

[8] Bates v. Austin, 2 A. K. Marsh. 270. [9] McMurtry v. Adams, 3 Bush, 70.

by agreement with A., entered on the land and died there. E.'s son having repudiated D.'s title, it was held that he was liable for forcible entry and detainer without notice to quit.[1] In Illinois, the action may be maintained against a sub-lessee holding over after the termination of the original lease,[2] but a sub-lessee who is not a party cannot be removed under the writ unless he entered *pendente lite*.[3] * In Wisconsin, it has been held that the proceedings may be maintained against a city.[4]

§ 1204. In California, where a person enters unlawfully on land occupied by another during his absence, and refuses to give it up on demand, he is liable to an action of unlawful detainer, however honestly he may have believed that he had a right to enter. † In Randall v. Falkner,[5] it appeared that the premises belonged to the public domain of the United States, but had been withdrawn from entry and sale; that in 1867 the defendant built a cabin on it, with a view to acquire a right to it as a homestead under the laws of the United States as soon as the land was subject to entry; that the next year one E. wrongfully took away the cabin and sold whatever right he had to the land to the plaintiff, who in the latter part of 1869 drew lumber on to it for a house, plowed the greater part of the land and sowed it with grain; that the defendant then counseled with an attorney as to his rights, and both the attorney and the land officers of the United States for that district advised him to go on to the tract and build a cabin in order to acquire a prior right, and that acting under their advice, and with a *bona fide* intention to acquire such right, which he was qualified to do, he entered

[1] Goodlet v. Cleaveland, 12 B. Mon. 430.
[2] Reed v. Hawley, 45 Ill. 40.
[3] Leindecker v. Waldron, 52 Ill. 283.
[4] Rains v. Oshkosh, 14 Wis. 372.
[5] 41 Cal. 242.

* The action will not lie against one in lawful possession because his vendor, years previous, made an entry by force (Clark v. Barker, 44 Ill. 349).

† A person who honestly claims the right to the possession of land is not an intruder within the statute of Georgia (McHan v. Stansell, 39 Ga. 197).

A person who builds a house on part of a tract of several acres, upon another part of which the owner has a house, is not guilty of a forcible entry and detainer of the whole tract (Thompson v. Smith, 28 Cal. 527).

in February, 1870, peaceably and quietly, and had ever since remained in possession. It was held that the foregoing facts did not justify the entry of the defendant, the land being at the time in the actual occupancy of the plaintiff, and that as the defendant refused to surrender the possession upon demand, the case came within the statute.

§ 1205. One who aids a person in forcibly entering on land in the peaceable possession of another, and afterwards assists the party entering in remaining, may be joined as a defendant in the action;[1] but two or more who hold in severalty cannot be joined.[2] A. having left his house locked, intending to return, it was broken open, and so left. B., who entered without having had anything to do with the wrongdoers, was held not guilty of a forcible entry.[3] In Illinois, the action will lie by one joint tenant, or tenant in common, against his cotenant.[4]* In California, where the principal defendant is a married woman, doing business as a sole trader, her husband may be joined with her.[5]

§ 1206. In Missouri, an action of forcible entry and detainer does not abate upon the death of the defendant; but being an action for damages as well as for possession, it may be continued against the heirs and the administrator; and if the heirs have no interest in the premises, they can disclaim, and the action proceed against the administrator.[6]

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[1] Blumenthal v. Waugh, 33 Mo. 181.

[2] Reynolds v. Thomas, 17 Ill. 207.

[3] Greer v. Wroe, 1 Sneed, 246.

[4] Mason v. Finch, 1 Scam. 495.

[5] Howard v. Valentine, 20 Cal. 282.

[6] Brewington v. Stephens, 31 Mo. 38; see *ante*, § 1202.

* It is laid down in Bacon's Abridgment, title Joint Tenants and Tenants in Common, that one tenant in common may offend against the statute against forcible entries and detainer, either by forcibly ejecting, or forcibly holding out, his companions. For though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry in no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment for the forcible entry into a moiety of a manor is good referred to by Mullen, J., in King v. Phillips, 1 Lansing, 421).

7. *Complaint.*

§ 1207. In New York, the complaint must allege the right of possession.[1] The object of the statute being to require the party to disclose the nature of his right, so that it will appear whether or not it is a legal and valid right, an allegation that the relator and his grantor had been in the quiet and peaceable possession of the premises for more than five years, and that he has a good legal right and estate to said premises, and a legal right to the possession of the same, is not sufficient; for the reason, that neither a freehold interest, nor an interest for a term of years, is alleged, nor is it shown what right the relator has to the possession.* But such a complaint is not so defective as to deprive the officer of jurisdiction. As possession is *prima facie* evidence of ownership in fee, if the allegation is not sufficiently full and specific, the defendant must raise the objection before the judge, to entitle himself to the benefit of it.[2] An affidavit to the complaint in the form of verification of pleadings required by the New York code[3] is not sufficient. The affidavit must be positive and state the facts positively; or if any facts are stated upon information, they must be so expressed, and the source of information be given.[4]

§ 1208. In New Jersey, the complaint must set forth the nature of the estate of the party aggrieved, and the place where the premises are situated;[5] and it must appear from the complaint, that the complainant was in possession of the premises, either in fact, or in law.[6] It is sufficient to allege

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[1] The People agst. Fulton, 11 N. Y. 94.

[2] The People v. Fields, 52 Barb. 198; s. c. 1 Lans. 222; 58 Barb. 270.

[3] N. Y. Code, § 157.

[4] Decker v. Whitney, 1 Thompson & Cook, 533.

[5] Wall v. Hunt, 4 Halst. 37; Banks v. Murray, 2 South. 849; Kerr v. Phillips, Ib. 818; Cowman v. Barber, 2 Penn. 688; Weller v. Parke, Ib. 661.

[6] Corlies v. Corlies, 2 Harr. 167.

* A declaration in forcible entry and detainer, under a statute requiring that the facts of the case shall be set out, which alleges that the plaintiff is entitled to the possession, only states a conclusion of law, and is therefore bad (Cooper v. Marchbanks, 22 Texas, 1).

that the complainant was possessed as tenant for years of a leasehold estate not yet ended.[1] But a complaint for forcibly detaining the "messuage or dwelling-house" of the plaintiff, is bad for uncertainty.[2]* In Wisconsin, a complaint which specifies more land than the plaintiff is entitled to recover, will not be bad for that reason;[3] and an objection that the complaint is not sufficiently definite and certain, is waived by answering and going to trial on the merits.[4]

§ 1209. In Ohio, the complaint is in the nature of a declaration. It must describe the land with such certainty as will apprise the defendant of what is demanded of him, and furnish a guide to the sheriff in executing the writ of restitution. It must contain a venue which may be laid in any town in the county where the land lies.[5] An allegation that the "defendant doth unlawfully, forcibly, and with a strong hand, detain," &c., is sufficient.[6] In Indiana, the complaint is required to show that the premises are in the county, and that the detainer is unlawful.[7]†

§ 1210. Under the statute of Connecticut, requiring that the complaint for a forcible detainer of land shall allege that the complainant was in the actual possession at the time of the defendant's entry, an allegation that "the defendants peaceably, and without the consent of the complainant, entered, and that they unlawfully and unjustly, and with a strong hand, do deforce and keep the complainant out of possession," is fatally defective; it being consistent with the foregoing that the complainant was never in possession.[8] In

[1] Berry v. Williams, 1 N. J. R. 423.
[2] Applegate v. Applegate, 1 Harr. 321.
[3] Jarvis v. Hamilton, 19 Wis. 187.
[4] Ibid. 16 Wis. 574.
[5] Murphy v. Lucas, 2 Ham. 255.
[6] Barto v. Abbe, 16 Ohio, 408.
[7] Boxley v. Collins, 4 Blackf. 320.
[8] Phelps v. Baldwin, 17 Conn. 209.

* It is essential that the defendant have notice of an inquisition of forcible entry and detainer (The State v. Stokes, Coxe, 392). Serving a summons "by leaving a copy fastened to the door of the house which is said to be in possession of the defendant, as he was not therein," is not sufficient (Miller v. Doolittle, 2 South. 845).

† In Indiana, any variance between the description of the premises as laid in the information and the evidence, in a prosecution by information, will be fatal (Ball v. State, 26 Ind. 155; Elliot, J., dissenting).

Arkansas, the object of the statute[1] being to restore possession forcibly taken or unlawfully detained, without regard to the ownership or title to the property, the plaintiff must in all cases allege in his declaration that he was in possession of the premises.[2] *

§ 1211. In Michigan, the complaint must show that the complainant has a right to the possession of the premises.[3] Under the statute,[4] which provides that "when any forcible entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, the person entitled may recover," a complaint which charges an entry and holding by force, will be deemed for forcible entry only.[5] The sufficiency of the complaint in its description of the premises is governed by the rules of pleading.[6] In Minnesota, the statute requires the complaint to describe the premises with particularity.[7]

§ 1212. In California, it has been held that forcible entry and forcible detainer are distinct causes of action, and must be separately alleged in different counts; otherwise, the complaint will be bad on demurrer. But if not demurred to, the objection will be waived.[8] Where the complaint avers forcible entry "with a multitude of people," and a forcible and unlawful detainer in one count, the forcible entry is the gist of the action.[9] It is necessary to allege that the entry or detainer was forcible.[10] Where the action is against a tenant for holding over, the complaint need not state that such holding over is wrongful if this appears indirectly from

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[1] Digest, ch. 71.
[2] Bush v. Dunham, 4 Mich. 339.
[3] McGuire v. Cook, 8 Eng. 448.
[4] Comp. L. § 4975.
[5] Seitz v. Miles, 16 Mich. 456.
[6] Clark v. Gage, 19 Mich. 507; Comp. L. §§ 4976, 4986.
[7] Lewis v. Steele, 1 Minn. 88.
[8] Valencia v. Couch, 32 Cal. 339.
[9] McMinn v. Bliss, 31 Cal. 122.
[10] McEvoy v. Igo, 27 Cal. 375.

* In McGuire v. Cook, *supra*, the court were inclined to the opinion that forcible entry and detainer and unlawful detainer could not be joined, and that where it appeared on the face of the declaration that the premises sought to be recovered were one and the same, it was good cause for demurrer.

the allegations.[1] An averment that the defendant entered by permission of the plaintiff shows a license to enter, and not the relation of landlord and tenant.[2] Stating that the defendant, since his alleged entry, has appropriated the plaintiff's stock in trade and tools, and that they will be rendered worthless if the defendant is not restrained by legal process, is improper.[3] There need not be an allegation of possession.[4] But as the averments of the complaint must be taken most strongly against the pleader, if it state that the complainant was in possession, and afterward alleges the contrary, it fails to show any ground of action.[5] Where the proceedings are before justices of the peace, there need be only a general description of the premises.[6] A declaration in forcible entry and detainer which describes land by a name is sufficient, if it can be rendered certain by the evidence, although it be a Spanish name which can be translated into English so as to mean nothing.[7] Where the premises were sufficiently described, it was held that an error in the complaint and judgment in referring to the lot as in the northeasterly instead of the northwesterly corner of a larger lot was of no consequence.[8]

§ 1213. In Alabama, a complaint which alleges that the plaintiff was seized in fee, and that the defendant entered and disseized and put out the plaintiff from the peaceable possession of the premises, sufficiently avers possession.[9] But an averment that the plaintiff was "lawfully and peaceably possessed of a leasehold interest or estate" does not aver that he was in actual possession.[10] The time of the possession of the complainant is not material.[11] When, however, the complaint does not show that the plaintiff was in possession at

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[1] Uridias v. Morrell, 25 Cal. 31.
[2] Owen v. Doty, 27 Cal. 502.
[3] Gillam v. Sigman, 29 Cal. 637.
[4] Cronise v. Carghill, 4 Cal. 120.
[5] Dickinson v. Maguire, 9 Cal. 46.
[6] Hernandez v. Simon, 4 Cal. 182.
[7] Castro v. Gill, 5 Cal. 40.
[8] Paul v. Silver, 16 Cal. 73.
[9] Cunningham v. Green, 3 Ala. 127; Ward v. Lewis, 1 Stew. 26; Lecatt v. Stewart, 2 Ib. 474.
[10] Townsend v. Van Aspen, 38 Ala. 572.
[11] Bliss v. Winston, 1 Ala. 344.

the time of the entry, it must allege the estate of the plaintiff in the premises.[1] An allegation that the plaintiff was lawfully possessed, was in possession, and claimed said premises as tenant under A., and had been in possession of the same for a period of six months previous thereto, sufficiently specifies the complainant's estate.[2] The land sought to be recovered must be distinctly described in the complaint.[3] The following was held to be a sufficient description: "A messuage with the appurtenances known as the south half of section twenty."[4] But a complaint which describes the premises as "a part of the township fourteen, range one west, and section nine southwest, quarter eighty," unaided by verdict, is bad for uncertainty.[5] The following description of premises was held sufficiently specific: "That the plaintiff had the peaceable possession of the northeast quarter of section five, township eight, range eleven east, in the Coosa land district, in the west part of said quarter, being and lying in the State and county aforesaid, dwelling-house and other buildings, and fifty acres of land cleared, more or less."[6] This description was held sufficient: "Premises situated in the city of Mobile, and known and described as all that piece, parcel, or lot of land known as No. 268 of the Orange Grove Tract, situated on the corner of Jackson and Lipscomb streets in the city of Mobile."[7] * The statutory demarcations of range, township, and section need not be specified; a description of the metes and bounds and objects of notoriety in the neighborhood is sufficient.[8] It is

[1] Walters v. Rogers, 9 Ala. 834.
[2] Wright v. Lyle, 4 Ala. 112.
[3] M'Rae v. Tillman, 6 Ala. 486.
[4] House v. Camp, 32 Ala. 541.
[5] Cunningham v. Green, 3 Ala. 127.
[6] Huffaker v. Boring, 8 Ala. 87.
[7] Townsend v. Van Aspen, 38 Ala. 572.
[8] Mead v. Daniel, 2 Port. 86; Bell v. Killcrease, 11 Ala. 685.

* In Kansas, the following was held a sufficient description of the premises: "The hotel commonly called the Clinton House, in Indianola, Shawnee County, together with all the rooms, houses, garden, lots, &c., used in connection with the same" (Kykendall v. Clinton, 3 Kansas, 85). In West Virginia, where the summons, in an action for unlawful detainer, described the land as "a certain tract or parcel of land lying and being in the county of Ritchie, near Gorman's Tunnel, and containing about ten acres," it was held that the description was bad for uncertainty (Gorman v. Steed, 1 W. Va. 1).

enough to allege that "the defendant entered on said lands peaceably, and by force or threats detains the same."[1] The complaint need not, however, allege an "entry" by the defendant.[2] Charging that he "forcibly and unlawfully detains and keeps possession" of the premises, "detaining and holding the same by such words, circumstances, or actions as have a natural tendency to excite fear and apprehension of danger," is a sufficient allegation under the statute.[3] The date of the complaint two years subsequent to the other proceedings will be deemed a mere clerical error.[4]

§ 1214. In Illinois, there is no precise form for a complaint of forcible detainer. It is sufficient if it show that the relation of landlord and tenant existed, that the time for which the premises were let has expired, and that the tenant continues to hold the premises after demand made in writing for the possession of the same.[5] Where the proceedings are against a subtenant, it need not be alleged how or when the demand for possession was made, nor what the terms of the lease were; nor need the landlord anticipate the defense, that the defendant had a right to attorn to another.[6] The plaintiff must show that he had the actual possession of the premises other than a mere constructive entry, such as the fee simple draws to it.[7] A complaint which alleges possession of a house is not sustained by proof that the plaintiff was in possession of part of the house.[8] A complaint is bad which simply avers that the plaintiff was entitled to possession, and that the defendant entered forcibly and kept him out, without alleging that the plaintiff had actual or constructive possession, or that the relation of landlord and tenant existed.[9] So likewise, a complaint is insufficient which alleges that A. entered forcibly upon the premises of which

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[1] Ladd v. Dubroca, 45 Ala. 421.
[2] Lecatt v. Stewart, 2 Stew. 474.
[3] Matlock v. Thompson, 18 Ala. 600; Huffaker v. Boring, *supra*.
[4] Powers v. David, 6 Ala. 9.
[5] Smith v. Killeck, 5 Gil. 293; Dunne v. Trustees of Schools, 39 Ill. 578.
[6] Balance v. Fortier, 3 Gilm. 291.
[7] McCartney v. McMullen, 38 Ill. 237.
[8] House v. Wilder, 47 Ill. 510.
[9] Whitaker v. Gautier, 3 Gilm. 443.

the plaintiff was in possession, and that A. afterward transferred the possession to the defendants, who have since forcibly kept it.[1] A complaint averred that A. owned and had a right to the possession of two tracts of land of 200 acres, and that he rented about fifteen acres of one tract to B. for a year; that at the end of the year, B. unlawfully withheld the whole of the premises from A.; that C. unlawfully entered therein under B., and that they both forcibly and unlawfully withheld the land from A. It was held that the court had not jurisdiction of the complaint, as it did not show, except as to the fifteen acres, that the relation of landlord and tenant existed, which it was necessary should appear, no forcible entry and detainer being set up; and that even as to the fifteen acres, the complaint was defective, the statute providing that it shall particularly describe the lands.[2] The plaintiff in an action of forcible detainer alleged that the term had been "determined by expiration, and by due notice in writing served upon said J. L., by delivering a copy to a person above the age of twelve years, residing on said premises." It was held insufficient, the words "due notice" expressing a mere conclusion of law, and it not appearing that the written demand for possession was delivered to the defendant personally, nor served by the plaintiff or by some person authorized by him to serve it.[3] *

§ 1215. In Missouri, the complaint must allege a forcible detainer.[4] Where it charged that the plaintiff was entitled to the immediate possession of certain premises, and that the defendant unlawfully detained the same, it was held sufficient.[5] A complaint which alleges that the plaintiff was "lawfully possessed" of the premises in dispute, and that

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[1] Ballance v. Curtenius, 3 Gilm. 449.

[2] Beel v. Pierce, 11 Ill. 92; House v. Wilder, 47 Ib. 510; Thompson v. Sornberger, 59 Ib. 326.

[3] Doran v. Gillespie, 54 Ill. 386.

[4] Tipton v. Swayne, 4 Mo. 98. [5] Andrae v. Heinritz, 19 Mo. 310.

* In Colorado, in order to maintain an action for unlawful detainer, the plaintiff must have made a demand in writing for the surrender of the premises, and such demand must be set out in his petition (Doss v. Craig, 1 Col. 177).

the defendant "unlawfully entered and detained the same," and was thereby guilty of a forcible entry and detainer, is good.[1] A general description of the premises is sufficient.[2] It is the same in Kentucky.[3] In the latter State, under the civil code,[4] the warrant for forcible detainer must show the plaintiff's interest or right to the possession of the premises, and it must appear that the parties sustain the relation of landlord and tenant.[5] *

§ 1216. In Virginia, under the statute,[6] the only complaint required in proceedings for unlawful detainer is that contained in the summons.[7] A complaint under the act of 1814 will be sustained if it contains a reasonably certain description of the land in dispute, although it omits to state the estimated quantity.[8] In Tennessee, the act of 1842, ch. 86, regulating the proceedings in an action for forcible entry and detainer, does not require a written complaint, but that the matter of the complaint should be incorporated in the warrant. Concurrent jurisdiction is conferred upon the Circuit Court and justices of the peace. If the action be brought before two justices of the peace, the description must be contained in the warrant; if in the Circuit Court, in the declaration.[9] In the latter State, it is not necessary to recite in the writ the plaintiff's interest in the estate, the allegation that he is entitled to the possession being sufficient.[10] A description of the premises in the warrant as "a school-house in the 10th civil district of Union county, known as Miller's school-house," was held sufficiently definite.[11]

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[1] Wade v. McMillen, 29 Mo. 18.
[2] Tipton v. Swayne, *supra*.
[3] Moore v. Massie, 3 Litt. 296.
[4] § 500.
[5] Taylor v. Monohan, 8 Bush, 238; and see Powers v. Sutherland, 1 Duvall, 151.
[6] Code of Va. ch. 134, p. 556.
[7] Clinger v. Shepherd, 12 Gratt. 462.
[8] Allen v. Gibson, 4 Rand. 468.
[9] Settle v. Settle, 10 Humph. 504.
[10] Rhodes v. Comer, 2 Sneed, 40; Turner v. Lumbrick, 1 Meigs, 7.
[11] Butcher v. Palmer, 1 Heisk. 431.

* In Minnesota, a complaint is sufficient which alleges that the plaintiff was in the actual possession by his wife on the day of the entry, and that on such day the defendant did make an unlawful and forcible entry into and upon the premises in question, and "ever since has, and now does unlawfully and forcibly detain the same, contrary to the form of the statute" (Davis v. Woodward, 19 Minn. 174).

§ 1217. In California, where there is a variance between the complaint and the evidence, the complaint may be amended.[1] In Alabama, the complaint may be amended before issue joined.[2] In New Jersey, where the defendant appears and requests an adjournment, and allows part of the jurors to be sworn without objection, he thereby waives a defect in the summons.[3] In Arkansas, a variance between the affidavit filed by the plaintiff and the writ may be pleaded in abatement; as, for instance, where the affidavit is for unlawful detainer, and the writ for forcible entry and detainer; and if, in such case, the writ be abated, the defendant will be entitled to judgment for restitution.[4] In Illinois, where there is a misjoinder of defendants, the action may be dismissed on motion.[5] Mere formal defects in the complaint are cured by verdict.[6] Where the complaint alleged that the defendant, with force and arms, unlawfully and forcibly entered upon the plaintiff's land, and him, the plaintiff, with force and arms did expel and unlawfully put out of possession, it was held too late, after verdict, to object that the complaint did not show that the plaintiff had peaceable possession of the premises before the injury complained of.[7] In New York, it has been held that where the objection, that the complaint in proceedings in forcible entry and detainer omits to set out the nature of the complainant's title or interest in the premises, has been overruled in the county court, and the proceedings taken to the Supreme Court by certiorari, the defendant, before he traverses the inquisition, should again make the objection, and if he fail to do so the defect will be cured by verdict.[8]

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[1] Shelby v. Houston, 38 Cal. 410.

[2] Murray v. Harper, 3 Ala. 744.

[3] Houghton v. Potter, 3 Zabr. 338.

[4] Sumner v. Spencer, 4 Eng. 441.

[5] Reynolds v. Thomas, 17 Ill. 207.

[6] Shaw v. Gordon, 2 Greene, Iowa R. 376; Matlock v. Thompson, 18 Ala. 600; Farr v. Farr, 21 Ark. 573.

[7] Test v. Devers, 2 Blackf. 80.

[8] The People v. Fields, 1 Lans. 222; s. c. 52 Barb. 198.

8. *Evidence for the complainant.*

§ 1218. The plea of not guilty puts the plaintiff upon proof of every material allegation of his petition.[1] In order to recover, he must show that he had the actual possession, either in person or by agent, of the premises upon which the forcible entry is alleged to have been made. A mere constructive possession is not sufficient. The title is not in any sense involved, but simply whether the plaintiff had the possession at the time the defendant invaded and detains it.[2] Possession apparently in a third person, may be proved by parol to have been in reality in the plaintiff.[3] But proof that the plaintiff was in possession several years before the alleged forcible entry, is not sufficient.[4] In California, the plaintiff is required to show that he was not only in the actual possession of the premises, but that his possession was peaceable.[5] Proof that the plaintiff has the title, has paid taxes, and exercised acts of ownership over the premises, is not of itself evidence of peaceable possession.[6] Where, in an action for an unlawful and forcible entry and detainer, the plaintiff introduced evidence tending to show that by himself, tenant or agent, he had been in the quiet and peaceable possession of the land, excepting a small portion thereof, for two years before the defendant entered; that he had nailed up and otherwise fastened the windows and doors of the dwelling-house on the premises, and left it unoccupied; and that shortly afterward the defendant was found in possession, and refused to surrender it on demand of the plaintiff, and threatened violent resistance; it was held that the plaintiff had made out a *prima facie* case.[7]

[1] McKinney v. Hartman, 4 Iowa, 154.

[2] Georges v. Hufschmidt, 44 Mo. 179; Graw v. Prior, 53 Ib. 313; McCartney v. McMullen, 38 Ill. 237; Thompson v. Sornberger, 59 Ib. 326.

[3] Morgan v. Higgins, 37 Cal. 59.

[4] Hassett v. Johnson, 48 Ill. 68.

[5] Reed v. Grant, 4 Cal. 176; Warburton v. Doble, 38 Ib. 619; Conroy v. Duane, 45 Ib. 597; Barlow v. Burns, 40 Ib. 351.

[6] McCartney v. Alderson, 45 Mo. 35; Miller v. Northup, 49 Ib. 397.

[7] Jarvis v. Hamilton, 19 Wis. 187.

§ 1219. The deeds under which the party claims, are only evidence as to the extent of his possession.[1] The plaintiff may have had possession, though not upon the land; and whether or not such was the case, is to be determined by the jury.[2] Whether the entry of a landlord into a part of the leased premises, not in dispute and not abandoned by the tenant, is an entry into the whole, will depend upon the intention with which the entry was made, and is a question for the jury.[3] If the action be brought by the vendee of the landlord against the tenant, it is for the jury to determine whether the plaintiff has acquired the rights and remedies of the landlord.[4] Where, in an action for forcibly entering on the front of a town lot, the plaintiff proved that he had a small house in the rear of it, it was held sufficient evidence of the actual possession of the whole lot.[5] But a complaint which claims entire premises, is not sustained by proof of a right to the possession of part.[6] Letters of agents received in the usual course of the mail, showing their possession as agents, are admissible to prove the plaintiff's possession.[7] The same is true as to a recovery in trespass.[8] It is not necessary for the plaintiff to show, in order to prove possession, that he stood upon the land, or kept servants or agents there. Anything done by him on the premises, indicating an intention to hold possession, is sufficient.[9]*

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[1] Brooks v. Bruyn, 18 Ill. 539; Smith v. Hoag, 45 Ib. 250; Pearson v. Herr, 53 Ib. 144; Mountain v. Roche, 13 Fla. 581.

[2] Chiles v. Stephens, 3 A. K. Marsh. 340. [3] Ibid.

[4] Gillett v. Mathews, 45 Mo. 307. [5] O'Callaghan v. Booth, 6 Cal. 63.

[6] House v. Wilder, 47 Ill. 510; Thompson v. Sornberger, 59 Ib. 326.

[7] Julian v. Lacey, 14 Mo. 434. [8] Moore v. Massie, 3 Litt. 296.

[9] Bartlett v. Draper, 23 Mo. 407.

* Where, upon a trial for unlawful detainer, the defendant claims title, the plaintiff may prove that the defendant entered on the premises under a parol lease from himself, though the lease proved was to continue more than a year (Adams v. Martin, 8 Gratt. 107).

In an action for forcibly entering a plantation, carrying off some of the slaves, and terrifying the others so that they ran away, it was held that the plaintiff might prove the consequential damages necessarily resulting from the loss of servants; such as wood floated off by the rising of the river, and injury to the corn crop by cattle breaking into the corn field. In the same case, after the defendant had proved in mitigation of damages a judgment in another State, against the plaintiff as principal and himself as surety, and a receipt for the

§ 1220. The particular circumstances of force and intimidation attending the entry, as well as the character of the possession intruded upon, are subjects of proof at the trial.[1] Where it appeared that the defendant used force wrongfully, and employed his servant to assist him, it was held that his general purpose, the fact of his presence, his silence while the acts of violence were done, and his whole deportment during the assault and battery by his servant, were as significant as his previous direction to the servant not to touch the plaintiff.[2] In an action for a forcible entry into a house and field, it appeared that at the time of the alleged entry there was a tenant in the house who surrendered it to the defendant upon being paid for his improvements; but there was nothing to show under whom the tenant entered—whether under the plaintiff, or defendant, or neither. It was held that the evidence did not support the charge of a forcible entry.[3] In California, proof that the defendant declared that he would remain on the premises until removed by force of law, was held not to establish a forcible detainer.[4] In Missouri, the statute provides that when there is an allegation of forcible entry "the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained, or unlawfully detained the same."[5] In Tennessee, A. locked the door and closed the windows of a house, and upon a demand of possession made by B. to A.'s agent it was refused. B. being

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payment of the judgment by himself, and that the plaintiff then resided with the slaves in that State, and promised not to remove his slaves therefrom until the judgment was paid; it was held that the plaintiff might give in evidence two judgments held by him against the defendant, and the defendant's agreement to get time from a bank holding the judgment against the plaintiff and defendant, for the payment thereof, and to credit thereon the judgments against the defendant (McAfee v. Crofford, 13 How. U. S. 447).

[1] Jarvis v. Hamilton, 19 Wis. 187. [2] Barden v. Felch, 109 Mass. 154.

[3] Quertemus v. Breckinridge, 5 Dana, 125.

[4] Hodgkins v. Jordan, 29 Cal. 577.

[5] Wagn. Sts. 645, § 16; Wunsch v. Gretel, 26 Mo. 580; McCartney v. Amer, 50 Ib. 395.

afterward in possession claiming adversely to A., it was held presumptive that he obtained possession forcibly.[1]

§ 1221. Where the original entry was lawful, a demand of possession and a refusal by the defendant must be proved.[2] Service of a demand in writing for possession must be proved by a witness. A sworn indorsement of service on the original paper, either by an officer or private person, would not be evidence.[3]

§ 1222. Where forcible entry and forcible detainer are both alleged, the forcible entry should be proved, forcible detainer not being equivalent to forcible entry.[4] In North Carolina, where the affidavit of the plaintiff and the precept of the justice summoning the jury were for a forcible entry only, and a forcible detainer was alone proved, it was held that the plaintiff could not recover.[5] In Virginia, a detainer at the date of the warrant must be proved. But if the complaint states the detainer and the warrant does not, the latter may be aided by the complaint.[6] A complaint for a forcible detainer on a certain day within three years before suit, is sustained by evidence of such detainer on any day within such time.[7] Although the plaintiff is not confined in his proof to the exact time alleged, yet two distinct occurrences cannot properly be submitted under one complaint. When the occurrence is not fixed by a given date, it will be considered as made certain when the plaintiff goes to trial with evidence directed to the events of a particular day.[8]

§ 1223. In New Jersey and Alabama, the magistrate is required to recite in his docket his reasons for receiving evidence which was objected to. But his omission to do so will not be cause for reversing the judgment, that part of the statute which requires it being only directory.[9]

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[1] Davidson v. Phillips, 9 Yerg. 93.
[2] Vennum v. Vennum, 56 Ill. 430.
[3] Drehman v. Stifel, 41 Mo. 184.
[4] Preston v. Kehoe, 15 Cal. 315.
[5] Jordan v. Rouse, 1 Jones Law, N. C. 119.
[6] Kincheloe v. Tracewells, 11 Grat. 587.
[7] Warren v. Ritter, 11 Mo. 354.
[8] Hoffman v. Harrington, 25 Mich. 146.
[9] Snediker v. Quick, 1 Green, 306; Sauniere v. Wode, 3 Harr. 296; Houghton v. Potter, 3 Zabr. 338; Clark v. Stringfellow, 4 Ala. 355.

9. *Defense.*

§ 1224. It is not a justification of a forcible entry that the plaintiff had once abandoned the possession, not intending to return;[1] neither will fraud in the execution of a lease be a justification of an unlawful detainer by a tenant;[2] nor in case of default in the payment of rent, the subsequent tender of the rent, with interests and costs.[3] And the lessee of premises cannot plead in defense, a covenant in the lease that it shall be renewed upon the expiration of the term, the equitable right not being the subject of inquiry in this form of action.[4] The defendant may, however, prove that he did not enter under the lease, but being already in possession, was induced to accept a lease from the plaintiff by false and fraudulent representations that the plaintiff owned the property, when, in fact, it belonged to another.[5] And he may show in defense that he was evicted by judgment in ejectment recovered against him by a third person under whom he holds, notice of the ejectment suit having been duly given to the landlord.[6] A disclaimer by a tenant to persons unlawfully entering upon premises in his possession will be a defense to an action of forcible entry and detainer brought by him.[7] A. having forcibly dispossessed B. of a school-house, the latter stated that if A. had C.'s right, he had a right to the possession, but that he did not believe that he had C.'s right. It was held that proof that A. had C.'s right did not establish B.'s consent to A.'s taking possession.[8] *

§ 1225. We have seen that as forcible entry and detainer is a mere possessory action, the question of title cannot arise

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[1] Keyser v. Rawlings, 22 Mo. 126.
[2] Simons v. Marshall, 3 Iowa, 502.
[3] Roussell v. Kelly, 41 Cal. 360.
[4] Finney v. Cist, 34 Mo. 303.
[5] Johnson v. Chely, 43 Cal. 299.
[6] Wheelock v. Warschauer, 21 Cal. 309.
[7] Dudley v. Lee, 39 Ill. 339.
[8] Vanhook v. Story, 4 Humph. 59.

* In an action of forcible entry and detainer by a tenant against his landlord, the defendant cannot set up damages to himself growing out of the contract between them, his remedy being an action on the contract (Johnson v. Hoffman, 53 Mo. 504).

in it.[1] In Alabama, where in an action for unlawful detainer it appeared that the defendant bought the land at a sheriff's sale under execution against the plaintiff, and received the possession from a sub-tenant of the plaintiff's lessee, after the expiration of the term, it was held that the record of the judgment under which the land was sold and the sheriff's deed could not be received for the defendant, even "to show that his possession was lawful," such evidence going to the merits of the title.[2] *

§ 1226. But although, in general, the title cannot be inquired into in forcible entry and detainer, yet it may be investigated to define the boundaries, or as to the question of damages, or rents to be recovered in an action by a mere intruder against the rightful owner of the land, or where the claimant, by fraud, prevails upon a person to take a lease, or

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[1] *Ante*, § 1218; and see Settle v. Henson, 1 Morris, 111; Black v. The State, 3 Yerg. 588; Stone v. Malet, 7 Mo. 158; Youngs v. Freeman, 3 Green, 30; Cunningham v. Green, 3 Ala. 127; Drake v. Newton, 3 Zabr. 111; Allen v. Smith, 7 Halst. 199; Beauchamp v. Morris, 4 Bibb, 312; Smith v. Dedman, Ib. 192; Fortier v. Ballance, 5 Gilman, 41; Mitchell v. Davis, 23 Cal. 381; Beeler v. Cardwell, 29 Mo. 72; Tucker v. Phillips, 2 Metc. (Ky.) 416; Smith v. Hollenback, 51 Ill. 223; Prewitt v. Burnett, 46 Mo. 372; Harris v. Turner, Ib. 438; Van Eman v. Walker, 47 Ib. 169; Milner v. Wilson, 45 Ala. 478; Gates v. Winslow, 1 Wisc. 650; Eastman v. White, 3 Chand. 196; Rev. Sts. of Wisc. ch. 117.

[2] Dumas v. Hunter, 25 Ala. 711; Clay's Dig. 251, § 5; Code, § 2859.

* As the issue in an action for a forcible entry, where the defendant pleads not guilty, is upon the defendant's forcible entry, records of other suits between other parties with respect to the property or possession are *prima facie* irrelevant (Horsefield v. Adams, 10 Ala. 9).

If the complaint avers that two persons are tenants in possession, and it is proved that one only is tenant or in possession, one of the defendants cannot be found guilty and the other acquitted, but the verdict must be in favor of both (Snedeker v. Quick, 7 Halst. 129).

The issue being whether the inquisition is true or not, evidence that the warrant was issued without the plaintiff's authority is immaterial (Smith v. White, 5 Dana, 376).

In Arkansas, the act of limitations in relation to forcible entry and detainer does not commence running in favor of one in possession under a lease until the expiration of the lease (Burke v. Hale, 4 Eng. Ark. R. 328).

In Tennessee, the possession of three years, which will bar a writ of forcible entry and detainer, must be the possession of the party setting it up. The possessions of two or more persons cannot be united to form the bar of the statute (Thompson v. Holt, 9 Humph. 407).

In Iowa, under the statute (Code, § 2372) providing that thirty days' peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued, shall bar an action of forcible entry and detainer, it was held that the fact that the plaintiff knew of the adverse holding was indispensable to the bar (Fultz v. Black, 3 Clarke, Iowa, 569).

to enter under him upon a false representation as to his title.[1] And where the proceedings are instituted to recover possession of a house, papers showing title to the premises may be read to the jury, not with reference to the title, but only the possession, to show the character of the holding of the parties.[2] In Iowa, the action cannot be maintained, under the code, where the plaintiff pleads a title paramount.[3]

10. *Verdict.*

§ 1227. In some of the States, under an allegation of forcible entry and detainer, it is necessary to prove the forcible entry, and the finding of the jury that the defendant withholds the possession, is not responsive to the complaint.[4] It has often been held upon an indictment for forcible entry and detainer, that the defendant may be found guilty of either forcible entry or forcible detainer; as they may be two separate and distinct offenses. But when the wrongful acts are continuous, the rule may be more difficult of application. In New York, it was suggested by the court in a somewhat recent case,[5] that the alleged forcible entry might be rejected as surplusage, and the verdict be permitted to stand for the forcible detainer. In Raymond v. Bell,[6] it was claimed that the verdict was wrong, because it did not find the forcible entry and detainer alleged in the complaint specially, but followed the issue found in the case upon the defendant's plea of not guilty, and only found that the defendant was guilty as in the complaint was alleged. It was said in argument that the complaint being for a forcible entry, and also for a forcible detainer, some of the jury might have thought the forcible entry proved, and some might have rested their verdict upon the forcible detainer; and thus by uniting the two causes in this manner, the complainant might have obtained

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[1] Philips v. Sampson, 2 Head, Tenn. R. 429.
[2] Settle v. Settle, 10 Humph. 504.
[3] Bosworth v. Farrenholtz, 4 Greene, 440.
[4] Preston v. Kehoe, 15 Cal. 315; Wall v. Goodenough, 16 Ill. 415.
[5] The People v. Fields, 1 Lans. 222. [6] 18 Conn. 81.

the verdict, when if they had been required to find a verdict specially, they would not have agreed. It was further urged that the statute required a special finding; that as it gave a remedy unknown to and at variance with the common law, and was summary in its provisions, and settled the right to the possession of real estate irrespective of the title of the parties, it ought to be strictly construed; and that unless the jury expressly, and in terms, found a forcible entry or the forcible detainer complained of, the proceeding was erroneous. The verdict was, however, sustained.*

§ 1228. In Kentucky, in a proceeding for forcible entry and detainer, the finding of either is sufficient;[1] but if the proceeding be for forcible detainer, a verdict for forcible entry is erroneous.[2] In proceedings for forcible entry *or* detainer, the finding of a forcible entry *and* detainer is good;[3] as also a finding of the detainer simply.[4] Where the charge is of a forcible entry *and* detainer, a verdict will be sustained which finds the defendants guilty of the forcible entry *or* detainer. And the same is true where the charge is only of a forcible entry, and the jury find the defendant "guilty of the forcible entry or detainer complained of in the warrant."[5] Where an inquisition is traversed, the finding must be merely upon the truth of the inquisition. Where, therefore, an inquisition found that the plaintiff should have the possession

[1] Swartzwelder v. U. S. Bank, 1 J. J. Marsh. 38.

[2] Sinclair v. Sanders, 3 J. J. Marsh. 303.

[3] M'Brayer v. Wash, 6 J. J. Marsh. 464.

[4] Carpenter v. Shepherd, 4 Bibb, 501. [5] Case v. Roberts, 4 Dana, 596.

* In Raymond v. Bell, *supra*, the court said: "The statute does indeed say that if the jury find that a forcible entry has been made into the houses, lands, or tenements, or that the same are detained with force and strong hand, as complained of, then the judge shall render judgment. By this it is undoubtedly made necessary that the forcible entry or detainer complained of should be found, or restitution cannot be awarded. Indeed, such would be law if it was not expressly required by statute. Judgment is but the sentence of the law upon the result of proceedings. It must, therefore, be founded upon facts. There can be no judgment to redress an injury until it is first found that an injury has in fact been committed. But it does not follow from this that a special finding is necessary. If there is any reason for it—as if the jury doubt whether the facts will justify them in finding the issue generally—they may in any case find the facts specially; and we know of no distinction in this respect between this action and any other."

and it was traversed, and the jury found that the defendant was guilty of the forcible detainer, the judgment of restitution was reversed.[1] *

§ 1229. As a general verdict finds every essential fact, it need not state the withholding of the possession at the commencement of the suit.[2] In Indiana and Connecticut, when the verdict is for the plaintiff, it must state that the premises are detained by force.[3] In Colorado, to sustain a complaint for forcible entry, the jury must find that the plaintiff was in the actual possession of the premises in question, and that the defendant by an unlawful and forcible entry actually dispossessed the plaintiff.[4] In Illinois, it was held that a verdict of guilty was sufficient, although it would have been more formal to add "in manner and form as alleged in the complaint."[5] In North Carolina, the verdict must show that the complainant has either a freehold or a term of years in the land.[6] Stating that the plaintiff is "the owner of said house" is not sufficient.[7]

§ 1230. In Iowa, it has been held that the court has no right in an action for a forcible entry to withdraw the decision from the jury, or to instruct them to find for the plaintiff, notwithstanding all the evidence offered in defense has been ruled out.[8] In Mississippi, the record must show affirmatively that the jury were sworn. Simply reciting that the jury find upon their oaths is not sufficient.[9] In New Jersey, an inquisition of forcible entry and detainer was held bad, which purported to have been taken "on the oaths or affirm-

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[1] Penny v. Skirvin, 9 B. Mon. 238.
[2] Gorman v. Steed, 1 West Va. 1.
[3] Boxley v. Collins, 4 Blackf. 320; Bull v. Olcott, 2 Root, 472.
[4] Wier v. Bradford, 1 Col. R. 14.
[5] Smith v. Killeck, 5 Gilman, 293.
[6] Mitchell v. Fleming, 3 Ired. 123.
[7] Grissett v. Smith, Phill. N. C. 164.
[8] Oleson v. Hendrickson, 12 Iowa, 222.
[9] Holt v. Mills, 4 Sm. & Marsh. 110.

* The finding in the verdict of an unlawful entry by the defendants, and a forcible detainer by them, is in accordance with the second section of the statute of California. The third section of the act applies to a different class of forcible detainers, to wit, where the entry was unlawful, and made in the night time or in the absence of the occupant (Conroy v. Duane, 45 Cal. 597).

ations of A. B.," &c., without stating that those who were affirmed were conscientiously opposed to taking an oath.[1]

11. *Damages.*

§ 1231. In the absence of any statutory provision on the subject, the jury should assess the value of the rent.[2] In Missouri, the jury may assess damages for waste and injury, as well as for rents and profits up to the time of the verdict.[3] In that State, where a landlord dispossessed his tenant before the expiration of the lease, it was held in forcible entry and detainer against him by the tenant that he could not claim rents or damages by way of offset, but must restore the property and pay the damages and rents allowed by the judgment; but that the landlord might afterward bring ejectment, laying his ouster prior to the time he dispossessed the tenant, and recover the premises, and damages for the detention, from the time of the ouster.[4] In Tennessee, the actual expense the plaintiff has incurred by the unlawful act of the defendant may be taken into consideration in estimating the damages. But evidence of injury to the freehold merely, such as waste, &c., is not admissible; though if allowed to go to the jury without objection, it is not a ground of error.[5] In Illinois, in an action on the appeal bond, the rental only can be recovered.[6] In California, it has been doubted whether the plaintiff can add a conditional prayer, that if waste be subsequently committed, damages may be assessed therefor, and can prove that waste has been committed pending the action, and demand an assessment of damages therefor. But after recovering judgment for possession, he may bring a second action for waste committed pending such prior suit.[7] The plaintiff is not entitled to damages sustained by him to land adjoining the demised premises, in consequence of the tenant

[1] The State v. Putnam, Coxe, 260.
[2] Spear v. Lomax, 42 Ala. 576.
[3] Eads v. Woolridge, 27 Mo. 251.
[4] Robinson v. Walker, 50 Mo. 19.
[5] White v. Suttle, 1 Swan, 169.
[6] Tomlin v. Green, 89 Ill. 225.
[7] Hicks v. Herring, 17 Cal. 566.

holding over;[1] but the value of the rents and profits may be recovered without being averred in the complaint;[2] and the same, as to treble damages.[3] And the plaintiff is entitled to the value of the rents and profits from the time of the entry to the date of the judgment, whether he would have the right to the possession of the premises during the whole of that time or not.[4] But he cannot be allowed damages for the detention of the whole of a tract when the ouster is shown to have been of a part only.[5] In Arkansas, where the finding is for the defendant, as he has his remedy upon his bond, the jury cannot assess damages against the plaintiff.[6]

12. *Judgment.*

§ 1232. A defective description in the judgment is aided by reference to the sufficient description in the complaint.[7]* In Kentucky, where, in rendering judgment for the plaintiff, judgment for restitution is omitted, the court may render judgment for restitution at a subsequent term.[8] In Wisconsin, where the proceeding was against a tenant holding over, and after the jury had found for the plaintiff the justice merely made an entry that "the court renders judgment according to the verdict," it was held error.[9] In Kentucky, under the code, where the traverser of a verdict of a jury does not appear when the cause is called for trial, judgment for possession may be given in favor of the traversee, although no issue on the traverse was joined.[10] Ordinarily, a judgment rendered jointly against two, when one had only occupied the premises for a part of the time, and come into possession long after the other, would be improper; but not

[1] Kower v. Gluck, 33 Cal. 401.
[2] Holmes v. Horber, 21 Cal. 55.
[3] Tewksbury v. O'Connell, 25 Cal. 262.
[4] Roff v. Duane, 27 Cal. 565.
[5] Thompson v. Smith, 28 Cal. 527.
[6] Fowler v. Knight, 5 Eng. 43.
[7] House v. Camp, 32 Ala. 541.
[8] Norton v. Sanders, 7 J. J. Marsh. 12.
[9] Swift v. Cornes, 20 Wis. 397.
[10] Dibble v. Porter, 1 Duvall, 190.

* The following was held not to be a sufficient recital of a judgment for the restitution of premises: "Parties appeared ready for trial. After hearing the evidence, the court decides in favor of the plaintiff against the defendant. Costs taxed to defendant, $6.85. A. B., Justice" (Allen v. Corlew, 10 Kansas, 70).

if the defendants acted in concert to accomplish a common purpose.[1] In Tennessee, the plaintiff can only recover so much of the land as he was dispossessed of before suit brought.[2] In Illinois, the only judgment to which the plaintiff is entitled is that he have restitution of the premises.[3] The statute of Missouri, concerning forcible entry and detainer, does not contemplate a judgment on the appeal bond against the principal and sureties, as in ordinary appeals from justices of the peace. Such bond may be sued if it be not complied with. But a summary judgment cannot be rendered in the same suit.[4]

13. *Appeal.*

§ 1233. In North Carolina, an appeal cannot be taken from the proceedings.[5] In Tennessee, either party may take the cause to the Circuit Court by *certiorari* at any time before the writ of possession is executed, and an appeal will also lie within the two days allowed by law, as in other cases.[6] In Michigan, the statutes give two remedies to the defendant below for the review of the proceedings: First, by appeal to the Circuit Court; and second,[7] by *certiorari* to remove the cause to the same court. Jurisdiction will not be entertained in such case to review upon a common law *certiorari*, although the court might have the power to do so under special circumstances.[8] In New Jersey, a resident who removes by *certiorari* a judgment rendered against him in an action of forcible entry and detainer, need not file security for costs, though it be proved that he will be unable to pay should the decision be against him.[9] A judgment which is erroneous as to costs may be corrected in that respect and be

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[1] Kingman v. Abington, 56 Mo. 46.
[2] White v. Suttle, 1 Swan, 169.
[3] Robinson v. Crummer, 5 Gilm. 218.
[4] Keary v. Baker, 33 Mo. 603; Gunn v. Sinclair, 52 Ib. 327.
[5] Grissett v. Smith, Phill. N. C. 164.
[6] Day v. Johnson, 4 Cold. 231.
[7] St. of Mich. of 1869, p. 20.
[8] Smith v. Reed, 24 Mich. 240, referring to Farrell v. Taylor, 12 Ib. 113.
[9] Smith v. Williamson, 6 Halst. 315.

otherwise affirmed.[1] In Illinois, under the act of 1853, the appeal bond may be amended, and the court may compel an additional bond to secure rents which accrue before the term of court to which the action is continued, in default of which the appeal may be dismissed.[2]

§ 1234. Irregularities are not a ground of exception unless they are such as to prevent a fair trial on the merits.[3] In Missouri, if the affidavit and recognizance are defective, the appellant may file sufficient ones within such time as will not delay the other party.[4] After judgment, the action cannot be tried over again on the ground that the second suit embraces premises not included in the first, it not being permitted to avoid the judgment by an enlargement of the claim.[5] In Virginia, after verdict for the plaintiff, the court may grant a new trial to the defendant.[6]

14. *Writ of restitution.*

§ 1235. The writ of restitution determines neither the right of property nor the right of possession.[7] Therefore, the plaintiff may be entitled to restitution, notwithstanding the defendant has recovered judgment in ejectment.[8] But in Iowa, upon appeal by the plaintiff in forcible detainer to the District Court, and a verdict, "We find the defendant guilty, and that plaintiff only had possession of the land that the house occupied," it was held that the plaintiff was not entitled to be put in possession, it not appearing that the right of the plaintiff to the possession had not expired before the final trial.[9] In New York, if the complainant prevails upon the trial of the traverse, a precept is to issue to the sheriff commanding him to cause the complainant to be restored

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[1] Ibid. [2] Rider v. Bagley, 47 Ill. 365.
[3] Jones v. Skiles, 1 A. K. Marsh. 54; Rowe v. Powell, 4 J. J. Marsh. 153.
[4] Hamilton v. Jeffries, 15 Mo. 617. [5] Harvie v. Turner, 46 Mo. 444.
[6] Hammock v. Wilson, 2 Virg. Cas. 321.
[7] Mitchell v. Hagood, 6 Cal. 148. [8] Dedman v. Smith, 2 A. K. Marsh. 260.
[9] McLaughlin v. First Nat. Bank, 23 Iowa, 602.

and put into full possession of the premises according as he was seized or possessed before the entry.[1] Restitution will not be awarded on conviction in a criminal process.[2]

§ 1236. It is a general rule in quashing proceedings in forcible entry and detainer, to award a writ of restitution, and the court, on motion for that purpose, will not allow the merits of the controversy to be gone into. The writ is not, however, demandable of right, and when it appears from the case itself that by issuing it manifest injustice will be done, it will be refused.[3] But in Arkansas, on a rule dismissing an action of unlawful detainer, on the ground that the plaintiff had not enlarged his possession bond, it was held that the defendant was entitled to restitution.[4]* In California, when the plaintiff is placed in possession by a writ of restitution, and the judgment is afterward reversed, it is the duty of the court below to reinstate the defendant in the possession,[5] but not as against third parties who have ousted the defendant during the pendency of the action, when he did not lose possession of the property in consequence of the judgment.[6] In an early case in Connecticut, the court, upon the reversal of the judgment, declined to order restitution of possession.[7]

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[1] The People v. Fulton, 11 N. Y. 94.
[2] State v. Walker, 5 Sneed, 259.
[3] Watson v. College, 2 Jones L. N. C. 211; Towle v. Smith, 27 Wis. 268.
[4] Runyon v. Hale, 5 Eng. 476.
[5] Polack v. Shafer, 46 Cal. 270.
[6] Bowers v. Cherokee Bob, 46 Cal. 279.
[7] Bird v. Bird, 2 Root, 411.

* In Arkansas, the statute which provides that a writ of possession shall not be executed unless a bond is given to the sheriff "or other person," does not mean the defendant in the action as such "other person," but the sheriff or other officer to whom the writ is directed. If, however, the bond is made payable to the defendant, neither the plaintiff nor his sureties will be allowed to deny its validity. There being no provision that such a bond shall be filed, an allegation that it is on file in the clerk's office will not excuse the omitting the *profert* and production of the original (Mitchell v. Gibson, 14 Ark. 224).

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