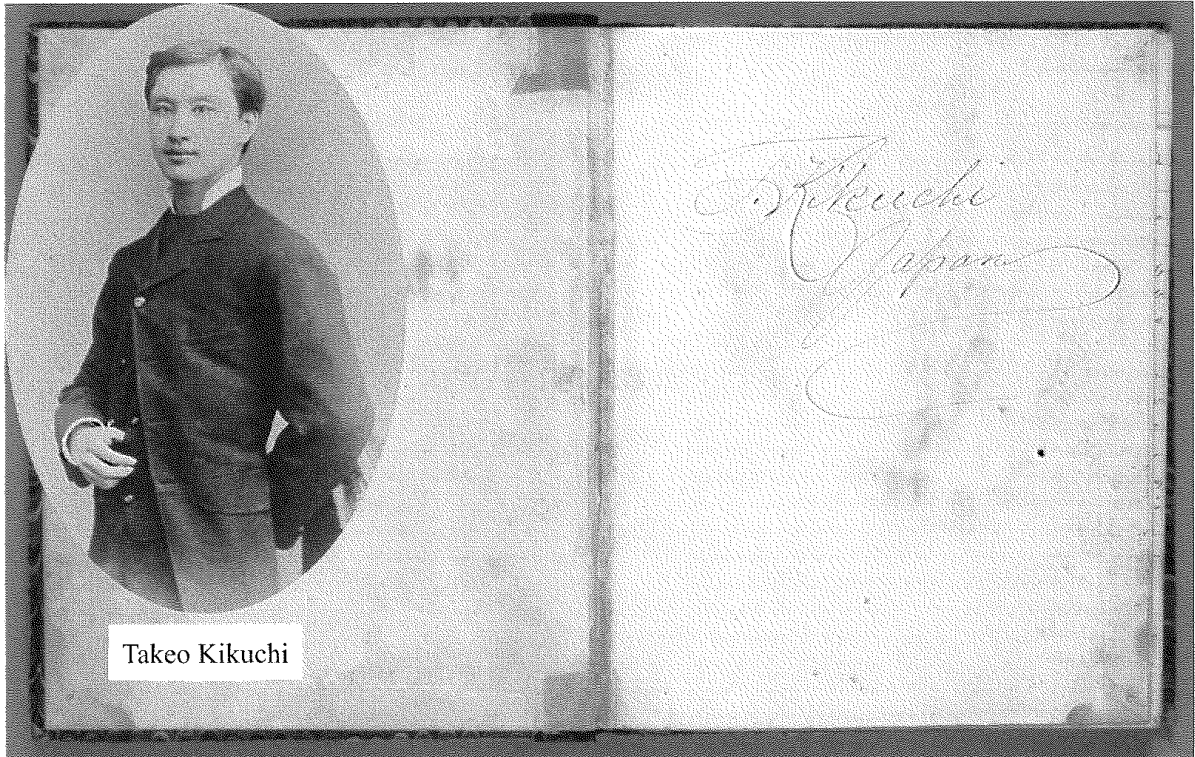
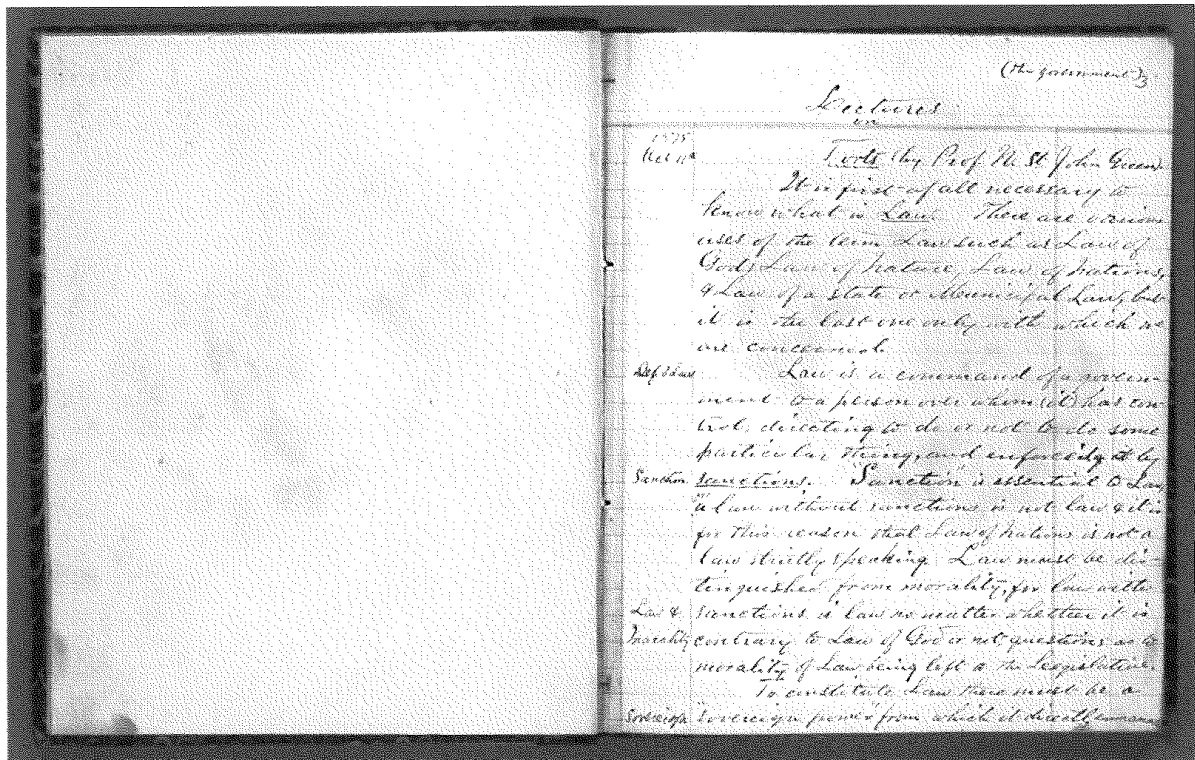


Lectures on Torts



Takeo Kikuchi

[flyleaf:]



[page 1:]

[flyleaf:]
T. Kikuchi
Japan

[Law Student Notebook
edited with an introduction by
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[page 1:]

Lectures
on
Torts (by Prof[essor] N[icholas] St. John Green).

1875
 Oct[ober] 11th
 [Monday]

It is first of all necessary to know what is Law. There are various uses of the term Law such as [the] Law of God, Law of Nature, Law of Nations & Law of a State or Municipal Law, but it is the last only with which we are concerned.

Def[inition] of Law
Law is a command of a government to a person over whom (it) has control, directing to do or not to do some particular thing, and enforced (~~enforcing~~ it) by sanctions. "Sanction" is essential to Law, for a Law without sanctions is not law & it is for this reason that [the] Law of Nations is not a law strictly speaking. Law must be distinguished from morality, for law with sanctions is law no matter whether it is contrary to [the] Law of God or not, questions as to morality of Law being left to the Legislative [Legislature]*

Sanction.

Law & Morality

Sovereign
To constitute Law there must be a "sovereign power" from which it directly emanate[s].

* (the government)

	[page 2:]
Eng[lish] & Amer[ican] & Rom[an,] Euro[pean] Laws	[The] Law of England & America consists of Legislative acts & decisions of courts. A peculiar difficulty of studying & administering English ^{law} is in hunting up separate statutes & cases, unlike Roman & Continental Laws.
Rights	Rights There are also various usages of the term Rights, as Natural Rights, Moral Rights, & Legal Rights. Natural R[ights] do not mean anything. Moral R[ights] have no relation to our subject.
Leg[al] Ri[ghts]	Legal Rights are creation[s] of Law either to act or forbear. [There are] Two kinds of L[egal] R[ights] viz. L[egal] R[ights] as against everybody else & those as against a particular person or persons, e.g. Personal R[ights] for the first &[, for example, a] Promissory note for the second.
2 Sorts	
Duties	Duties They correspond to R[ights] everywhere. They are also legal not moral. D[uty] is ^{forbearance} something which we are obliged to forbear on pain of punishment of Law.
Torts	Torts The word is derived from Norman French meaning simply wrong. But

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it came to mean Trespasses only.

Ac[tion] of Torts

An action of Tort may be brought on violation of those R[ight]s as against everybody or of special duties imposed by Law, but does not lie on violation of

Ac[tion] on Contract.

contracts in which case civil [an] action of contract lies.

[An] Action of torts is maintained on violation of forbearance while an Ac[tion] on contracts lies in violation of acts (to do). Whenever there is a violation of Rights of some one [party], there is a breach of Duty of the other [party].

Ac[tion] of Trespass Assault.

[An] Action of Trespass is brought on both Assault & Battery

Assault is an attempt or an offer to do present violence to the person of another against his will. There is a difference between an assault on account of which damages can be recovered by the person injured & that which can be prosecuted criminally -- between civil & criminal.

Intention & Damage.

[It is] With the former alone that we are concerned. To constitute an assault there must [be] the

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concurrence of Intent & Damage. Violence offered must be done with [an] intention to put another into fear & reasonably adequate to produce the effect. A difference between recovery of damages in an action of Contract & that in an action of Tort is, that in the former damages can^{be} easily calculated with pencil & paper, while in the latter, their estimation is very difficult, in as much as they are mostly immaterial or incorporeal, & left entirely to the jury. An assault must be [an] actual act, [;] a mere word unless assisted by acts, does not amount to an assault. Also an act must be against [the] will of the party assaulted. Throwing stones, presenting a gun & the like, are not of themselves assaults, unless confirmed by circumstances showing an intention of doing wrong, which is found by the jurors. (v[ide] Savages, Modern Court p. 3ⁿ⁴). If an act be done against the will of the plaintiff, other*

Damages in Contr[act] & Tort.

Actual.

Against Will

Amount of violence

* Whether an offer without intention is an assault is uncertain.

ⁿ⁴ Tuberville v. Savage, 86 Eng. Rep. 684, 1 Mod. 3 (Eng. 1669)

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things being equal, the amount or degree of violence does not matter to make it an assault, although the degree affects the amount of damages (Eoseus v.ⁿ⁵). A mere threat does not amount to an assault.

Battery

Battery is an actual doing of violence to the person of another against his will. It is not a mere attempt -- as in the case of an assault. A violence actually done against the will of the suffering party is a battery no matter whether it be committed intentionally or negligently.

Assault & Battery.

An assault is not always contained in a battery, as when one person hastily runs down stairs with his face turned backward & unconsciously or negligently throws back downward another coming up. But there is a combination of an assault & a battery, as is [the] case generally when he knocks another down stairs when coming up, knowingly & with intent & attempt[s] to do him violence.

ⁿ⁵ Eoseus v. This citation cannot be verified; no case containing this (or a similar) party name dealing with assault can be found in case reports.

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Touch. *A slightest touch, other things being equal, amounts to battery, provided it produces harm to the person^{of}, or anything usually worn or had by the party such as [a] horse he [is] riding on, [a] cane in his hands, chairs he is sitting on, &c. In battery violence may be done either by the party himself or by anything set in motion by him.*

*Legal Act
without
Negligence*

It is absurd that when both parties violate the law, the one may maintain an action against the other. If one does anything lawfully & without any negligence that can be found by the jury in examining the circumstances, he is not liable to a battery (6 Cush. 292).^{} If in the exercise of a legal act one accidentally hurts another, as striking a bystander in an attempt to whip a dog belonging to him, he is not liable as has been said, but if the act itself is illegal as where he strikes or wounds a third person in fighting with another, he is responsible for the damages caused (2 Miles 298ⁿ⁶).*

^{*} *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850). *The defendant struck the plaintiff's eye, with a stick with which he struck dogs, one his own & the other the plaintiff's, to prevent their fighting. An action of trespass for this assault & battery. The court held that the defendant's act to prevent his dog from hurting another's is lawful & his striking the plaintiff is purely accidental & unintentional. Want of due care on the part of the defendant must be proved by the plaintiff who fails in this proof. If both parties are chargeable with negligence the plaintiff cannot recover. So [also] if both parties are using ordinary care. The defendant used care adapted to the exigency & was not therefore liable. "Actions of trespass for assault & battery survive. Tourtellot v. Rosebrook, 52 Mass. (11 Metc.) 460 (Mass. 1846). The plaintiff sued for trespass on the case alleging that fire spreading from the defendant coal pit managed negligently consumed his wood & growing trees. The court held that he sued for the defendant's negligence but as the latter was doing a lawful act, the burden of proof rests upon the plaintiff who fails in this [so] no action will lie.*

ⁿ⁶ *Sullivan v. Murphy*, 2 Law Rep. 247 (Phila. Dist. Ct. 1839)

- [page 7:]
- Indirect.* *So far [as to] direct violences done to the person of another. Now we come to indirect one[s].*
- Imprisonment.* *Imprisonment Imprisonment is a restraint of one's person. A person is imprisoned when he is restrained from his movement or his locomotive power. It is in [a] case of false or illegal imprisonment that an action lies, but imprisonment is here treated of generally. Imprisonment is not necessarily confined to one place but a person may go round the world restrained. Cases on this topic have reference mostly with [respect to] arrest by officers. If officers in executing their warrant command a person to go with them & he submits, he is arrested & under restraint though they do not touch his person at all. He is imprisoned in this case just as much as when he is caught by his collar. Partial restraint amounts to imprisonment. Thus if*
- Official Arrest.*
- Partial Restraint.*

[page 8:]

a person is obliged to go in one direction & forbidden to [go] any other way which is open to him, he is still imprisoned. (1 Lawlence 739ⁿ⁸).

*Restraint
Actual
3 ways.*

To constitute an imprisonment, a restraint must be actual. It may^{be} either by force, by threat of force, or by assertion of force (2 New Report 211^{n8a}). Two things essential to an imprisonment are: (1) The person must be put in such a situation as to feel that he is under restraint, & (2) he must be restrained under the color of force. The doctrine that every continu-

*New
Imprisonment*

ation of^a false imprisonment is a^{new} false imprisonment, must mean, says Prof. Green, the continuation of it after an action is brought up, not that every minute after a person is restrained affords him^{the grounds} to sue for a new

*Legal arrest by
private person.*

false imprisonment. That a man may be arrested on suspicion has become law. A legal arrest by a private person is one made under a warrant from a court or administrator of justice to him

ⁿ⁸ 1 Lawlence 739. Citation cannot be verified. Lawrence's Reports (20 Ohio) contain no reference to unlawful imprisonment or partial restraint.

^{n8a} Arrowsmith v. Le Mesurier, 2 Bos. & P. New. Rep. 211, 127 Eng Rep. 605 (Eng. 1806)

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for commission or omission of law. Officers without warrants arrest in [at] their own peril. A legal arrest may be made by a private person for a breach of peace. Breach of public peace means generally assault or battery in any felonious offense which last is any offense in (N[ew] Y[ork or]) Mass[achusetts] punishable by imprisonment in the state prison. He may lawfully arrest a person or persons while the latter are actually committing any of the offenses above mentioned, but if the offense is going to be renewed, he may even after they stopped in their action. His duty is to deliver the offender to officers of peace or police officers. In an actual continuance of affray e.g. he which is a fighting of two or more persons or riot -- including necessarily above three persons, he may lawfully arrest them. (108 Mass. 116ⁿ⁹ & 12 N.H. 526^{n9a}). In the Mass. case the defendant, a deputy constable arrest[ed] a lunatic who were [was] making loud noise or disturbance to a religious meeting

Breach of Peace.

Actual committing.

Delivery to Constable.

Case of arrest of a lunatic.

ⁿ⁹ Look v. Dean, 108 Mass. 116, 120 (1871)

^{n9a} Colby v. Jackson, 12 N.H. 526 (1842). *In the N.H. case the defendant, one of the selectmen & overseers of the poor, arrested & confined the plaintiff on the application of the latter's wife, whereby an action of trespass for assault & battery was brought. The defendant maintained that the judge shall instruct the jury that if they find that the plaintiff was a dangerous lunatic, the defendant had [a] right to retain the plaintiff so long as this condition continued. The court held that -- The overseer of the poor may apply for [top of next page:] a guardian & the selectmen may make inquisition but their duty ends here, & they have no greater right to detain a lunatic than a private person. The defendant was so far right as he confined the plaintiff in case of urgency & applied to the judge of the probate court for a warrant to make an inquisition & inquired according to a warrant [to] the lunatic's relatives who all said "dangerous," but he acts contrary to law when without returning the results of the inquisition as directed he continued the imprisonment. But as his motive was not a malicious but a right to assist the family in exigency & doing the best to [for] the welfare of the plaintiff & entitled to a mitigation of damages.*

*Illegality of
detention of
a crazy person
not dangerous.*

[page 10:]

& kept him in the police station. The plaintiff thereby brought an action for unlawful imprisonment. Notwithstanding the defendant's justification alleging that as the plaintiff was an insane [person] the arrest was for his welfare & the honest execution of the official duty, it was held that since no person should be restrained simply because he is insane, the ~~restraint~~ ^{detention} of the plaintiff who was not dangerous ^{to himself & others} if insane was illegal.

*Detention in a
hospital.*

Though simple arrest may be justified detaining him instead of sending [him] to a lunatic hospital is unjustifiable. The fact that the defendant was acting under a superior officer or another constable afterwards sent the plaintiff to a lunatic hospital is inadmissible. The head constable also was liable for detaining the plaintiff in the hospital without a warrant for & when the latter was not a dangerous insane [person] in which [case] alone the statute autho-

[page 11:]

rizes arrest. of Any plea is ineffectual as the constable deviated from the statute which he must follow.

3 Conditions
to justify
arrest for
a past
offense.

** In order that a private person may lawfully arrest another for a past offense, the offense must be a felony, it must have been actually committed, & he (who arrests) must suspect or belief [believe] & must have a reasonable cause to believe, which the court will considers sufficient cause or reason to believe, that the person whom he arrests is the one who committed the felony. (12 Cush. 264ⁿ¹¹ where a decision was made according to Eng[lish] Law, as it was before Mass[achusetts] Law had made any offense punishable by imprisonment in the state prison a felony). Belief must be well grounded on the circumstances.*

Reasonable
Cause.

& Reasonable Cause as well as reasonable time or notice must be determined by circumstances in each case. (2 Bingham 523^{n11a}; 14 C.B.N.S. Series 534^{n11b}; 8 Paine 526^{n11c}; & 2 Q.B. 169^{n11d}).

* *If he can arrest without warrant?*

ⁿ¹¹ Commonwealth v. Carey, 66 Mass. (12 Cush.) 246 (1853). This case discusses common law rules concerning what actions were considered felonies. Kikuchi's notes likely inverted the "4" and "6" in the case citation.

^{n11a} Hedges v. Chapman, 2 Bing. 523, 130 Eng. Rep. 408 (Eng. 1825)

^{n11b} Marsh v. Loader, 14 C.B. N.S. 535, 143 Eng. Rep. 555 (Eng. 1863)

^{n11c} 8 Paine or Payne 526. Citation cannot be verified. No cases with similar citations discuss reasonableness and arrest.

^{n11d} Pantan v. Williams, 2 Q.B. 169, 114 Eng. Rep. 66 (Eng. 1841)

[page 12 (entire page crossed out with an X, a stray passage from criminal law class):]
 X *When an indictment is directed to a
 X person by [a] different name[,] the supposed prisoner may
 X adopt a general plea [of] "not guilty," thus throwing [the]
 X burden of proof upon the government. If one
 X indicted against has no counsel the court is
 X bound to give one. In a general plea [of] "not
 X guilty" the proof by the government must not
 X be given [?] from the knowledge of the jury them-
 X selves, but they must hear witnesses sworn.
 X The strict rule as to the government[']s
 X proof does not apply to time & place. If
 X a crime is committed any time before the
 X finding [of] an indictment against the crimi-
 X nal, the charge is good, provided it is within
 X six years from the time the act was done, which
 X are [is the] statute [of] limitation[s] in capital offenses.
 X Again it is material whether the crime has
 X been committed in a place different from
 X that named in the indictment, provided such
 X place is within the jurisdiction of the court.
 X The custom of confining a trial within the
 X county where the act was done is founded on

* Another version of this passage is in Kikuchi's Criminal Law notes at page 11.

[page 13 (top ten lines crossed out with an X, a stray passage from criminal law class):]

X *the old English usages of summoning witness-*
 X *es from the neighborhood of the place & conti-*
 X *nued for the reason of releaving [relieving] poor crimi-*
 X *nals from the inconvenience of getting wit-*
 X *nesses in favor of them.*
 X *Time and place, however, must be*
 X *strictly charged & proven, where they are*
 X *essential to the nature of the crimes com-*
 X *mitted, as night to burglary, & highway to*
 X *highway robbery.*

*Contrast
 between
 Officers &
 private per-
 son in arrest.*

*Differences between Officers & pri-
 vate persons. -- Whereas a private person
 can arrest for [a] felony which has been ac-
 tually committed, the officers without a
 warrant can arrest, whether they have
 reasonable cause to suspect or suppose
 that it has been committed. Comm. Lawⁿ¹³.
 They can arrest also on the information
 of other persons, whereas he cannot. By [a]
 statutory provision they can arrest for
 offenses other than felonies. Such powers ^{are} ~~α~~
 confined to peace officers as constables.*

ⁿ¹³ Josiah William Smith, *A Manual of Common Law* (4th ed., London 1870), p. 14. Also, pages 14-15 directly state the rule announced on page 9 of Kikuchi's notes concerning a private person's right to detain those currently engaged in, or threatening to renew, breaches of the peace.

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*Warrant in
crim[inal] cases.*

A warrant in criminal cases is a direction to officers to produce the body of the accused to answer before the court. It must be issued either in [an] indictment or [a] complaint. Officers must judge whether the court issuing it has jurisdiction over the matter^{cause} therein stated. If no defect exists in [on] its face, which they can see on reading the paper, they are justified in arrest, whether the fact contained therein is false or right^{true}. 13 Mass. 324ⁿ¹⁴ it is said that the constable could not arrest the Sab[b]ath-breaker on the Lord's day [i.e., Sunday] under the warrant of the justice of [the] peace who has no authority to have the prisoner arrested for such petty^{civil} offense on such day. But the constable may be justified in prosecution of the warrant, though the justice issuing it being interested may not be qualified to do it, for the such disqualification may be unknown to him.

*Officer's
liability.*

Manner

In criminal warrant[s] officers can

ⁿ¹⁴ Pearce v. Atwood, 13 Mass. 324 (1816)

[page 15:]

of arrest. *arrest on any day or at any hour of the day, can break open into [a] house if they are refused in their request. But they must not use more force than necessary for the purpose & must take the prisoner before the magistrate in the most convenient way (not of course to himself), & as soon as possible.*

Arrest in civil cases. *Arrest in civil cases cannot be made without the process of the court. It cannot be made on Sunday (Car. II 29ⁿ¹⁵) & such arrest is declared in Comm[on] Law to be a false imprisonment. The recent tendency of the legislature is to restrict greatly the power of arrest.*

7 Ann c. 12^{n15a} *Ambassadors.* *By common law some persons are exempted from arrest ^{in civil cases} as seamen uncommissioned officers of army & navy & common soldiers. Ambassadors, public ministers, the members of their household & men-servants, but ^{not} consuls are ~~not~~ within the exception in civil & crimi-*

ⁿ¹⁵ Statute 29 Charles II, ch. 7 (Eng. 1677)

^{n15a} Statute 7 Anne, ch. 12 (Eng. 1708). This statute established immunity for foreign ambassadors and ministers but does not mention soldiers or sailors.

- [page 16:]
- Governors* *nal cases. Governors are also privileged. -- 7 Wallace 482ⁿ¹⁶ All persons in public service are exempt, as a matter of public policy, from arrest upon civil process, while thus engaged. But they are liable for felony, to the ordinary processes for his arrest or a bench warrant of the legal tribunals. So mail carriers may be temporarily arrested on [a] charge of felony on [a] warrant.*
- Members of legislature* *Members of [the] legislature are also exempted during session & during travel necessary to attend the house. Officers are liable for arrest of privileged persons, but if they do it from entire ignorance of the fact, their act may be excusable. This privilege also extends to persons attending the court not only judges, [and] jury, but witnesses too.*
- Witnesses, judges & jury* *not only judges, [and] jury, but witnesses too.*
- Bail.* *The case of the bail is exceptional & peculiar. The prisoner bailed is in the same situation as actual custody & the bail [bondsman] may arrest him even out of the jurisdiction of the court where he became bail [bondsman], provided [it is] in the same state, even while attending*

ⁿ¹⁶ United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868)

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the court & even on Sundays. He may command the assistance of the sheriff, or even depute [i.e., delegate] his power, but the deputy cannot again delegate his authority.

Husband
&
Wife.

Husband & Wife -- Husband cannot use any personal violence to his wife -- 6 Iredell's North Carolina Rep. 164ⁿ¹⁷
Such personal restraint & coercion as one may lawfully use towards another will not form any ground of extenuation in murder, [and] is not a provocation. In this case the right of the deceased to coerce the prisoner depends ^{upon} the authority of a husband over his ^{}wife. It seems that he may confine her under ^{certain} circumstances, but considering the full control [that the wife has] over her property apart from his, he cannot very well restrain her for her extravagant expense, in short the extent of his authority is hard to determine. The question as to his power to take her wherever he goes on [an] official journey has never been decided, & it is very doubtful whether he can take her out of the*

ⁿ¹⁷ State v. Craton, 28 N.C. (6 Ired.) 164 (1845)

^{*} *Even if she was detained by her consent, the husband had the right to stop the prisoner until he should give up his wife. He has generally the exclusive custody of his wife. Although any person has a right to protect her from the violence of, & take her from cruel usage under him & although the husband would not have a right to take her by force, from the house of any parent or any proper protection, during a difference between them, nor to confine her without sufficient reasons, yet he may lawfully [top of next page:] lay her up under restraint where she makes undue use of liberty, as going into lewd company, because the restraint is for preserving her honor & her purity.*

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the jurisdiction of a particular court.
*1 Burrow 542*ⁿ¹⁸

*Parent &
 Child.*

*Parent & Child -- No legal obligation
 is imposed upon [a] parent by English
 law to support his children & he is only
 liable for such negligence as would injure
 their health. Minor children cannot
 in any way maintain an action them-
 selves. -- v. Johnson, 2 N.H. 283*^{n18a}

*Intention of parent in assault or battery
 to his children which is necessary to prove
 is neither more nor less than that required
 in the same offense between ordinary parties.*

ⁿ¹⁸ Rex v. Mead, 1 Burr. 542, 97 Eng. Rep. 440 (Eng. 1758). This case holds that if a husband and wife make a formal separation agreement after the husband's "ill usage" of the wife, the husband cannot force the wife to move back in with him, but does not deal with a removing someone from a particular jurisdiction.

^{n18a} (blank) v. Johnson, 2 N.H. 283. This citation cannot be verified. Green may have referred to Wright v. Malden & Melrose R.R. Co., 86 Mass. (4 Allen) 283 (1862), where the court held a parent's negligence would preclude that child from suing based on another's negligence in the street.

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*Cruel
treatment.*

If his correction amounts to cruelty -- he is liable no matter whether he does it from malice or not. The support of [a] child & right over him is given to one of the parents who must reasonably take care of him in case of separation. [A] Mother succeeds to [a] father's power over children

Emancipation.

on his decease. The authority of [a] parent ceases at emancipation which takes place either in writing or by verbal promises when they have attained the age of majority. It happens also when they are enlisted to navy or army service or when they marry. When it has once been given then he cannot take it back at his will.

*Master &
scholar.*

Master & Scholar It is generally said that master has the power & authority over his scholars delegated from their parents so far as their welfare concerns, & thus standing in loco parentis, has [a] right to exercise moderate chastisement or correction. But this

Contrast

But this

- [page 20:]
- between public & private schools.* *applies to private schools where there is no rule or regulation imposed by law above [the] master. In public schools, however, such rules & regulations restrict scholars[,] & their parents do not mean to submit their children to nothing [i.e., anything] but these rules & regulations, hence the master has no right to exercise [a] power of chastisement. Even in a private school he cannot chastise beyond reasonable degree, & if he transgresses the degree he is liable.*
- Master & Servant.* *Master & Servant -- Any master cannot chastise even moderately servants of full age, for contract any breach of duty, as the contract is free hiring. The only occasion [on which] he may [chastise] is the case of servants under age, provided he does so with [the] permission of their parents.*
- Apprentices* *Such permission is not necessary, however, in the case of apprentices under age, for they cannot be expected to act like adults & he is put in the place of their parents, correcting [apprentices] whenever they act improperly.*
- Exception.* *The only exception to the rule that [a]*

	[page 21:]
<i>in case of master & seamen.</i>	<i>master cannot chastise servants, is the case of [a] master of a ship & seamen, he being au- thorized even to act somewhat violently. It is [by] regulation of statutes & shipping articles, that all men on board a ship are to obey the order of the master. -- 1 Sprague 119ⁿ²¹.</i>
<i>Expediency</i>	<i>Such authority is given to a master for the sake of expediency, because but for this authority, it would often be difficult to perform in the purpose or voyage. He re- quires a despotic power just as a comman- der of an army. He can imprison them on shore if in harbor as in case of mutiny or other disobedience,</i>
<i>Passengers.</i>	<i>but he can do this for as punishment but simply to keep them. In relation to pas- sengers, he has also an ample power. He can enforce the rules & regulations for keeping order on board, even by imprisoning them, may compel them to serve in case of com- mon dangers.</i>
<i>Marshal [Martial] Law</i>	<i>Martial Marshal Law -- Existence of this law is nothing more than [an] absence of all</i>

ⁿ²¹ United States v. Colby, 1 Spr. 119, 25 F. Cas. 490, 8 Law Rep. 496, 25 Fed. Cas. No. 14,830 (1845)

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the laws, & one who declares it amounts to say[ing] that he has power to & will act as he sees fit. After its expiration the court may consider to examine & decide whether an act done under it is justifiable or not.

Military Law.

Military Law -- It is different from marshal [martial] law which is not law at all. It is a code of law governing military & naval men & is just as binding & has just the same authority as revised statutes. This in England is the Mutiny Act passed annually by parliament.

*Self-defense
ass[ault] or
battery.*

A person may^{justify} his assault or battery done within a certain limit ~~or~~ for self-defense of person & [of] property both real & personal. Right of parents & child, husband and wife, master & servant, to commit assault & battery for each other's defense, is perhaps to be taken to mean the right of interference only, for it is a settled principle of law that no one can commit such acts but for self-defense. Even in this case he is bound

*Nearness of
relations.*

[page 23:]

to use reasonable force only[,] which is determined by the jury.

Origin of the right to use force.

The right to use force in regaining his property wrongfully taken is derived, perhaps, from the old English doctrine that he is obliged to have recourse to his own act [i.e., self-help] before going to law. English Law differs

Contrast between Rom[an] & Eng[lish].

in this respect that from Roman Law which forbids anyone to resort to his own acts whenever he had [a] remedyⁱⁿ, or is entitled to go to, law. It is generally said that everyone may use [such] force [as is] necessary to recover his property unlawfully taken or retained, unless he thereby commits a breach of peace. But it is difficult to use force without breaking [breaching the] peace.

Previous request.

The true rule is then that whenever the adverse party conducts himself peaceably a previous request to leave a place, return property, or stop an action, before resorting to force^{is necessary}.

Force only.

If the other party, however, acts violently, so that circumstances do not allow

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any previous request, he can immediately use necessary force, for in this case unlike in the former instance, he uses reasonable & not more than necessary force.

Recovery of real property.

In respect to recovery of real estate entry was formerly indispensable, & it is now the rule that anyone who uses force or violence to regain the possession of real property wrongfully held by another; is punishable criminally although it really belongs to him. The party who thus holds land unlawfully is, however, liable to an indictment.

Slander & Libel.

Slander & Libel -- In civilized communities [a] man's character is essential to his happiness & prosperity & every act that injures it is regarded as an offense. It is [a]

Character not Reputation.

man's character only, however, & not his reputation that [the] law protects; hence proof of truth of what is spoken or written is always allowed to be produced. Whatever [a] man's reputation may be, if his character is such as [it] is said to be,

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no action will lie on his behalf. Defamation of his character is not only injurious to himself but indirectly to the state or community of which he is a member.

What are Libel & Slander?

Character may be defamed [defamed] in two ways; either by words or pictures written or printed, or by spoken records [words]. The former of these is called libel & the latter slander.

Contrast.

The chief difference between the two is, that libel is a criminal offense, while slander is a civil [offense].

What words slanderous.

1. Slander -- A man cannot be punished criminally for his words in slander. To constitute a slander, the words spoken must be defamatory to [an]other's character, & what is defamatory must be determined by the sentiments of the society generally, not by the feelings of individuals.

Change of meanings.

Strict care & guard must be used against change of meanings of words at different times & localities. Certain words formerly regarded as slanderous may not be so now, or words

[page 26:]
having defamatory senses in one place may convey quite different or opposite meanings in another.

Proof of damages.
Anything spoken that is defamatory is slander, but it must be proved by the injured party that he thereby sustains damages in order to hold the speaker liable. If, however, it relates to his profession, occupation, or trade, an action may be maintained without showing any special damages. A mere speaking of certain words is in some cases thus-

Words themselves actionable.
slander without further proof or it is the same thing that [the] words themselves are actionable. But here the words must be such as to convey [the] charge of something disagreeable to [the] hearer or the charge of some disease which excludes him^{one} from society, in a plain & popular sense. Any defamatory word is actionable, if it is proved that some special damage, naturally flowing from the speaking of it, is sustained. No action will of course lie if no one heard it spoken, however slanderous it may be.

Any defam[atory] words on proof of damages.

[page 27:]

*Imputation
of crime*

The general rule as to the imputation of [a] crime upon another is that the ^{his} acts must be criminally punished, & the words must convey some imputation upon the moral character of another. If words are not slanderous in the place where they were spoken, no action would lie. Crimes must be disreputable ones, in order to make the imputation of them by words of mouth actionable.

*Slanderous in
the place
spoken.*

*Imputation of
diseases.*

*Words imputing contagious diseases are actionable as slander, provided only the imputed party has them actually. -- 6 Allen 236ⁿ²⁷ The pl[aintiff] brought an action of tort alleging that the def[endant] imputed [to] him before the public of contagious insanity. Held: no action will lie without special damage averred for slander, though it would for libel. An action for oral slander, in charging the pl[aintiff] with disease, has been confined to the imputation of such loathsome disease, & infectious maladies as would make him an object of disgust & aversion, & banish him from**

*Kinds of disease
actionable.*

ⁿ²⁷ Joannes v. Burt, 88 Mass. (6 Allen) 236, 239 (1863)

* *human society. The only examples are the plague, leprosy, & venereal disorders.*

[page 28:]

Words not
actionable
may become
so.

Words which are not of themselves actionable may become so, if they are spoken in regard to a man's profession or trade. A strict adherence, however, need not be made to profession or trade, but anything spoken that will naturally takes away his livelihood or deprives him of society is a sufficient ground of action. -- Physician Case 1 Ex. 196ⁿ²⁸ The def[endant] in a discourse with R. whom the pl[aintiff] as a surgeon & accoucheur attended, said "He is not an apothecary; he has not passed examination; he is a bad character; none of the medical men here will meet him; & there have been many inquests held upon persons [who] died because he attended them." The latter words as to the inquest was [were] not proved on trial. Held: the words taken together impute[d] to the pl[aintiff] a want of proper or necessary qualification for his profession or business of surgeon &c. They are false & malicious therefore. Then the def[endant] charged the pl[aintiff] with^a bad character in such a sense as to disable him to obtain [from obtaining] the benefit of the assistance of his professional brethren, when their consultation would be required

ⁿ²⁸ *Southee v Denny*, 1 Exch. 196, 154 Eng. Rep. 83, 17 L.J. Ex. 151 (1847)

[page 29:]

*General
unfitness.*

*Such imputation must be as to
general unfitness for business & not to
unfitness in particulars.*

*Words to be actionable must be
spoken to somebody other than the per-
son of whom they were uttered or must
be heard by some third persons.*

*Special
damages.*

*Special damage -- If, e.g., one
imputes another of [being a] cheat, who is about
to be employed & in consequence of this
imputation the latter loses his engagement,
this loss is a special damage.*

*Natural
Consequence.*

*Natural consequence -- If one
goes round imputing another of [being a] cheat
or some other defamatory acts, & thereon
a third party wishing to redress [this,] beats
the imputed person, this last one cannot
recover damages for assault or battery
from the imputing party, for the conse-
quence is not natural. But if anyone
wishing to employ the charged, ceases to
do so on hearing the imputation, this is na-*

[page 30:]

tural & an action [of slander] will lie.

Libel

Libel -- All words written that are defamatory are actionable, whether a special

2 Contrasts between

damage had been sustained or not. Another difference between slander & libel is that

Sl[ander] & Li[bel]

words spoken are not indictable but those written are so. Any publication or writing

Definition of Libel.

that degrades a person in the estimation of the society is a libel. Mr. Kentⁿ³⁰ defined libel

to be a malicious publication either in printing or writing or signs or pictures, tending

either to injure the memory of one dead or the reputation of one alive, & expose him to

public hatred, contempt, or ridicule. This definition is good if "blackening of memory

Memory of one dead

of one dead" is taken away, for it would be ridiculous, says the lecturer, that when one

blackened.

says calls Julius Caesar to be a very wicked man, the living relations of Caesar can bring an

action of damages against that man & or have him indicted & recover damages.

Truth is

Truth of what is said or written is

ⁿ³⁰ James Kent, Commentaries on American Law (12th ed. by O.W. Holmes, Jr., Boston 1873), vol. 2, pp. 16-17. Green directly quoted Kent's libel definition.

[page 31:]

- defense.* *only a matter of defense. Although by the common law such truth is never allowed to be set up in defense, yet statutes have greatly limited or modified it, & in general truth is now a good defense.*
- Not truth alone but justifiable motive in case of libel.* *Though in slander the truth of what is spoken is a sufficient defense, yet in criminal prosecution for libel, truth alone does not avail anything but must be corroborated by a justifiable motive or cause for publication.*
- Intention to injure another* *An intention to injure another is indispensable to constitute ~~slander or~~ libel.*
- Hearing from another* *It is no defense at all ^{in libel} that one writes or publishes ~~libel~~ something which he hears from another & merely repeats, not forming any opinion upon it.*
- Privileged Communications, on Expediency.* *Privileged Communications -- This privilege, which all the members of the society more or less enjoy, is solely based upon public policy & expediency. Members*

- [page 32:]
- Explanation* *of the society are interested in knowing the characters of the persons whom they are associate[d] with, & unless a certain class of communications is privileged they have no means to get that knowledge. On one hand, it is very hard for a man to suffer injury to the reputation for which he is well deserved, but on the other hand it is exceedingly inconvenient for another to be deprived of all the means of knowing the man's character. The only ground on which this privilege is founded, therefore, is that of expediency.*
- Rule as to communications.* *The privilege of communication must be strictly limited, & the rule of law is indispensable for the safety of the community, that no man in stating character of another should say more than what is needed or necessary. Any excess of language or speaking to a third person who has nothing to do with the matter, equally forfeits the privilege, because either of the two tends to disturb the well-being of the community & thus destroys the very purpose for*

	[page 33:]
<i>3 Kinds of communication as regards motive.</i>	<i>which this privilege is given.</i> <i>Actionable 3 Sorts of Communications -- There are three sorts of communications that have anything to do with slander & libel, in respect of the motives with which a man makes such communications. These are (1) Communications with [the] "motive of malice & hatred," (2) with [the] "motive of benevolence & kindness," & (3) with [the] "motive of indifference & carelessness."</i>
<i>Two Cases absolute or conditional privilege.</i>	<i>In some cases of privileged communications, the privilege is absolute & without regard to the motive; whether words are spoken or printed with malice, with indifference, or from [the] motive of benevolence, the speaker or author is entirely exempt from his liability. But in other cases communications made with evil motives would forfeit the privilege which would be secured & protected if done with good intention.</i>
<i>Absolute privilege. 3 Cases.</i>	<i>Cases that fall under the first category [i.e., absolute privilege] are three in number & three only.</i>

[page 34:]

- In Parliaments.* (a) *Speeches in parliament. In [the] U.S. & each individual state this privilege is secured by constitutions.*
- In courts.* (b) *In [a] court of justice. [A] Witness is not liable for anything which he says material to the question at issue. He may be indicted for perjury if he testified a falsehood, but no action of slander or libel can be maintained against him for words he utters in the court in [the] capacity of [a] witness. If he goes beyond the question at issue & volunteers to say any defamatory words unnecessarily, then he must bear the consequences.*
- In accusing another [of] a crime.* (c) *Where a man accuses another of a crime upon a reasonable cause & evidence. In general, therefore, a man is entitled to this privilege if he does what he has [a] right to do, no matter what his motive is. In all other cases motive forms an essential part of a communication to determine whether it is actionable or not & here [the] privilege is conditional.*

[page 35:]

*Master's
communication
of his servant's
character.*

*Communication by Master concerning
the character of his Servant -- A large
majority of cases comes under this head.
The master has a right to state honestly
the character & conduct of his servants to
another person upon inquiry. Nor is this
the only privilege, but he can go a step far-
ther. He need not wait until an inquiry
is made. This right, again, is not confined
to his domestic servants alone but extends
to all persons who are in his employment,
as clerks, cashiers, treasurers &c.*

*Within a
due bounds.*

*His words must, however, be con-
fined within a due bound. E.g., A
employs B, C, D, & many other servants.*

Example.

*X wishes to know B's character & conduct
in order to employ him, & asks A about it.
Here A has [a] right to give X an honest opi-
nion about B. But if A would say that
B habitually drinks, is idle & ignorant, &c.
in the presence of C, D, &c. B's fellow servants,
in [by] way of information to X, he would be*

[page 36:]

considered to have committed excess in his privilege & is liable for slander or libel. This is because in stating such a serious matter as a man's character & conduct, A should have taken a due care to restrict it within the narrowest possible limits & his speaking of it in so large a presence would imply a malice.

Case.

In [the] case of Fountain v. Boodle, 3 Q.B. 11ⁿ³⁶ the def[endant], who had been^{was} asked as to the character of her governess & why she had parted with her, replied that it was "on account of her Incompetency, & not being lady-like nor good-tempered," but it was shown that the governess had served the def[endant] above a year in that capacity, & had been twice recommended favorably by her during that year to other persons for [a] situation as a governess, & general evidence of her competency, good-temper, & lady-like manners was given by witnesses who were her personal friends. Held: this evidence required some answer on the

ⁿ³⁶ Fountain v. Boodle, 3 Q.B. 5, 11, 114 Eng. Rep. 408, 411, 2 Gale & D. 455 (Eng. 1842)

[page 37:]

part of the def[endant] & in [the] absence of any evidence of her incompetency, &c., there was proof of a malice for the jury. If the pl[aintiff] makes out a prima facie case of malice, it certainly lies in the def[endant] to answer it. When it is said that he must prove the truth of his statement, it is not meant in the sense of truth absolutely, but he must show that the assertion was made with an innocent belief of its being the truth.

Not absolute truth, but innocent belief of truth sufficient.

There is no reason why a distinction should be made between speaking & charging with a certain disease or crime is slander & speaking & charging with other [matter]s [is not].

Theory as to law of Slander & Libel.

The only probable theory advanced by N[icholas] St. John Green is: that at [an] early period the jurisdiction over this matter exclusively belonged to [the] spiritual court, that when three lay courts, King's Bench, Common Pleas, & Exchequer were established, each tried

[page 38:]

to get a wider jurisdiction; that on the ground [that] jurisdiction should be determined by the principal matter of an action, the King's Bench has gradually drawn out many topics from spiritual courts, as well as others, as, e.g., charge with [a] crime on the ground[s that] crime is the principal part over which the spiritual court has nothing to do, [or] charge with [a] disease or on [unfitness for a] profession if damage is shown, alleging that [a] money matter does not belong to the jurisdiction of the spiritual court; & that thus of criminal, civil, & financial & spiritual tribunals, the last suffered most. Any charge if may be actionable if damage is shown, so it ~~co~~ has come to pass.

Ecclesiastical courts al[s]o considered malice by civil law & this the King's court has taken into its own hands. Unlike in murder malice in libel & slander does not mean anything.

	[page 39:]
<i>Trespass</i>	<i>Trespass</i> <i>Trespass is an injury to [a] person & [or] property for which damages can be recovered.*</i>
<i>4 Kinds of action.</i>	<i>Three kinds of action can be maintained: (1) [an] Action of Trespass. (2) [an] Action of Trespass on [the] Case. (3) [an] Action of replevin. (4) [an] Action of Trover. Of these only on an action of replevin can specific property be recovered.</i>
<i>Action of Trespass.</i>	(1) <i>Action of Trespass --</i> <i>Property is generally defined to be an unlimited absolute right to use a thing, but this is impossible.</i>
<i>Property.</i>	<i>Property in English law is very vague. It is generally a right to use indefinitely according to general provisions of law & unless another's right is thereby violated. This is what is called a general property.</i>
<i>General.</i>	
<i>Special.</i>	<i>But in some cases a man</i>

* *Any unlawful act committed with violence actual or implied to the person, property, or rights of another (Bouv[er's Law] Dict[ionary] (for which damages can be recovered.)*

John Bouvier, A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the Union: With References to the Civil and Other Systems of Foreign Law (12th ed., Philadelphia 1868), vol. 2, pp. 608-609.

[page 40:]

*has right to use in a certain way &
this is called special property.*

*Actual &
Constructive
possession.*

*Law makes a distinction between
“actual” & “constructive” possession, but
in legal effect both are the same. Pos-
session is constructive if one has right
to get property back, though not in his
own hands.*

*At present only special pro-
perty will be considered.*

*3 Conditions
to action of
Trespass.*

*Now nobody can bring an
action of Trespass, unless the following
three conditions concur. 1) ~~He must~~*

Possession.

*(1) He must have possession
of the property damaged, either actual or
constructive, at the time of injury done.*

by force

*(2) The injury must be inflicted
by “force” & so in slander no action of tres-
pass can be maintained. “Force” means
originally violence, but any physical
contact is sufficient to maintain the action.*

Damage

(3) Damage must be a direct

[page 41:]

direct result of injury. *result of the injury inflicted.*
 When these three things concur
 an action of trespass can be instituted,
 but if any one of them is wanting an
 action of trespass on [the] case might be
 maintained.

Trespass on [the] case. *(2) Trespass on the case or*
 Case --

Writ *The writ of trespass origi-*
 nally was issued by the clerk of
 chancery & was of a particular form.
 But as commerce advanced various
 injuries ~~he~~ arose, to which the writ
 would not apply but which still
 demand[ed] redress. Parliament then
 passed the act authorizing chancery
 to issue, if it finds [found] any analogy
 to the cases in which "the" writ was
 originally issued. Suppose, for example,
 a person hired a house or farm & a third
 person injured furniture or wheat, he [i.e., the tenant]
 can maintain an action of trespass,

[page 42:]
but [a] landlord not having possession over them could not maintain the action. The landlord, however, can now maintain an action on the case, if the house is burned or trees are destroyed, because he has property in them, though not immediate.

Trover. (3) Trover --
Originally This action ~~ted~~^{lay} originally when one lost his personal property & another, who had found it, refused to deliver it back. * But afterwards it became fictitious & is solely founded upon [a] fiction.

No wager in Trespass. Formally [Formerly] in all civil cases the law was waged, but only in trover wager of law was not allowed. As it was not so hazardous as wager [of law], trover became a favorite action.

Then fictitious. It came to lie where there were no loss & finding ^{in fact}, but property is wrongfully converted, in order to recover

* [stray note at top of page 63:] *A finder may relieve himself from responsibility by bringing interpleader in Equity & leaving [the other] parties to fight*

[page 43:]

damages for conversion. In such cases the court would not allow the def[endant] to deny his finding, but only permits him to say whether he has [rightful] possession or not.

Conversion

Whenever the conduct of the def[endant] is such as cannot be pursued unless he is the owner of the property in question, there has been a conversion of it; or assertion of his ownership on his part & denial of title of the pl[aintiff to] make a conversion.

power to select an action.

One has the power to choose an action which he thinks fit; he can waive one & bring another as he likes.

Replevin

(4) Replevin --

Peculiarity

This is the only action by which specific property can be recovered. It would be resorted [to], when the property taken, is of special value to its true owner.

[page 44:]

- When convenient?* *This is convenient, when it is certain that the specific property can be recovered; but on the other hand it is highly advisable to recover damages instead of specific property, when it is uncertain.*
- Security.* *In bringing an action of replevin the pl[aintiff] has to pay double the value of the property, which he must be able to describe, as security to prosecute the suit; & if unsuccessful, he must return this property in as good condition as ever. But he can take immediate property.*
- Restitution* *If the def[endant] succeed[s] the court issues the writ of restitution by which the sheriff goes & takes property from the pl[aintiff] if he can find it.*
- Trespass upon Real Property. Def[inition].* *Trespass upon Real Property -- Every entry upon land in the occupation or possession of another constitutes a trespass, in respect of*

[page 45:]

which an action for damages is maintainable, unless the act can be justified in the exercise of some legal or personal authority or incorporeal rights. It matters not whether the land is enclosed or unenclosed, provided it is in somebody's possession. A mere crossing of an open field, therefore, constitutes a trespass, unless the man has, e.g., a search warrant, a license from the occupier, or right of pass [i.e., right of way], or the like.

Trespass lies without any damage.

An action of trespass upon land would lie without any damages proved. Generally whenever one's right [is] interfered with or violated, he can maintain an action without proving any damage, but if proved, he can recover it in addition.

Distinction between injury & damages

Injury & damage, though commonly synonymous, have different acceptations [i.e., meanings] in law. An injury is

[page 46:]

any interference or violation of one's legal rights. But one is damaged, when he has suffered an actual loss or injury to his body or property. And there are some cases where one is damaged, yet he cannot bring an action, because he has not been injured. But on the other hand, an action would lie in cases where his legal right is injured without an accompanying damage, so that the Latin maxim "damnum absque non injuria," necessitating a combination of injury & damage would not apply in every case

When can [a] landlord sue on?

If land is leased out, the landlord cannot maintain any action of trespass, unless his reversionary right or interest have [has] been injured, or in other words unless the injury be such as would remain uncured to the time of reversion.

[page 47:]

*Exemplary
damages,
when?*

*Where entry is made after [a]
warning not to enter, an exemplary [i.e., punitive award of]
damage[s] would be assessed, as a sort
of punishment or warning to others.*

*Difficulty of
assessing
damage[s] in
torts.*

*But in actions on torts, un-
like those of contracts, damages can-
not be precisely measured or assessed, &
the court would not interfere with
the jury in their assessments, though
the judge might think differently.
In trover, however, this can be
done, because in that action, the
damage[s] one can recover is [are] the
market value of the property con-
verted.*

*Excuse for
self-defense.*

*Trespass may be excused
on the ground of self-defense or
protection of his one's own property,
in apprehension of some pending
peril or danger. But there ought
to be some limit to this rule.*

*Trespass ab
initio*

Abuses of license make

[page 48:]
the act trespass ab initio. -- Smith's
In what case, trespass ab initio. *L[ea]ding Cases, Sixth Carpenters' Caseⁿ⁴⁸. * It is*
not an abuse of every license however that
makes the original act a trespass
ab initio. If one enters into
another's premises with the permission
of the owner, he will not become a trespasser
by any subsequent act. It is
only ~~when an abuse of~~ a license by
law that makes one a trespasser
ab initio, if he, having entered law-
fully, abuses it afterwards. Thus
if an officer with a search warrant
goes into a wine store but gets drunk
there & commits some wrong, this sub-
sequent act relates back to his entry
& makes him a trespasser. In
case of a public inn a person enters
by the license of [the] law, though the
landlord himself permits him to come
in.
Every injury *Though it is said that*

ⁿ⁴⁸ Six Carpenters Case, 8 Coke 146, 77 Eng. Rep. 695, 1 Smith's Leading Cases 217 (Eng. 1610)

* *The principal act, the abuse of a legal authority to enter makes the original entry unlawful, does not extend to criminal cases, & the fact that one who has entered an inn & the bar-room, as he had right by law to do, afterwards commits larceny in the bar-room, cannot relate back, so as to make his entry into the house criminal & indict him for entering the house with intent to [top of next page:] steal. The reason of the rule is the policy of law for preventing its authority being turned into an instrument of oppression & injustice.*

[page 49:]

*to possession is every injury to the possession of land
an injury to is considered to be an injury to the
property in property itself, yet this does not
every case. hold true always. Thus when one
is turned out of his door, an injury
has been done to him not to his
house.*

*Throwing or Throwing anything ^{upon} onto or
letting anything letting cattle into another's land
into another's constitutes a trespass, but dogs & cats
land. are excepted on the ground that
their nature is wandering.*

*No obligation By common law no
to make fence. man is obliged to make a fence
& it is no defense at all to
say that there is no fence to
prevent cattle from going in.
Everyone is bound to keep his
cattle from trespassing though not
obliged to maintain a fence.*

*Statutory But this law has been
modification modified & changed to a great*

	[page 50:]
<i>Prescription</i>	<i>extent by statute. If a person has been accustomed to maintain a fence, he is entitled or obliged to continue it, by force of prescription.</i>
<i>Trespass of wild rabbits.</i>	<i>A person will be liable for trespass of wild rabbits upon [a] neighbor's land, if he allows them to live on his land & it is doubtful whether the neighbor can shoot them off as he likes.</i>
<i>of dogs.</i>	<i>Trespass of dogs as biting does not bind their master, unless their ferocious & vicious nature or disposition has been known to him [i.e., scienter], or unless statutes provide otherwise. -- 100 Mass. 140.ⁿ⁵⁰ This rule applies to other domestic animals.</i>
<i>Surface & subsoil</i>	<i>Surface of land & sub-soil may be subject to a separate ownership, & the owner of either cannot bring an action of trespass & recover damages for injuries done</i>

ⁿ⁵⁰ Blair v. Forehand, 100 Mass. 136, 142 (1868). The court discusses Massachusetts statutes that historically made animal owners liable, among other circumstances, when the dog "was suspected of being dangerous or mischievous."

[page 51:]

*to the other, unless his property is
thereby damaged also.*

*Equity
remedy.*

*Though an action of tres-
pass cannot be maintained till [until]
after an act has been done, yet [a]
court of equity interposes & prevents
it from being done by [a] writ of
injunction, where the injury will
be irreparable & the remedy of [the]
law will therefore be inadequate.*

Forcible entry.

*Forcible entry is forbidden
even in case a man making
it may have a perfectly good
title to the premises[,] but [instead] he must
resort to law.*

Highway.

*Highway --
A general rule is that
a man whose ^{land} bounds to a high-
way owns it to its center & can
maintain an action of trespass
for injuries done to his portion of
the way. 49 Vt.ⁿ⁵¹*

ⁿ⁵¹ Cole v. Drew, 44 Vt. 49 (1871)

[page 52:]

Right of cutting trees of highway. *If a private person cuts trees, e.g. on [a] highway, the action of trespass will lie, unless they are such as to constitute [a] public nuisance[,] & this action can be brought by the owner of the adjacent land.*

When they [i.e., trees can] be [a] subject of nuisance, the owner of such land may cut trees down so far as his dominion extends & no further; but he cannot use what he cuts, being entitled only to abate the nuisance.

Tenants in common. *In case of tenancy in common one tenant cannot bring an action of trespass against the other, because the latter has equal right to use & raise profit out of the land. But if one digs minerals, the other can bring an action against him. -- 1 Lancing (N.Y.)*

221ⁿ⁵²; 43 Vt. 183^{n52a}; 57 Me. 328^{n52b}; L. Rep. C. P. 358^{n52c}

ⁿ⁵² 1 Lancing (N.Y.) 221. This citation cannot be verified. The lecture probably refers to Channon v. Lusk, 2 Lans. 211 (N.Y. Sup. Ct. 1870), where the court discusses co-owners and their rights against one another.

^{n52a} McClellan v. Jenness, 43 Vt. 183 (1870)

^{n52b} Hines v. Robinson, 57 Me. 324 (1869)

^{n52c} L. Rep. C.P. 358. The citation cannot be verified; cases with similar citations do not discuss tenants in common.

[page 53:]

*Heir's right to
action of
trespass.*

[An] *Heir cannot maintain
an action of trespass until he has
actually possessed [taken possession] of his land.
But when he [has] once made entry [his]
possession relates back to the time
when the right of property devolved
upon him by the death of his
predecessor. Statutes, however, [have] now dis-
pensed with [the] entry required by com-
mon law.*

*A tenant in
common can
sue -- When?*

*A tenant in common
can maintain an action alone
to recover damages to the whole
extent, unless the def[endant] sets up
a defense that the tenant is
not entitled to the whole.*

*Parties to be made Defen-
dants. --*

*Parties liable
as def[endant]s.*

*An action of trespass
may be brought either against
the trespasser himself or one who
procures him or ~~do~~ orders him to*

[page 54:]

to do [the trespass]. By common law [a] master & servants cannot be sued together, but & also in other cases both the trespasser & his instigator may be jointly sued.*

Damages

Damages

Damages are aggravated if trespass is committed after [a] warning or request to desist.

3 Classes.

Three kinds of damages --

(1) Where no damage is done an action is brought [only] for vindication of title or right & in this case nominal damages is assessed.

(2) Where an actual damage is done, assessment is made according to the deduction of value by the wrongful act, or sometimes allowing the expense to take away obstacles & restore land to its former state.

(3) Where trespass is done intentionally or accompanied with peculiarly aggravating circumstances,

* cannot [be jointly sued] -- for different actions will lie, [i.e.,] trespass & trespass on [the] case wh[ich] cannot be joined in one action.

[page 55:]

an exemplary [i.e., punitive award of] damage[s] is levied.

*Recoverable
from whom?*

*Damages are recoverable
from any one of [several] co-trespassers or
from all of them jointly at [the plaintiff's] option. An
action of trespass differs, therefore,
from that of contract, in the
latter of which the pl[aintiff] is confined
generally to either of two ways, viz.,
to sue one or else all of them [those in breach], neces-
sarily.*

*When no
contribution
among co-
trespassers?*

*If trespassers know their
act to be wrong at the time
they commit it, & one of them is
subjected to assessment, there can
be no contribution, i.e., he cannot
legally recover from others their
portion of damages he paid.*

*When is
contribution
allowed?*

*But generally, law allows
a contribution to be made [among co-defendants], unless they
assist or encourage one another in
committing a wrongful act. As
where one is injured in a highway*

[page 56:]

by a horse car or opening a coal hole in a side-walk, he may either sue the city government or the horse car company or the owner of the coal hole; & if either is assessed with damages, the other must contribute pro rata of its own share.

Personal property.

Personal Property --

Conversion of chattels.

Conversion --

Generally when one interferes with personal property of another without warrant, damages can be recovered from him by an action of trespass. Whenever an action of trover lies, an action of trespass will lie, but the converse is not true.

Trover & Trespass.

Trespass on land & that on chattels.

The distinction between an action of trespass upon land & that in [to] personal property consists in the length of time within which [a] suit may be brought up.

[page 57:]

<i>When does Trover lie?</i>	<i>Trover lies in [the] case of conversion of personal property.</i>
<i>Conversion.</i>	<i>What is conversion then?</i>
<i>Origin of trover.</i>	<i>Originally the action lay only where one lost his property & another found it & refused to return it[*]. As no wager of law was allowed in this action, a large resort was made to it. Even where there was no losing & finding in reality, & the court did not allow a def[endant] to traverse an allegation of finding, only permitting him to plead non-conversion of the property. When the action came to be extensively resorted to, the meaning of the term conversion became [came] to be enlarged.</i>
<i>Def[inition] of Conversion</i>	<i>Conversion is an asportation [i.e., carrying off] or removing of property of another without any ownership or right over it either of his own or of another for whom he takes it, to turn</i>

^{*} [stray note at top of page 63:] *A finder may relieve himself from responsibility by bringing interpleader in Equity & leaving [the other] parties to fight.*

- [page 58:]
 [turn] it into his own or such other's use. How far the intent to steal convert it into his own use is necessary is shown -- 8 M. & W. 551ⁿ⁵⁸. Such asportation is inconsistent with [a] general right of property. Any adverse possession or holding of property was held to be a conversion, though the definition comes far short of [the] requisite comprehensiveness. -- 2 Gloucester & Mormon 531.^{n58a} As to what is conversion see also -- 31 N.Y. 490.^{n58b}
- Cases of conversion
- Accidental & intentional destruction An accidental destruction of property by one who is in lawful possession of it cannot be conversion. Destruction[,] to be conversion[,] must be intentional. A wrongful sale of property is conversion, but mere purchase ~~doe~~ is not, until the purchaser has ownership over it. As to partial conversion[,] see -- L. Rep. 8 Ex. 126.^{n58c}
- Wrongful Sale.
- Misdelivery. Misdelivery of goods by [a] carrier

ⁿ⁵⁸ *Fouldes v. Willoughby*, 8 M. & W. 540, 151 Eng. Rep. 1153 (Eng. 1841).
 A mere change of position or re- [top of next page:]

removal of property from the hand of the owner does not amount to a conversion, there must be a taking with intent & exercising over the chattel an ownership inconsistent with the real owner's right of possession. Whipping a horse. If a person made a horse jump out of a boat by waving his hand or cracking his whip that would not amount to a conversion.

^{n58a} 2 Gloucester & Mormon 531. This citation cannot be verified; no cases with similar citations discuss adverse possession and conversion.

^{n58b} *Boyce v. Brockway*, 31 N.Y. 490 (1865). --

The defendant] shipped all the firkins of butter as their own notwithstanding information that a part belonged to the pl[aintiff]: held, that if they take it into their hands & dispose of it to others or exercise any dominion over it they are guilty of conversion. It is enough in this action that "the rightful owner has been deprived of his property, by some unauthorized act of another assuming dominion or control over it.["

^{n58c} *England v. Cowley*[,] L.R. 8 Exch. 126 (Eng. 1873) -- a mere prevention of removal is not a conversion

[page 59:]
*was held to be conversion -- 7 Allen 341,ⁿ⁵⁹
 14 Allen 443.^{n59a} Any person who
 puts property in trust contrary to [a]
 fiduciary contract as ponebroker [pawnbroker], or
 who puts it contrary to [the] order of
 another, is guilty of conversion; for
 he has [a] special property over it. If
 one takes my horse without my
 ? permission & refuses to deliver it
 back, he is a trespasser but not
 liable for trover, though [it has been] held other-
 wise. If one hires a horse
 promising to go to some place &
 then goes to another, this has been
 held in Mass[achusetts] to be conversion. -- 5
 Mass. 104.^{n59b} This is founded on this
 reasoning that as soon as he
 deviates from the specified road,
 bailment terminates. But this
 cannot be an absolute rule, for
 Modification whether or not [this is] a conversion must
 of rule. depend much on the nature of [the]*

ⁿ⁵⁹ Claffin v. Boston & Lowell Railroad Co., 89 Mass. (7 Allen) 341, 341 (1863)

^{n59a} Hall v. Boston & Worcester Railroad Corp., 96 Mass. (14 Allen) 439, 443 (1867)

^{n59b} Wheelock v. Wheelwright, 5 Mass. 104 (1809)

[page 60:]

contract or whether he thought [himself] to have [a] right to take another road or not.

If deviation is made intentionally, knowing that it is wrong, then surely he is liable to an action of trover.

*Damages
in trover.*

[The] *General rule as to damages is that they are the market value of the property at the time of conversion, though in some states an additional [amount of] damage[s] is given.*

*Taking goods
intending not
to pay.*

Where one contracts to buy goods intending "not to pay" at the time of purchase, that is conversion, & the owner may recover wherever he finds them, for there was no sale in this case. "Intending not to pay" is quite different from not intending to pay, for in the former case there is a positive intention.

*Sheriff's
liability.*

Addison's statementⁿ⁶⁰ that a sheriff is liable for trover if he sells another's property [for] more than

ⁿ⁶⁰ C.G. Addison, *The Law of Torts* (Boston 1870), p. 133

[page 61:]

necessary in executing is rather too broad. He is not liable, for instance, if^{on} making \$90^{for} [a] debt of \$100, he is then obliged to sell a horse, e.g., to make up^{the remaining sum of} \$100 & it^{was sold for} ~~coste~~ \$50 or \$100.

*Willful
destruction*

Every wrongful destruction of property amounts to a conversion, provided, i.e., the act is willful or intentional.

*Change of
form only.*

The rule that a change of property from one form to another is a conversion, must be taken with some limitation.

*Def[endant]'s
title to converted
property.*

In trover the def[endant] acquired title to the property he converted only when he has paid damage[s] assessed, or if the pl[aintiff] cannot recover the execution at all, he can take the property back.

As to fixtures

This action will not lie for fixtures unless they are separated from realty.

[page 62:]

<i>Conversion without title.</i>	<i>Conversion of property without title. --</i>
<i>Mere purchase*.</i>	<i>A mere purchase from one who has no right or title over the property sold does not amount to conversion. -- 9 Allen 121;ⁿ⁶² 1 Cush. 539;^{n62a} 34 Vt. 330.^{n62b} The seller pretending it to be his own is liable in conversion. -- 4 Vt. 242.^{n62c} -- 2 Bush Booth (Ky)^{n62d}</i>
<i>Demand & refusal.</i>	<i>--. A purchaser of goods from one having no title over them in good faith is not liable. -- 104 Mass. 173.^{n62e}</i>
	<i>Demand & Refusal. --</i>
	<i>No action of trover can be maintained unless conversion is proved, & if proved if not proved it is necessary to prove demand & refusal of delivery. But as it is often very difficult to prove the fact of conversion, demand & refusal are conveniently resorted to, & allowed as an evidence[,] not the</i>

* *On what ground or form of action can it be recovered from*

the bona fide purchaser? [written sideways in margin]

ⁿ⁶² Gilmore v. Newton, 91 Mass. (9 Allen) 171, 172 (1864). The court and Green both use the exact language from Simon Greenleaf, A Treatise on the Law of Evidence (6th ed., Boston 1852-1860), vol. 2, § 642.

^{n62a} Stanley v. Gaylord, 55 Mass. (1 Cush.) 536, 552 (1852)

^{n62b} Deering v. Austin, 34 Vt. 330, 334 (1861)

^{n62c} Merrill v. Moulton, 40 Vt. 242 (1867)

^{n62d} Chandler v. Ferguson, 65 Ky. (2 Bush) 163, 164 (1867)

^{n62e} Hills v. Snell, 104 Mass. 173, 178 (1870)

[page 63:]

*proof, of conversion from which
the jury may infer this act.
Demand & refusal standing alone
are sufficient evidence of a conversion,
provided the refusal is absolute, &
unqualified, & unexplained, but [the rule is]
otherwise, if ~~the~~ it [i.e., the refusal] is reasonable
or qualified. It is advisable in
practice to make demand before
suing on trover, however good [the]
evidences [that] are on hand.*

45 N.Y. 34ⁿ⁶³

*What refusal
constitutes a
conversion?*

*Refusal to deliver unless a
written evidence is produced is not
a conversion by itself & it ought
to be left to the jury to find out
whether this is a qualified refusal &
if so whether it is reasonable. So long
as refusal is qualified, reasonable, &
don made with ⁱⁿ good faith, it is not a
conversion. -- 45 N.Y. 38^{n63a} -- common carrier
Cases put by Addison^{n63b} are specific &
cannot be taken as general principles*

ⁿ⁶³ McEntee v. New Jersey Steamboat Co., 45 N.Y. (6 Hand) 34, 34 (1871)

^{n63a} Id. at 37

^{n63b} C.G. Addison, *The Law of Torts* (Boston 1870), p. 136 (citing *Abington v. Lipscomb*, 1 Q.B. 776, 780, 113 Eng. Rep. 1328, 1330 (Eng. 1841)). Addison explains that refusing to return too many demanded goods is not evidence of conversion, but does not discuss “common carriers” as Green’s lecture indicates.

[page 64:]

of law. It does not follow that because demand is large the refusal is not a conversion.

Mere negligence not conversion.

A mere negligence of a bailee does not constitute a conversion without intent to convert; but immoderate use of the thing bailed does. -- 48 N.H. 402 (horse case).ⁿ⁶⁴
As to what act of [a] bailee amounts to a conversion

see 43 Vt. 30.^{n64a} If a common carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner either express or implied, he cannot detain them against the true owner, until the freight or carriage is paid, he not being obliged to receive them, unless carriage is paid in advance & no man being [subjected] to be deprived of his property without his consent. -- 5 Cush. 137.^{n64b}

The title of a purchaser for value of a

ⁿ⁶⁴ Wentworth v. McDuffie, 48 N.H. 402, 405-06 (1869)

^{n64a} Alvord v. Davenport, 43 Vt. 30 (1870)

^{n64b} Robinson v. Baker, 59 Mass. (5 Cush.) 137, 145 (1849). Green directly quoted the court's opinion.

[page 65:]
~~stolen~~ notes including negotiable ones,
 Title of buyer of stolen negotiable papers. The title of a purchaser for value of ^{stolen} negotiable paper, is not impaired by negligence. It will only be defeated by proof of fraud or bad faith. Neither will such a notice of such facts as would put a prudent man upon his guard, defeat his recovery thereon. -- 47 N.Y. 143;ⁿ⁶⁵ 17 C.B. 162.^{n65a}
 Conversion of notes. -- 102 Mass. 503^{n65b}
 Transfer does not necessarily discharge. If one possessing notes payable to [the] bearer, which have been converted, transfers them to another, he is not liable for conversion. But it does not follow that, because he has transferred, he is not guilty. His liability, on the other hand, depends upon the motive with which he took them. If he took them knowing them

ⁿ⁶⁵ Welch v. Sage, 47 N.Y. 143, 145 (1872). Green directly quoted the court's opinion.

^{n65a} Raphael v. Bank of England, 17 C.B. 161, 139 Eng. Rep. 1030 (Eng. 1855)

^{n65b} Spooner v. Holmes, 102 Mass. 503 (1869)

[page 66:]

*to have been converted, he has
no better title than the one
from whom he received them,
& will be liable for conversion.
A great difference, however, between
negotiable paper & ordinary goods,
is that an innocent possessor of
the former has a good title
against the owner but is liable
in [the] case of the latter.*

*Private action
before
convict[ion].*

*The rule that the
owner of converted property can-
not bring a private action, un-
til the felon is convicted, is
true in England where there
is no public prosecution against
felonies. In the U.S. there is no
need of the rule, as the grand
jury [can] always indict him. -- 1 Gray
3 ;ⁿ⁶⁶ 19 Ohio ⁽⁴⁾ 63;^{n66a} L.R. 7 Q.B. 554.^{n66b}*

*Conversion
by one of
co-tenants.*

*Conversion of chattels by
one of Partners or Tenants in*

ⁿ⁶⁶ Boston & Worcester R.R. Corp. v. Dana, 67 Mass. (1 Gray) 83, 83 (1854)

^{n66a} Hown v. Minnick, 19 Ohio St. 462, 462 (1869)

^{n66b} Wells v. Abrahams, L.R. 7 Q.B. 554 (Eng. 1872)

- [page 67:]
common. --
- Eng[lish] rule.* *In England one of [two or more] co-tenants cannot sell their joint property, because he thereby disposes of another's share & is liable for conversion but ~~a third~~ person would not be liable if bought [he] sold in a market overt.*
- Amer[ican] rule.* *The case is quite different in the U.S. where no market overt can be found. -- 18 Vt. 390 market overt.ⁿ⁶⁷ In some states, however, it was held that if he sells it as exclusively his own, he is guilty of conversion & liable to an action of trover. -- 99 Mass. ;^{n67a} 42 N.Y. 549.^{n67b} Contra: -- 27 Vt. 93;^{n67c} 52 Pa. 370;^{n67d} 54 Me. 253.^{n67e}*
- Property, if separate in its nature.* *One of the co-owners of property in common, which is separate in its nature, as oil,*

ⁿ⁶⁷ Griffith v. Fowler, 18 Vt. 390 (1846)

^{n67a} Delaney v. Root, 99 Mass. 546, 547 (1868)

^{n67b} Dyckman v. Valiente, 42 N.Y. 549, 560 (1870)

^{n67c} Barton v. Burton, 27 Vt. 93, 95 (1855)

^{n67d} Walworth v. Abel, 52 Pa. 370, 370 (1866)

^{n67e} Strickland v. Parker, 54 Me. 263, 269 (1866)

[page 68:]

can sell part whenever he pleases & refusal by the other to allow him such sale is conversion. -- 12 Mich. 328,ⁿ⁶⁸ 2 Lansing 211.^{n68a} If he destroys the whole he is liable.

Conversion of property in trust. What is the right of transferee?

Conversion of property in trust. -- If property in trust is transferred in breach of a trust, the transferee is in the same situation as the transferor but otherwise if he takes it in good faith.

Conversion by one who has lien.

Lien. -- If one keeps property by virtue of [a] lien against another & refuses to deliver it up when demanded by a third person who has rightful title, this alone is not conversion, & the real owner cannot re-

ⁿ⁶⁸ *Fiquet v. Allison*, 12 Mich. 328, 331 (1864)

^{n68a} *Channon v. Lusk*, 2 Lans. 211 (N.Y. Sup. Ct. 1870)

[page 69:]

*cover it without paying the
lien.*

He cannot sell.

*One who has a lien,
however, cannot sell property,
unless it is pledged as secu-
rity & [a] day certain is fixed
for payment & until that day
is over without the payment.*

Nuisance

Nuisance

*Nuisance is an
indirect injury to real
property in contradistinction
with trespass that is direct
injury. Addison's definition
that "it is an infringe-
ment upon the enjoyment
of proprietary & personal
rights" is true as [a] crimi-
nal offense, but not so
as a civil one.ⁿ⁶⁹ Whether
an act or omission amounts*

ⁿ⁶⁹ C.G. Addison, *The Law of Torts* (Boston 1870), p. 48. Green directly quoted Addison's nuisance definition.

[page 70:]
to a nuisance depends [a] great deal upon circumstances. -- 11 H.L. 642.ⁿ⁷⁰

Escape of filth & water is a nuisance. *Everyone is bound to keep filth or water [from escaping] & is liable for its escape, just as in case of wild animals. The action lies therefore for the breach of this duty not on account of [a] right of the neighbor. -- 1 Salkeld 71 or 1 Ld Laym.^{n70a}*

Water Case. *water case -- L.R. 9 Ex. 64;^{n70b} 3 H.L. 330.^{n70c}*

One is not liable, however, for [the] natural fall of water; only he cannot accumulate water -- L. R. 7 Q.B. 661;^{n70d} L.R. 7 Ex. 305.^{n70e} In the one case the def[endan]t was liable because he was negligent, but in the other

ⁿ⁷⁰ St. Helen's Smelting Co. v. Tipping, 11 H.L. Cas. 642, 11 Eng. Rep. 1483 (Eng. 1865)

^{n70a} Probably Iveson v. Moore, 1 Salk. 15, 91 Eng. Rep. 16, 1 Ld. Raym. 486, 91 Eng. Rep. 1224 (Eng. 1699)

^{n70b} Smith v. Fletcher, L.R. 9 Exch. 64 (Eng. 1874)

^{n70c} Rylands v. Fletcher, L.R. 3 H.L. 330 (Eng. 1868)

^{n70d} Ross v. Fedden, L.R. 7 Q.B. 661, 665 (Eng. 1872)

^{n70e} Smith v. Fletcher, L.R. 7 Exch. 305 (Eng. 1872)

[page 71:]

he was responsible whether

he was negligent or not --

X 106 Mass. 194;ⁿ⁷¹ 2 *Attis Dallas* (U.S.C.)^{n71a} ; 51

N.Y. 474;^{n71b} *108 Mass. 261.*^{n71c}

What

constitutes

a nuisance?

What amounts to [a]

Nuisance? --

In order to constitute a nuisance it is sufficient, if the [defendant's] enjoyment of life in [a] dwelling house is rendered uncomfortable, or in other words any special & direct damage is not necessary.

Certain trades are nuisances themselves.

Certain trades if carried on near a town are themselves nuisances, but [the] blacksmith [trade] & the like are not, unless carried on in an improper location.

[A] *Question often arises*

ⁿ⁷¹ Shipley v. Fifty Associates, 106 Mass. 194, 200 (1870)

^{n71a} U.S. (2 Dallas). This citation cannot be verified; no case in the reporter supports the lecture's contention.

^{n71b} Losee v Buchanan, 51 N.Y. 476, 491 (1873)

^{n71c} Wilson v. New Bedford, 108 Mass. 261, 266-67 (1871)

[page 72:]

*as to whether the landlord
or his tenant as the
occupier is liable & the
law in this respect
is rather uncertain.*

*Where is the
tenant liable?
Where is the
landlord?*

*If the use alone
of a house, not the building itself is nuisance, the
tenant not the landlord
is liable. But if on
the other hand the building itself is constitutes [the] nuisance the owner not the
occupant, is responsible, although he may not be
able to remove or remedy
it, as on account of [the] demise [i.e., the lease] at the time.*

*Nuisance lies
if injured
where he has
right to pass.*

*A man can
maintain the action [of nuisance] if
he is injured in passing
through a land over which*

[page 73:]

*he has right of path [a right of way];
but he cannot, if in-
jured while trespassing upon
another's land where he
cannot lawfully enter.*

*Contrast
between*

*Mass[achusetts]
&*

Conn[ecticut]

*In Mass[achusetts] if a man is
injured at a distance of
ten inches from [a] road or
sidewalk, he cannot
recover any damage[s], under
any circumstances whatever. --
12 Met. 371.ⁿ⁷³ Circumstances
are taken into considera-
tion in Conn[ecticut], however, &
he may bring an action
if he walks in dark, for
instance, without being able
to discriminate [the] road from
other land & is injured,
though ~~can~~ the place where
he received the injury lies
at a considerable distance.*

ⁿ⁷³ Howland v. Vincent, 51 Mass. (10 Metc.) 371 (1845). The notebook citation appears to have read “12 Metc.” instead of “10 Metc.”; Howland v. Vincent supports the lecture’s proposition and is cited in the next footnote’s case as an example of the difference between Massachusetts and Connecticut rules.

[page 74:]
from the road. -- 13 Conn. 535.ⁿ⁷⁴
The question should properly
belong to the jury.

Leaving a cellar-
door open does not make
the owner liable, though it
would in England. Such [a]
question is properly for
the jury to consider.

What is [a]
highway? *Land is [a] highway, if*
some public authority is under [an]
obligation to repair it & an
indictment will generally lie
against a nuisance on the
highway.

When does [an]
action lie in
common
nuisance? *In common nuisance [an]*
action would lie only when
the individual received a
damage different from that
of others in "kind," not in
"degree." If one is obliged to go
around half a mile & the other

ⁿ⁷⁴ City of Norwich v. Breed, 30 Conn. 535, 544 (1862)

[page 75:]
*a few steps, on account of [an]
 obstruction in [the] highway, the
 difference of damage is in
 “degree.” But if another in [a]
 dark night stumbled over
 a gate, for instance, ([an] obstruction)
 & broke his leg, his damage
 is different from that of the
 two others & an action will
 therefore lie.*

*No man can
 remove [a]
 common
 nuisance.* *It is commonly
 laid down that no man
 has [a] right to remove a
 common nuisance, but there
 may be cases where he
 can.*

*Navigable
 rivers =
 highway.* *Navigable rivers are
 highways & the same rule
 applies in the one as in the
 other. -- 65 Pa. 165.ⁿ⁷⁵
 If the owner of a
 wrecked ship abandons her, he*

ⁿ⁷⁵ Winpenny v. City of Philadelphia, 65 Pa. (15 P.F. Smith) 135, 140 (1870)

[page 76:]

is not liable for [a] nuisance thereby caused, but he will, if he exercises any control over her.

Accidents arising out from house.

Accidents arising from a house. --

As between the landlord & the tenant, the former is under no obligation to repair the house he let [i.e., leased].

Who is liable?

To the public, however, the landlord will be liable, if the house was dangerous at the time of letting [i.e. leasing]; & the tenant, if it was not dangerous at the time. -- 9 Allen 17;ⁿ⁷⁶ 14 Gray 246;^{n76a} 2 Mich. 354.^{n76b} In the latter case, the landlord will be liable only when he agrees to repair the building.

ⁿ⁷⁶ Milford v. Holbrook, 91 Mass. (9 Allen) 17, 21 (1864)

^{n76a} 14 Gray 246. Citation cannot be verified, but possibly refers to Gregory v. Inhabitants of Adams, 80 Mass. (14 Gray) 242, 246 (1859). This case discusses a city's obligations to keep roads safe for the public, but does not mention landlord duties.

^{n76b} 2 Mich. 354. Citation cannot be verified, but possibly refers to Clark v. Babcock, 23 Mich. 164, 168-69 (1871). This court says "the lessor, under such a lease, would have been under no obligation to repair, without an express agreement to do so," which supports Green's lecture.

[page 77:]

Accident in [on] stairs will make the owner liable, but those [accidents] in front or [on the] sidewalk arising in consequence of throwing something from windows, for example, will subject the occupants of such rooms to liability. -- 59 Barb. 497.ⁿ⁷⁷

What is necessary to make one liable for nuisance?

There must always be a duty to make one liable for a nuisance which is a breach of a duty.

Right to excavate.

Everyone can lawfully dig or excavate, or demolish a house so long as he does not injure another's property thereby. -- 17 Johns. 92;^{n77a} 37 Vt. 99;^{n77b} 12 Mass. 220.^{n77c}

Right to support his own house.

Everyone has also [a] right to make [have] ratth [earth?] support his house by erecting it upon

ⁿ⁷⁷ O'Brien v. Capwell, 59 Barb. 497, 504-05 (N.Y. Sup. Ct. 1870). This case stands for the proposition that a landlord has no duty to repair leased premises as long as the conditions were known to both landlord and tenant. The case supports the preceding and following paragraphs' contentions, but not the paragraph where the citation is found.

^{n77a} Panton v. Holland, 17 Johns. 92, 99 (N.Y. Sup. Ct. 1819)

^{n77b} Beard v. Murphy, 37 Vt. 99 (1864)

^{n77c} Thurston v. Hancock, 12 Mass. 220 (1815)

[page 78:]

another land[?]; but nobody is
allowed to erect ~~a~~ building^{it}
(so near to another's) in such
a manner as to ^{make the house} fall down
upon [a] neighbor's land. -- ~~99 Mass.~~

Rights of
tenants in
common.

74. Tenants in common
of a mill, e.g., may bring
a writ^{one} against the other, if
the latter neglects to repair it.
-- 99 Mass. 74.ⁿ⁷⁸ So, the occu-
pant of a lower room has [a]
right to sue the tenant of
the upper room in like cir-
cumstances. -- 34 Iowa 67.^{n78a}

Railway fence.

Railway fence --
By common law [a]
railroad company will not
be liable when the train
kills another's cattle, for every-
one is bound to keep them
within his own lands.
But [a] statute requires that the

ⁿ⁷⁸ Calvert v. Aldrich, 99 Mass. 74 (1868). On page 75, the court quoted Hale for the proposition that owners of mills could bring actions against co-owners because mills were important for the public good.

^{n78a} Ottumwa Lodge v. Lewis, 34 Iowa 67 (1867)

[page 79:]

company should h make [a] fence. This liability would, however, depend upon circumstances.

Canals.

Regulations as [to] canals, etc. see 99 Mass. 216;ⁿ⁷⁹ 56 Me. 498;^{n79a} 7 Blackstone 280.^{n79b}

Master's liability to servants.

Master's liability to servants.

A master will not be liable to his servants for not disclosing [the] dangerous character of [the] business, if they could know it or they profess to be acquainted with the business. He will be [liable], if otherwise.

ⁿ⁷⁹ Carleton v. Franconia Iron Co., 99 Mass. 216, 217 (1868)

^{n79a} Barrett v. Black, 56 Me. 498, 506 (1869)

^{n79b} 7 Blackstone 280. Citation cannot be verified; reporters and commentators with similar names do not contain discussions of canal regulations.