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Incidental Injuries from Exercise of Lawful Rights

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VI. INCIDENTAL INJURIES FROM THE EXERCISE OF LAWFUL RIGHTS.

A tort consists in some act or omission by one party whereby the lawful rights of another are invaded, obstructed or abridged. The elements of a tort are a wrong and a resulting damage; there is no tort where there is no wrong, and there is also no tort where there is no damage. The wrong, however, need not be one of intent, for the most innocent invasion of one's rights is a tort, as well as the most malicious; the malice being in many cases only an aggravation. Neither is it essential that the damage should always be tangible and susceptible of proof, for if a legal right is trampled upon, the law will imply damage, and the implication is conclusive.

In the present paper those cases will be considered in which one person suffers an injury in consequence of the exercise by another person of his legal rights. Many such cases occur in which, although the injury may be severe, the law will award no compensation, there being no tort in the case because there is an absence of that wrong the concurrence of which with damage is essential to an action. Negligence might supply the wrong, but we now speak of cases of which that is not an element.

It is almost impossible to conceive of a lawful action that may not by possibility cause injury to another. One man establishes a store which takes away from the profits of a store already established; he erects a mill, in consequence of which the value of another in the vicinity is sensibly diminished;[1] he collects his debt, and the debtor's business is broken up to the prejudice of others who were customers; he assists in starting a new town, which draws away the business from an

[1] Palmer v. Mulligan, 3 Caines 307, 313; Platt v. Johnson, 15 Johns. 213.

older one; or he gives to the public a park on one side of a city, which changes relative values to the prejudice of the opposite side;—in all these cases the injury may be very perceptible and easily traced to the cause which has produced it, but there is manifestly no ground for the suggestion that an action at law should redress it.

Some other cases which must be decided on the same ground do not at first view seem so clear. The case of a house commanding a fine view, which is cut off and destroyed by the erection of a building on the adjacent premises, may be taken as an illustration. The injury here is very direct and special, and it seems to take something from the man's property, and to deprive him in a measure of its enjoyment. But on the other hand, if every man might protect his view against the improvements of his neighbors, it is manifest that it would give him such a control of adjacent property as would preclude improvements, except with his consent; and to protect his view would usually diminish the value of the neighbor's property more than it would enhance his own. It was determined at an early day that an erection by one on his own premises which obstructed the view of another was not a legal wrong;[2] and the principle is held to cover the case of a structure on the party's own land which injures the value of business property in the rear of it by cutting off the view from the street.[3] The English law recognizes an easement in air and light over adjoining premises, under some ciroumstances; but the courts of the United States regard the doctrine which supports it as unsuited to the circumstances of this country, and incapable of being applied in our growing cities and villages without working most mischievous consequences. The injury which one sustains by having the light and air as they pass to his buildings obstructed and cut off by the structures of his neighbor, will therefore support no action.[4]

[3] Butt v. Imperial Gas Co., L. R. 2 Ch. App. 158.

[2] Aldred v. Case, 9 Coke, 58 *b*; Attorney-General v. Dougherty, 2 Ves. Sr. 453. See Maynard v. Escher, 17 Penn. St. 222.

[4] Parker v. Foote, 19 Wend. 309, 318, *per* Bronson, J.; Mahan v.

Collateral Support of Lands.—A man may injure his neighbor's premises by excavations made on his own. Such excavations are rightful up to a certain limit; beyond that they are unauthorized. The common law gave every man a right to collateral support for his own ground in its natural condition by the land of his neighbor; and to that extent the adjoining lands are subject to a servitude. But he has no right to support for the land weighted with buildings; and if an excavation is made, with due care and due notice, into which his buildings fall though without the buildings the natural surface would not have given way, he has no claim to compensation. The injury is incidental to the exercise by his neighbor of a legal right; and a party liable to such an injury must protect himself as best he may. The rule is thus stated in an old case: "If A be seized in fee of copyhold land closely adjoining the land of B, and A erect a new house on his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B, if B afterwards dig his land so near to the foundation of the house of A that by it the foundation of the messuage and the messuage itself fall into the pit, still no action lies by A against B—inasmuch as it was the fault of A himself that he built his house so near the land of B; for he cannot by his own act prevent B from making the best use of his land that he can. But it seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie."[5]

Injuries by Animals.—A man may rightfully keep domestic animals, and use and employ them as is customary. Others may be injured by them, but they are not entitled to redress unless the owner or keeper is personally guilty of negligence

Brown, 13 Wend. 261; Myers v. Gemmel, 10 Barb. 537; Cherry v. Stein, 11 Md. 1; Hicott v. Morris, 10 Ohio St. 523; Mullen v. Stricker, 19 Ohio St. 135; Hubbard v. Town, 33 Vt. 295; Pierce v. Fernald, 26 Me. 436; Ward v. Neal, 37 Ala. 500.

[5] Wild v. Minstaley, 2 Rol. Abr. 565. The cases on this subject are fully collected in Bigelow's Leading Cases on Torts, 527, *et seq.*, and in Washburn on Easements, 542–564.

or bad conduct. If he keeps an animal he knows to be vicious, without proper restraint, he is liable for the consequences; if he drives a horse furiously, he may be held responsible to one who is run over by him; but he is not liable if he was in the observance of due care, and the injury was accidental. "If one does an injury by unavoidable accident, an action does not lie; *aliter* if any blame attaches to him, though he be innocent of any intention to injure."[6]

Injuries from Fires.—No man can lawfully insist, because of the possibility of a fire spreading to his estate, that his neighbor shall not burn over his fallow or destroy his stubble by fire. A fire for any such purpose, or even for amusement, is perfectly lawful, and if the party setting it is guilty of no negligence, its accidentally spreading to his neighbor cannot charge him with an action.[7] The old rule was probably more strict, but even that did not hold the party liable where the fire spread from sudden storm, or other cause which could not have been foreseen or controlled by human agency.[8]

Injuries Inflicted in Self-Defence.—A man assaulted has a right to defend himself, and with force and violence proportioned to the real or apparent danger. If, in making such defence, an injury is unintentionally and without negligence done to a third person, this is no tort, for no man does wrong or contracts guilt in defending himself against an aggressor.[9] The same rule applies to a proper defence of property; an illustration being the case of building a wall to prevent the inroads of the sea, whereby a greater force of water is expended on the lands adjoining.[10] As was said by Lord Ten-

[6] Wakeman v. Robinson, 1 Bing. 213. See Weaver v. Ward, Hobart, 134, Mammac v. White, 11 C. B. (N. S.) 588.

[7] Clark v. Foot, 8 Johns. 421; Tourtelotte v. Rosebrook, 11 Met. 460; Scott v. Hale, 16 Me. 326; Ellis v. Railroad Co., 2 Ired. 138; De France v. Spencer, 2 Greene, (Iowa) 462; Fahn v. Reichart, 8 Wis. 255; Mich. Cent. R. R. Co. v. Anderson, 20 Mich. 244; Burroughs v. Housatonic R. R. Co., 15 Conn. 124.

[8] Tuberveille v. Stamp, 1 Salk. 13; Ld. Raym. 264; Webb v. Railroad Co., 49 N. Y. 420.

[9] Scott v. Shepperd, 3 Wils. 403; 2 Wm. Bl. 892; Brown v. Kendall, 6 Cush. 292; Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132.

[10] In England proprietors of grounds have in some cases been held

terden, in such a case, the only safe rule to lay down is this: that each land-owner for himself may erect such defences for his lands as the necessity of the case requires, leaving it to others in like manner to protect themselves against the common enemy.[11]

Protecting against the sea, however, and protecting against a flowing stream, or against the ordinary floods of streams, are very different in their nature, and may give rise to different liabilities. Proprietors upon the banks of natural streams are entitled to have them flow on in their natural course; and whatever embankment or structure tends to prevent this, or to increase the flow or force at times or in particular places, to the prejudice of a proprietor, is as much a wrong to him as would be the diversion of the water into a new channel.[12]

liable to trespassers who were injured by spring guns concealed on the premises, and of which the trespasser had no notice or knowledge. The case is an exception to the general rule, and appears to be put upon the ground that where one makes use of these dangerous instruments, humanity requires that the fullest possible notice should be given, and the law of England will not sanction what is inconsistent with humanity; in other words, that without such notice, the setting of spring-guns is an unauthorized act. Ilott v. Wilks, 3 B. & Ald. 304, *per* Best, J. See Dean v. Clayton, 7 Taunton, 489; Bird v. Holbrook, 4 Bing. 628, and Jay v. Whitfield referred to therein. The keeping of ferocious dogs, or the setting secretly of dangerous traps, is governed by the same rule. Brock v. Copeland, 1 Esp. 203; Townsend v. Wathen, 9 East, 277; Sarch v. Blackburn, 4 C. & P. 297. It is a little uncertain how far this principle can be carried, but doubtless it would be applied in some other cases where that is done by one on his own grounds without sufficient reason, which might result in loss of life or serious injury to those inadvertently, or even intentionally, committing trespass thereon. It has been often held that if one fall into an excavation upon the land of another where he is not expressly or by invitation invited, he has no claim to compensation from the owner. Blithe v. Topham, Cro. Jac. 158; Stone v. Jackson, 16 C. B. 199; Howland v. Vincent, 10 Metc. 373; Hargreaves v. Deacon, 25 Mich. 1. But if one dig a pit-fall with the purpose to injure trespassers, "humanity" may require that he be held responsible; and perhaps he should be held responsible in any case of an unguarded excavation so near the public way, that one lawfully using the way might, without gross negligence, fall into it.

[11] The King v. Commoners, etc., of Pagham, 8 B. & C. 354.

[12] See Gerrish v. Clough, 48 N. H. 9. Compare The King v. Trafford, 1 B. & Ald. 873; Williams v. Gale, 3 H. & J. 231.

Among the most troublesome cases are those which relate to the right of parties in waters which flow or pass from the lands of one proprietor to those of another, either above or below the surface, and to their rights respectively to be protected against such flow or passage when it would be injurious, or to insist upon it when it would be beneficial. A few of these cases will be mentioned:

1. *Drawing off subterranean waters to the prejudice of another.* Lord Ellenborough expressed the opinion in one case that a party who had for twenty years enjoyed the use of a spring on his own premises was entitled to be protected in it against the action of an adjoining proprietor, whose cutting for the purposes of a drain on his own premises drew away the water from it.[13] But it is now the settled law of England that excavations by a proprietor on his own grounds, for his own purposes, will not render him liable for the accidental injuries which his neighbor may suffer in consequence of the drawing off of the water which percolates through the soil. In the leading case the complaint was that the defendant, by sinking pits, shafts, etc., for mining purposes, had drawn off the water of certain underground springs, streams and watercourses on the land of the plaintiff, which he had theretofore used for manufacturing and other purposes. Tindall, C. J., in delivering the judgment of the Court of Exchequer Chamber in favor of the defendant, declared that the case "is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes, at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnium absque injuria*, which cannot become the ground of action."[14]

[13] Balston v. Bensted, 1 Camp. 463.

[14] Acton v. Blundell, 12 M. & W. 324, 353.

In this case the question of prescriptive rights was expressly waived in the opinion of the court, but in a subsequent case in the House of Lords it became necessary to meet it, and it was met with a distinct denial that any such rights could be claimed in sub-surface waters as they naturally percolated or found their way in secret passages through the soil. The facts in the case are stated by Mr. Justice Wightman, delivering the unanimous opinion of the judges, and they show that the complaint was that the defendants, by sinking a well for the supply of a town with water, had abstracted and intercepted underground water that otherwise would have flowed and found its way into a stream on which the plaintiff's mill was situate, and that the quantity so diverted was sufficient to be of sensible value towards the working of the plaintiff's mill. The reasoning on the question of prescriptive right we pass by, but on the main question the previous case in the Exchequer Chamber was fully approved, and some difficulties in the way of supporting an action were so forcibly put as to seem unanswerable. A French Artesian well was referred to, "which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall before it reached the ground by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river and in-

creasing its quantity to the detriment of the plaintiff's mill." Such a right, as was well said, was too indefinite and unlimited to be recognized, and it was rejected by the unanimous concurrence of the judges and the law lords.[15] The decision is understood to have settled the law for England, and it has found general acceptance and concurrence in this country.[16]

In Dickinson v. Grand Junction Canal Co., it was remarked by the learned Chief Baron that "if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground."[17] Confining this remark to the case of an

[15] Chasemore v. Richards, 7 H. L. Cas. 349. The case in the court below is reported in 2 H. & N. 168. On the same point reference may be made to New River Co. v. Johnson, 2 El. & El. 435; Hammond v. Hall, 10 Sim. 551; Smith v. Kendrick, 7 C. B. 566; The Queen v. Metropolitan Board of Works, 3 B. & Smith, 710; Popplewell v. Hodgkinson, L. R. 4 Exch. 248.

[16] Greenleaf v. Francis, 18 Pick. 121; Wheatley v. Baugh, 25 Penn. St. 528; Frazier v. Brown, 12 Ohio St. 294; Roath v. Driscoll, 20 Conn. 533; Bliss v. Greeley, 45 N. Y. 671; N. A. & S. R. R. Co. v. Peterson, 14 Ind. 112; Chatfield v. Wilson, 28 Vt. 49; Clark v. Conroe, 38 Vt. 469; Chase v. Silverstone, 62 Me. 175. In two New Hampshire cases the doctrine of Acton v. Blundell is questioned; but it would hardly seem to have been necessary to a decision of the actual controversies that the point should have been passed upon in either case. Bassett v. Salisbury Manuf. Co. 42 N. H. 569; Swett v. Cutts, 50 N. H. 439. In Parker v. B. & M. R. R. 3 Cush., 107, it was decided that if in consequence of an excavation made for a railroad track the water of a well on an estate adjoining is drawn off and the well thereby rendered dry and useless, the owner of such estate will be entitled to recover damages therefor, in the same manner as for land taken for the railroad, "because the respondents did not own the land; they only acquired a special right to and usufruct in it, upon condition of paying all damages which might thereby be occasioned to others." But see Commonwealth v. Richter, 1 Penn. St. 467; N. A. & S. R. R. Co. v. Peterson, 14 Ind. 112.

[17] 7 Exch. 282, 300, per Pollock, C. B. In Dudden v. Guardians, etc.

underground stream flowing in a well defined and understood channel, there has been a general disposition to accept it as sound law.[18] But one claiming rights in such a stream will be under the necessity of showing its existence. It will not be presumed that a spring comes from such a stream, but rather that it was formed by the ordinary percolations of water in the soil.[19] But when a clearly defined and well known stream is found to exist, rights corresponding to those in streams above ground may be recognized and protected.[20]

2. Protection against Falling Waters and Snows.—A man has a clear legal right to protect his premises against falling waters and snows, though prejudice to others may result. In the case of urban property he may, in erecting buildings and making improvements, do this to the extent of completely preventing the fall of rains and snows upon his grounds, and the only restriction upon the right appears to be this: that adjoining proprietors owe such duties to each other as the requirements of good neighborhood naturally impose; that each must so use his own as not unreasonably to injure his neighbor, but that this only obliges him to use all due care and prudence to protect his neighbor, and does not require that he shall at all events and under all circumstances protect him; and any injury that may result notwithstanding the observance of proper caution, must be deemed incident to the ownership of town property, and can give no right of action. If one constructs his building so as to cast the water therefrom upon the land of another, he is

1 H. & N. 627, the same learned judge said: "It is absurd to say that a man may take the water of such a stream, even though it be four feet from the surface."

[18] See particularly, Chasemore v. Richards, 7 H. L. Cas. 349, 373; Smith v. Adams, 6 Paige, 435; Wheatley v. Baugh, 25 Penn. St. 528; Whetstone v. Brower, 29 Penn. St. 59.

[19] Hanson v. McCue, 42 Cal. 303. See Mosier v. Caldwell, 9 Nev. 363. In Angell on Watercourses, § 157, the result of the authorities is stated to be that "in order to bring subterranean streams, within the rules which govern surface streams, their existence and their course must be to some extent known and notorious."

[20] Cole Silver Mining Co. v. Virginia etc. Water Co., 1 Sawyer, 470.

liable therefor, not only to the occupant, but to the reversioner;[21] but if he puts proper eave-troughs or gutters upon his building for leading off the water upon his own grounds, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances for which no one is in fault, but such injuries must be left to be borne by those on whom they fall.[22]

3. Drawing off Surface Water.—The drawing off of surface water may affect adjoining estates either as it deprives them of the benefit of the ordinary flow in natural watercourse, or as it increases the ordinary flow in such watercourses, or as it casts water through ditches upon adjoining lands, or so near to them that the water percolating through the soil causes the adjoining lands to be wet and unsuited to cultivation, or unproductive. In the first case, that is, where a lower proprietor is deprived of the benefit of the natural flow of the water, or of some portion thereof, it is settled that he can have no remedy. As has been forcibly said, one party cannot insist upon another maintaining his field as a mere water-table for the other's benefit.[23] On the other hand, it is equally well settled that one may lawfully drain his lands into a natural watercourse, even though a lower proprietor is injured by the increased flow.[24] "For the sake of agriculture —*agri colendi causa*—a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his ral channel of his streams, though the flow of water upon his

[21] Baten's Case, 9 Coke, 53 *b*; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 A. & El. 40; Fay v. Prentice, 1 M. G. & S. 828.

[22] Underwood v. Waldron, 33 Mich. Compare Bellows v. Sackett, 15 Barb. 99; Hoare v. Dickinson, Ld. Raym. 1568.

[23] Rawston v. Taylor, 11 Exch. 369, per Platt. B. See Broadben v. Ramsbotham, 11 Exch. 602; Livingston v. McDonald, 21 Iowa, 160, 167; Waffle v. N. Y. Cent. R. R. Co., 58 Barb. 413; Thayer v. Brooks, 17 Ohio, 491; Colt v. Lewiston, 36 N. Y. 217.

[24] Williams v. Gale, 3 H. & Johnson, 231; Miller v. Lauback, 47 Penn. St. 154; Waffle v. Porter, 61 Barb. 130. See Kauffman v. Griesemer, 26 Penn. St. 407.

neighbor be thereby increased. * * It is not more agreeable to the laws of nature that water should descend than it is that lands should be farmed and mined; but in many cases he thereby diminishes, not unreasonably, the supply of his neighbor below; and may clear out impediments in the natulands; may use running streams to irrigate his fields, though they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, should be maintained, but it should be prudently applied,"[25] and it will not preclude the lower proprietor erecting any such protections as may be needful to guard his lands against the additional flow, provided they do not intercept the passage of water which would naturally pass on to his land.[26] In Massachusetts it has been decided that one may erect barriers to prevent surface water which has accumulated elsewhere from coming upon his land, even though it is thereby made to flow upon the land of another to his loss. "The right of an owner of land to occupy and improve it in such manner and for such purposes, as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lands, to pass into and over the same in greater quantities or in other directions than they were accustomed to flow.[27] The point of these decisions is, that where there is no watercourse by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot

[25] Woodward, J., in Kauffman v. Griesemer, 26 Penn. St. 407, 414.

[26] Ibid. See Butler v. Peck, 16 Ohio St., 334.

[27] Citing Luther v. Winnisimmet Co., 9 Cush. 171; Flagg v. Worcester, 13 Gray, 601; Dickinson v. Worcester, 7 Allen, 19.

over that of his neighbor. *Cujus est solum, ejus est usque ad cœlum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon and beneath the surface, cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." [28]

The question of liability where one improves his land by artificial drains, which cast the water upon a lower proprietor, is difficult. No doubt he may improve them by filling up low and wet places without incurring liability to a lower proprietor upon whom the flow would be increased,[29] just as the public may lawfully improve the streets and public grounds, though the improvement may have the effect to cast the falling or surface water upon adjoining grounds.[30] A natural watercourse of course must not be stopped up, and the water turned back upon the lands of another proprietor.[31]

[28] Gannon v. Hargadon, 10 Allen, 106, *per* Bigelow, Ch. J.

[29] Goodale v. Tuttle, 27 N. Y. 459; Flagg v. Worcester, 13 Gray, 601; Hoyt v. Hudson, 27 Wis. 656.

[31] Martin v. Riddle, 26 Penn. St. 415; Luther v. Winnisimmet Co., 9 Cush. 171.

[30] Parks v. Newburyport, 10 Gray, 28; Flagg v. Worcester, 13 Gray, 601; Dickenson v. Worcester, 7 Allen, 19; Turner v. Dartmouth, 13 Allen, 291; Emery v. Lowell, 104 Mass. 16; Imler v. Springfield, 55 Mo. 119. If the proprietor of the adjoining lands protects them by an embankment which throws the water back into the road, the public have no cause for complaint. Franklin v. Fisk, 13 Allen, 211.

But "the true watercourse is well defined. There must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation watercourses."[32]

In Iowa, in a carefully considered case, it was held that if a ditch made by the defendant for the purpose of draining his lands, and which terminated within sixty feet of the line of the plaintiff, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and improvement of his farm.[33] So in Wisconsin it has been decided that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another, or so near it that it will flow over upon such land to its injury.[34] A case in Ohio somewhat similar was

[32] Dixon, Ch. J., in Hoyt v. Hudson, 27 Wis. 656, 661. In the same case an intimation in Bowlsby v. Speer, 31 N. J. 351, that there may possibly be an exception to this proposition in the case of gorges and narrow passages in hills or mountainous regions is repeated. As bearing on the question, see Eulrich v. Richter, 37 Wis. 226.

[33] Livingston v. McDonald, 21 Iowa, 160. See Reynolds v. Clark, Ld. Raym. 1399; Lane v. Jasper, 39 Ill. 54. The case of Adams v. Walker, 34 Conn. 466, the facts of which are somewhat imperfectly stated in the report, supports the same principle, and perhaps goes somewhat further.

[34] Pettigrew v. Evansville, 25 Wis. 223.

decided in the same way. In that case a part of the water which the defendant discharged upon the land of the plaintiff would naturally have found its way there had the drain not been cut.[35] These cases seem to confine the obligation of the owner of the lower estate to receive the waters flowing from the upper estate, to "waters which flow naturally without the art of man; those which come from springs, or from rain falling directly on the heritage, or even by the natural dispositions of the place."[36]

4 Collecting Water in Reservoirs.—A man may lawfully collect water in reservoirs on his premises. What the corresponding rights of his neighbors are is not very satisfactorily determined. Beyond question they have a right to be protected against any injurious consequences that might result from a negligent construction of the reservoirs, or from any want of care on the part of the person constructing or maintaining them, in consequence of which the water might escape to their injury, by percolation or otherwise.[37] Whether parties maintaining such reservoirs are not bound to a still stricter responsibility, is a question we do not care to enter upon in this place.[38] Neither do we deem it of importance to refer to more familiar questions relating to water rights. Our purpose has been only to present some classes of cases which may supply proper illustrations of the general principle which is stated at the beginning of the present paper.

Malice as an Ingredient in Torts.—As injury alone does not give a right of action, neither, as a general rule, do injury and malice combined. There must be a combination of wrong

[35] Butler v. Peck, 16 Ohio St., 334.

[36] Kauffman v. Griesemer, 26 Penn. St. 407, 413. See Martin v. Jett, 12 La. 501. As to the right of the upper proprietor to have natural passage for the surface water kept open for his drainage, though they are not watercourses, see Franklin v. Fisk, 13 Allen, 211; Goodale v. Tuttle, 29 N. Y. 459; Tootle v. Clifton, 22 Ohio St., 247; Martin, *ex parte*, 13 Ark. 198.

[37] Monson Manf. Co. v. Fuller, 15 Pick. 334; Fuller v. Chicopee Manf. Co., 16 Gray, 46; Wilson v. New Bedford, 108 Mass. 261; Prixley v. Clark, 35 N. Y. 520.

[38] See Rylands v. Fletcher, L. R. 1 Exch. 265; s. c. in error, 3 H. L. Cas. 330.

and injury to constitute a tort, and malice is not of itself a legal wrong. If one is only exercising his lawful rights, others can have no concern with his motives. A man may establish a business with the malicious purpose to destroy the business of his neighbor. This is no tort, whether he accomplishes his purpose or not, for he had a clear legal right to establish a new business, and his motives in doing so are not to be enquired into.[39]

"An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[40] This remark was made in a case where a landlord was charged with having maliciously distrained for more rent than was due to him, but it was only the statement of a principle that is as old as the common law. It has been applied in a case in which a prosecution was alleged to have been instituted maliciously, but where there was not an absence of probable cause,[41] and to cases of alleged malicious arrest of persons, privileged from arrest by being in attendance on court on subpœna, or by other causes,[42] and of maliciously issuing execution on a judgment which had been entered up for too large an amount, but which had not been corrected at the time suit was brought.[43]

In Mahan v. Brown the plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence near to and in front of the plaintiff's

[39] Auburn & Cato Plank R. Co. v. Douglass, 9 N. Y. 450.

[40] Parke, B., in Stevenson v. Newnham, 13 C. B. 285, 297. See Floyd v. Barbee, 12 Coke, 23; Stowball v. Ansell, Comb. 11; Tayler v. Hunniker, 12 Ad. & El. 488; Heald v. Carey, 11 C. B. 993; Clinton v. Myers, 46 N. Y. 511; Covanhoven v. Hart, 21 Penn. St., 501; Jenkins v. Fowler, 24 Penn. St. 308; Fowler v. Jenkins, 28 Penn. St. 176; Glendon Iron Co. v. Uhler, 75 Penn. St. 467; Smith v. Johnson, 76 Penn. St. 191.

[41] Anonymous, 6 Mod. 73; Williams v. Tayler, 6 Bingham, 183; Forshay v. Furguson, 2 Denio, 617, 620; Ammerman v. Crosby, 26 Ind. 451; Barton v. Kavanaugh, 12 La. An. 332.

[42] Vandevelde v. Lluellin, 1 Keb. 220; Maguay v. Burt, 5 Q. B. 381.

[43] Huffer v. Allen, L. R. 2 Exch. 15. See Gerard v. Lewis, 2 C. P. 305, in which Willes, J., says that the words "wrongfully and unlawfully are mere words of vituperation, and amount to nothing unless they show a cause of action."

windows, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her house uninhabitable. The court held that the action would not lie. "The defendant has not so used his property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint."[44]

In the South Royalton Bank v. The Suffolk Bank the same principle was involved. The defendants were charged with having maliciously and with intent to injure the plaintiff gathered up its circulating bills, and taken them out of circulation, and afterwards presented them in quantities for redemption to the injury of the plaintiff. On demurrer the court say: "Motive alone is not enough to render the defendants liable for doing those acts which they had a right to do. It is too well settled to need authority that malice alone will not sustain an action for a vexatious suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits maliciously to collect pay upon the plaintiff's bills, which they lawfully held, much less could they be sued for simply calling upon the defendants for pay, without the intervention of a suit, though done with malice. It may be true that sometimes the consequences attending an act may serve to give character to that act, and the rule has become established and grown into a maxim, that a man must use his own rights with due regard to the rights of others; but this principle does not apply to the present case. Here the act of presenting the plaintiff's bill for payment has no natural connection with any injurious consequences to follow from it, and if such consequences follow, they

[44] Mahan v. Brown, 13 Wend. 261, 265, *per* Savage, Ch. J. See Panton v. Holland, 17 Johns. 92.

must be fortuitous, and cannot give character to the act so as to render it unlawful."[45]

The same principle was applied in the case of Hunt v. Simonds, in which the plaintiff declared against insurance officers for maliciously conspiring to refuse insurance on his property to his injury. As he had no legal right to demand to be insured by them, it was clear that they had a lawful right to refuse; and whether they did this from good motives or from bad motives was of no legal importance.[46]

The case of public officers who have discretionary or judicial duties to perform is familiar. "The law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty."[47] "If a jury will find a special verdict; if a judge will take time to consider; if a bishop will delay a patron and impannel a jury to enquire of the right of patronage; you cannot bring an action for these delays, though you suppose it to be done maliciously and on purpose to put you to charges; though you suppose it be done *scienter* knowing the law to be clear; for they take but the liberty the law has provided, and there can be no demonstration that they have not real doubts, for these are within their own breasts; and it would be very mischievous that a man might not have leave to doubt without so great a peril."[48] As was remarked in a case in which a surveyor of highways was charged with maliciously working the highway in a manner detrimental to the plaintiff: "The true enquiry was,

[45] Bennett, J. in South Royalton Bank v. Suffolk Bank, 27 Vt. 505, 508.

[46] Hunt v. Simonds, 19 Mo. 583.

[47] Beardsley, J., in Weaver v. Devendorf, 3 Denio, 120. See Floyd v. Bender, 12 Coke, 23; Evans v. Foster, 1 N. H. 377; Yates v. Lansing, 5 Johns. 282; S. C. in Error, 9 Johns. 394; Laning v. Bentham, 2 Bay, 1; Brodie v. Rutledge, Ibid. 69; Pratt v. Gardner, 2 Cush. 68; Garnett v. Ferrand, 6 B. & C. 611; Dicas v. Lord Brougham, 6 C. & P. 249; Fray v. Blackburn, 3 B. & S. 576; Dawkins v. Lord Rokeby, 5 Q. B. 108; S. C. in Error, 4 Fost. & Fin. 806.

[48] North, Ch. J., in Barnardiston v. Soame, 6 How. State Trials, 1099. See Scott v. Stansfield, L. R. 3 Exch. 220. The subject was largely considered in Bradley v. Fisher, 13 Wall. 335.

whether the defendant had legal authority to do what he did in the highway. If he had such authority, and acted within the scope of it, he is not a trespasser because his motives or purposes with respect to the plaintiff were unkind or malicious."[49]

Within this principle, also falls the case of one in authority, who, under a discretionary power pertaining to his office, puts a subordinate on trial for alleged violation of the laws. The exercise of such a discretion cannot be a tort, even though bad motive or want of probable cause be charged.[50] Neither can the malice of a witness in giving injurious testimony, nor the malice of a party in making injurious allegations in affidavits which he files in the course of judicial proceedings render him liable to an action at the suit of the party aggrieved.[51] These cases are referred to as illustrations merely; there are many others in which the same principle is applied.

It has been made a question whether the principle is applicable in cases where one is dealing with surface water, or water percolating through the soil of his premises, to the injury of his neighbor. In Chatfield v. Wilson it was applied without hesitation. The case was one of gathering water on the defendant's premises which otherwise would have percolated through the soil of the plaintiff, supplying a reservoir and aqueduct which had been constructed by him, and malice was charged. "There are," it is said by the court, "many cases in the books relating to the relative use of surface streams, where the case has turned upon the question whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are cor-

[49] Thomas, J. in Benjamin v. Wheeler, 8 Gray, 409; see Sage v. Laurain, 19 Mich. 137; Thornton v. Thornton, 64 N. C. 211.

[50] Johnston v. Sutton, 1 T. R. 549; Freer v. Marshall, 4 Fost. & Fin. 485; Dawkins v. Lord Pawlett, L. R. 5 Q. B. 94; Dawkins v. Lord Rokeby, L. R. 8 Q. B. 285, and 4 Fost. & Fin. 806.

[51] Damport v. Simpson, Cro Eliz. 520; Revis v. Smith, 18 C. B. 125; Henderson v. Broomhead, 4 H. & N. 569; Cunningham v. Brown, 18 Vt. 123; Dunlap v. Glidden, 31 Me. 435; White v. Carroll, 42 N. Y. 166.

relative rights to the use of the water, and the boundary of the right is a *reasonable* use of it. But such cases have no analogy to the case at bar, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it. Such was the case of South Royalton Bank v. Suffolk Bank, 27 Vt. 505. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria.* On this point the case of Mahan v. Brown, 13 Wend. 261, is a direct authority."[52] This view appears also to have been accepted in Ohio, "subject only to the possible exception of a case of unmixed malice."[53] The intimations the other way have, however, been very strong. Lord Cranworth, in Chasemore v. Richards, expressed very great doubt whether a party would be at liberty to abstract water on his own premises for the use, unconnected with his own estate, of those who would have had no right to take it directly themselves, to the injury of neighboring proprietors who would have had an equal right with him.[54] In Massachusetts the instructions of the trial court, that if the defendant dug the well which drew water away from the plaintiff, for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable for so doing, were very distinctly approved by the court in banc.[55] And the Supreme Court of Pennsylvania appears to have recognized the same doctrine in several cases.[56]

There seems to be some difficulty in laying down a rule for these cases that will be quite satisfactory in principle and in its workings. That a man may lawfully make an excavation on his premises for the sole purpose of drawing away the water from his neighbor's well and rendering it useless,

[52] Chatfield v. Wilson, 28 Vt. 49, 57.

[53] Frazier v. Brown, 12 Ohio St., 294, 304.

[54] Chasemore v. Richards, 7 H. L. Cas. 349, 388.

[55] Greenleaf v. Francis, 18 Pick. 117, 122.

[56] Wheatley v. Baugh. 25 Penn. St. 528; Whetstone v. Bowser, 29 Penn. St. 59; Haldeman v. Bruckhardt, 45 Penn. St. 514. See, also, Trustees of Delphi etc. v. Youmans, 50 Barb. 516; Waffle v. Porter, 61 Barb. 130.

seems to be, and is in fact, a monstrous doctrine. On the other hand it cannot be held consistent with the authorities, or perhaps with reason, that adjoining proprietors have rights in the water percolating through the soil, corresponding to those they may have in a running stream which crosses their several estates. Such a rule would raise questions of reasonable use, and create difficulties both of evidence and of application that would make the right to such waters more troublesome than valuable. The courts have doubtless been right in declaring that one proprietor cannot insist on another keeping his estate as a filter for the use of the former, nor be heard to complain if the use by his neighbor of his own estate draws off the secret particles of water which otherwise he might have gathered. These waters belong to no one until they are collected, and they may be appropriated by the one who collects and puts them to use.

But though neither proprietor has such a right in or control over the water as will enable him to complain of his neighbor's appropriation, does not each owe to the other certain duties of good neighborhood, among which is the duty to abstain from purposely withdrawing the water that may be useful to both, when a use of it is not intended? Conceding that he may collect it for use, does this entitle him to do so not for use but of malice? If he sinks a well to supply his house or water his stock, it must be admitted that no question can be raised whether this is or is not a reasonable appropriation of the water; but if he digs a hole to injure his neighbor, it is not perceived that the two cases are necessarily to be governed by the same rule. What is a man's right in respect to the water percolating through his soil? The just answer seems to be this: It is a right to gather and appropriate it to his lawful uses. When he does this, he is exercising his right, and his motive is not open to enquiry. But when he collects it, not for use but to injure his neighbor, he exceeds his right, and there is that conjunction of wrong and injury which constitute a tort and will support an action.

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