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PREFACE

TO

SECOND CANADIAN EDITION.

A SECOND CANADIAN EDITION of "Underhill on Torts" having been called for, the author has taken the opportunity of adding considerably to the notes on Canadian cases, as well as bringing the law on the subject up to date. The arrangement followed in the First Edition is adhered to, and it has been the object of the author to include as well a reference to every reported case decided by the Supreme Court or the High Courts of the Provinces. In this way it is hoped that this Edition of Mr. Underhill's standard work will find a greater use than heretofore. If such be the case the author will be more than repaid for his labour in compiling it.

2, PUMP COURT, TEMPLE.
February, 1906.

PREFACE

TO

THE EIGHTH EDITION.

THE facts that seven Editions of this Work have been sold, that an American firm have thought it worth their while to issue an unauthorised edition in the United States, and that a Canadian edition has been published, render it no longer necessary to apologise for its existence.

Many of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a Treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place, to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation,

seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher* v. *Rylands*, and *Nichols* v. *Marsland* for instance?

In the second place, the men are few indeed who can trust their memories to retain the contents of a large treatise with accuracy; and although that is not necessary, yet it *is* essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work; and I still think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his digests and his reports; for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enables him to apply these principles to complicated facts with ease and certainty.

The present Edition has been somewhat shortened by the elimination of the Chapter on Infringement of Patents, Copyright, and Trade Marks. Although no doubt such wrongs are torts in the strict sense, they are of a very special nature, and are but rarely the subject of a common law action for damages. In a students' work such as this it has been thought better on the whole to exclude them.

The typography of this Edition has been altered by placing all cases in foot notes instead of (as formerly) in the body of the text. It is hoped and believed that this will facilitate the reading of the book by students.

Lastly, I have to express my thanks to Mr. J. Gerald Pease, of the Inner Temple and Western Circuit, Barrister-at-Law (who has edited the present Edition jointly with me, and upon whom the greater share of the labour has fallen), and Mr. Hubert Stuart Moore, of the Inner Temple, Barrister-at-Law, who wrote the articles upon Fisheries and Ferries for the last edition.

ARTHUR UNDERHILL.

5, New Square, Lincoln's Inn, W.C.
1*st June*, 1905.

CONTENTS.

PAGE

PREFACE TO SECOND CANADIAN EDITION vii

PREFACE TO THE EIGHTH EDITION xi

TABLE OF ENGLISH CASES CITED... xxi

TABLE OF CANADIAN CASES CITED li

TABLE OF ENGLISH STATUTES CITED lxvii

TABLE OF CANADIAN STATUTES CITED lxix

INTRODUCTION 3

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

PAGE

ART. 1. Definition of a Tort 7

„ 2. Classification of unauthorised Acts or Omissions constituting one Element of a Tort... 22

„ 3. Of Volition and Intention in relation to the unauthorised Act or Omission 24

„ 4. Malice and Moral Guilt 37

„ 5. Of the connection of the Damage with the unauthorised Act or Omission... 41

„ 6. Where Damage would have been suffered in the absence of unauthorised Act or Omission 44

„ 7. To what extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony ... 46

Chapter II.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION IS ONE FORBIDDEN BY STATUTE.

PAGE

Art. 8. General Rule 52
„ 9. Where the Act or Omission is forbidden to prevent a particular Mischief 55
„ 10. The Observance of Statutory Precautions does not restrict Common Law Liability 57

Chapter III.

RELATION OF CONTRACT AND TORT.

Art. 11. Distinction between Actions for Tort and for Breach of Contract 60
„ 12. Privity not necessary where the Remedy is in Tort ... 62
„ 13. Duties gratuitously undertaken 67

Chapter IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

Art. 14. Torts committed Abroad 69

Chapter V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

Art. 15. Who may sue 72
„ 16. Who may be sued for a Tort... 73

Chapter VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

Sect. I.—Liability of Husband for Torts of Wife.

Art. 17. Wife's Ante-nuptial and Post-nuptial Torts 79

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Chapter IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS.

		PAGE
Art. 38.	Injuries remediable by Injunction	177
„ 39.	Threatened Injury	188
„ 40.	Public Convenience does not justify the Continuance of a Tort	189
„ 41.	Mandatory Injunctions	191
„ 42.	Delay in seeking Relief	193

Chapter X.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

Art. 43.	Death generally destroys the Right of Action	194
„ 44.	Effect of Brnkruptcy	197

PART II.

RULES RELATING TO PARTICULAR TORTS.

Chapter I.

OF DEFAMATION.

Art. 45.	Definitions of Libel and Slander	201
„ 46.	What is Defamatory	204
„ 47.	Special Damage essential to Action for Slander ...	214
„ 48.	Publication	227
„ 49.	Justification	230
„ 50.	Malice and Privilege	233
„ 51.	Repeating Libel or Slander	249
„ 52.	Libels by Newspaper Proprietors	251
„ 53.	Limitation for Actions for Defamation	252

Chapter II.

OF MALICIOUS PROSECUTION.

Art. 54.	Definition	254
„ 55.	Prosecution by the Defendant	258
„ 56.	Want of Reasonable and Probable Cause	260
„ 57.	Malice	267
„ 58.	Failure of the Prosecution	270
„ 59.	Damage	271

CHAPTER III.

OF MAINTENANCE.

PAGE

ART. 60. Definition 275

CHAPTER IV.

OF SEDUCTION.

ART. 61. General Rule 280
„ 62. Relationship of Master and Servant in ordinary Actions for Seduction 284
„ 63. Misconduct of Parent 294
„ 64. Damages 295
„ 65. Limitation 296

CHAPTER V.

OF DECEIT OR FRAUD.

ART. 66. Definition of Fraud 298
„ 67. When an Action will lie for Fraudulent Statements ... 302
„ 68. There must be active Fraud 311
„ 69. Limitation 314

CHAPTER VI.

OF UNLAWFUL COERCION AND CONSPIRACY.

ART. 70. General Rules 315

CHAPTER VII.

OF NEGLIGENCE.

ART. 71. Definition 323
„ 72. Contributory Negligence 368
„ 73. Proximate Cause 399
„ 74. Onus of Proof 401
„ 75. Duties of Judge and Jury 407
„ 76. Limitation 408
„ 77. Actions by Personal Representatives of Persons killed by Torts 409

CHAPTER VIII.

NUISANCE.

PAGE

ART. 78. Description of Nuisances 417

Sect. I.—OF PRIVATE DAMAGE FROM PUBLIC NUISANCE.

ART. 79. General Rule 420

Sect. II.—OF PRIVATE NUISANCES TO CORPOREAL HEREDITAMENTS.

ART. 80. General Liability 427
„ 81. Reasonableness of Place 434

Sect. III.—RULES APPLICABLE TO PUBLIC AND PRIVATE NUISANCES.

ART. 82. Plaintiff coming to the Nuisance 437
„ 83. How far Right to commit a Nuisance can be acquired... 438
„ 84. Liability for Nuisances created by Ruinous Premises ... 442

Sect. IV.—NUISANCES TO INCORPOREAL HEREDITAMENTS 444

ART. 85. Disturbance of Right of Support for Land without Buildings 448
„ 86. Disturbance of Support of Buildings 452
„ 87. Disturbance of Right to Light and Air 457
„ 88. Disturbance of Water Rights 467
„ 89. Disturbance of Private Rights of Way 473
„ 90. Disturbance of Rights of Common 481
„ 91. Disturbance of Rights of Fishery 484
„ 92. Disturbance of Ferries 489
„ 93. Remedy for Nuisances by Abatement 493
„ 94. Remedy of Reversioners for Nuisances 497
„ 95. Limitation 498

CHAPTER IX.

OF TORTS FOUNDED ON THE DIRECT INFRINGEMENT OF PRIVATE RIGHTS.

Sect. I.—TRESPASS TO THE PERSON.

ART. 96. General Liability for Trespass to the Person 500
„ 97. Definition of Assault 501
„ 98. Definition of Battery 502
„ 99. Definition of False Imprisonment 504
„ 100. Justification of Trespass to the Person 506
„ 101. General Authority of Judicial Officers to Imprison ... 511
„ 102. *Primâ facie* Jurisdiction sufficient to excuse Judicial Officer of Inferior Court 514

CHAPTER IX.—*continued.*

PAGE

ART. 103. Conviction must be set aside 515
„ 104. Power to Imprison for Contempt of Court 518
„ 105. Power of Magistrates to Imprison 519
„ 106. Arrest by Constable and Private Persons 519
„ 107. Arrest for Misdemeanour 528
„ 108. Institution of Criminal Proceedings endangers right of Action 530
„ 109. Amount of Damages 531
„ 110. Limitation 532

Sect. II.—OF TRESPASS TO LAND AND DISPOSSESSION.

Sub-sect. (1).—*Of Trespass Quare Clausum Fregit.*

ART. 111. Definition 533
„ 112. Trespassers *ab initio* 543
„ 113. Possession necessary to enable the Plaintiff to maintain an Action for Trespass 544
„ 114. Trespasses by Joint Owners 549
„ 115. Continuing Trespasses 550
„ 116. Limitation 550

Sub-sect. (2).—*Of Dispossession.*

ART. 117. Definition 551
„ 118. Onus of Proof of Title 552
„ 119. Character of Claimant's Estate 553
„ 120. Limitation 554
„ 121. Commencement of Period of Limitation 554

Sect. III.—OF TRESPASS TO AND CONVERSION OF CHATTELS.

ART. 122. General Rule 556
„ 123. Possession necessary to maintain an Action for Trespass or Conversion 563
„ 124. Trespasses by Joint Owners... 567
„ 125. Trespassers *ab initio* 567
„ 126. Remedy by Recaption 568
„ 127. Remedy by ordinary Action 568
„ 128. Remedy by Action of Replevin 569
„ 129. Waiver of Tort 571
„ 130. Recovery of Stolen Goods 572
„ 131. Limitation 573

INDEX 575

TABLE OF CASES CITED.

A.

PAGE

A. *v.* B., 24 L. R. Ir. 234 ; 16 Cox, 566 50
Abrahams *v.* Deakin, [1891] 1 Q. B. 516 ; 55 J. P. 212 ; 60 L. J. Q. B. 238 ; 63 L. T. 690 ; 39 W. R. 183 106
Abrath *v.* North Eastern Rail. Co., 11 App. Cas. 247 ; 50 J. P. 659 ; 55 L. J. Q. B. 457 ; 55 L T. 63 ... ... 76, 261, 262, 269
Adamson *v.* Jervis, 4 Bing. .66 ; 5 L. J. (o.s.) C. P. 68 ; 12 Moore C. P. 241 ; 29 R. R. 503 176
Ajello *v.* Worsley, [1898] 1 Ch. 274 ; 67 L. J. Ch. 172 ; 77 L. T. 783 ; 46 W. R. 245 306
Alabaster *v.* Harness, [1895] 1 Q. B. 339 ; 64 L. J. Q. B. 76 ; 14 R. 54 ; 71 L. T. 740 ; 43 W. R. 196 278
Aldin *v.* Latimer, Clark & Co., [1894] 2 Ch. 437 ; 63 L. J. Ch. 601 ; 8 R. 352 ; 71 L. T. 119 ; 42 W. R. 453 460
Aldred *v.* Constable, 6 Q. B. 370 ; 8 Jur. 956 557
Alexander *v.* Jenkins, [1892] 1 Q. B. 797 ; 56 J. P. 452 ; 61 L. J. Q. B. 634 ; 66 L. T. 391 ; 40 W. R. 546 227
Allbut *v.* General Council, etc., 23 Q. B. D. 400 ; 54 J. P. 36 ; 37 W. R. 771 ; 58 L. J. Q. B. 606 ; 61 L. T. 585 240
Allen *v.* Flood, [1898] A. C. 1 ; 62 J. P. 595 ; 67 L. J. Q. B. 119 ; 77 L. T. 717 ; 46 W. R. 258 ... ... 37. 38, 39, 318, 322
—— *v.* New Gas Co., 1 Ex. D. 251 ; 45 L. J. Ex. 668 ; 34 L. T. 541 111
—— *v.* Taylor, 16 Ch. D. 355 ; 50 L. J. Ch. 178 460
—— *v.* Woods, 68 L. T. 143 ; 4 R. 249 554
Ambler *v.* Gordon, [1905] 1 K. B. 417 ; 74 L. J. K. B. 185 ; 92 L. T. 96 ; 53 W. R. 300 466
Anderson *v.* Gorrie, [1895] 1 Q. B. 668 ; 14 R. 79 ; 71 L. T. 382 ... 513
———— *v.* Oppenheimer, 5 Q. B. D. 602 ; 49 L. J. Q. B. 708 ... 432
———— *v.* Radcliffe, 29 L. J. Q. B. 128 : El. Bl. & El. 806 ; 6 Jur. (N.S.) 578 ; 1 L. T. 487 ; 8 W. R. 283 548
Andrews *v.* Nott-Bower, [1895] 1 Q. B. 888 ; 59 J. P. 420 ; 64 L. J. Q. B. 536 ; 14 R. 404 ; 72 L. T. 530 ; 43 W. R. 582 240
Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275 ; 47 L. J. Ch. 833 ; 39 L. T. 244 ; 27 W. R. 3 184
Angus *v.* Clifford, [1891] 2 Ch. 449 ; 60 L. J. Ch. 443 ; 65 L. T. 274 ; 39 W. R. 498 308
Apollo (Owners of) *v.* Port Talbot Co., [1891] A. C. 499 ; 55 J. P. 820 ; 61 L. J. P. 25 ; 65 L. T. 590 ; 7 Asp. M. C. 115 334
Applebee *v.* Percy, L. R. 9 C. P. 647 ; 43 L. J. C. P. 365 ; 30 L. T. 785 ; 22 W. R. 704 332
Appleby *v.* Franklin, 17 Q. B. D. 93 ; 50 J. P. 359 ; 55 L. J. Q. B. 129 ; 54 L. T. 135 ; 34 W. R. 231 50
Arbuckle *v.* Taylor, 2 Dow. P. C. 160 134
Arcedeckne *v.* Kelk, 2 Giff. 683 ; 5 Jur. (N.S.) 114 ; 7 W. R. 194 ... 466
Argentino, The, 14 App. Cas. 519 ; 57 L. J. Adm. 17 ; 61 L. T. 706 ; 6 Asp. M. C. 433 164

PAGE

Arkwright *v.* Newbold, 17 Ch. D. 301 ; 50 L. J. Ch. 372 ; 44 L. T. 393 ; 29 W. R. 655 312
Armory *v.* Delamirie, 1 Str. 504 ; 1 Sm. L. C. 343 ... ... 160, 565
Ashby *v.* White, 2 Lord Raymond, 938 ; 3 *id.* 320 ; 1 Sm. L. C. (11th ed.), 251 ; 14 How. St. Tr. 695 19
Asher *v.* Whitlock, L. R. 1 Q. B. 1 ; 45 L. J. Q. B. 17 ; 11 Jur. (N.S.) 925 ; 13 L. T. 254 ; 14 W. R. 26 ... ... 548, 552
Ashton *v.* Stock, 6 Ch. D. 719 ; 25 W. R. 862 555
Aslatt *v.* Corporation of Southampton, 16 Ch. D. 143 ; 45 J. P. 111 ; 50 L. J. Ch. 31 ; 43 L. T. 464 ; 29 W. R. 117 186
Aspden *v.* Seddon, L. R. 10 Ch. 394 ; 44 L. J. Ch. 359 ; 32 L. T. 415 ; 23 W. R. 580 449
Atkinson *v.* Newcastle Water Co., 2 Ex. D. 441 ; 46 L. J. Ex. 775 ; 36 L. T. 761 ; 25 W. R. 794 53
Att.-Gen. *v.* Birmingham Town Council, 6 W. R. 811 ; 4 K. & J. 528... ... ... 190, 421
——— *v.* Brighton, etc. Supply Association, [1900] 1 Ch. 276 ; 69 L. J. Ch. 204 ; 81 L. T. 762 ; 48 W. R. 314 ... 419
——— *v.* Cole, [1901] 1 Ch. 205 ; 65 J. P. 88 ; 70 L. J. Ch. 148 ; 83 L. T. 725 436
——— *v.* Conduit Colliery Co., [1895] 1 Q. B. 301 ; 59 J. P. 70 ; 64 L. J. Q. B. 207 ; 15 R. 267 ; 71 L. T. 777 ; 43 W. R. 366 ... ... 449, 451
——— *v.* Dorking Union, 20 Ch. D. 595 ; 51 L. J. Ch. 585 ; 46 L. T. 537 ; 30 W. R. 579 185
——— *v.* Emerson, [1891] A. C. 649 ; 55 J. P. 709 ; 61 L. J. Q. B. 95 ; 65 L. T. 564 ... ...487, 488, 489
——— *v.* Heatley, [1897] 1 Ch. 560 ; 66 L. J. Ch. 275 ; 76 L. T. 164 ; 47 W. R. 394 ... ...417, 419, 421
——— *v.* London and North Western Rail. Co., [1900] 1 Q. B. 78 ; 63 J. P. 772 ; 69 L. J. Q. B. 26 ; 81 L. T. 649 ... 190
——— *v.* Luton Local Board, 5 Jur. (N.S.) 180 421
——— *v.* Mayor of Manchester, [1893] 2 Ch. 87 : 57 J. P. 343 ; 62 L. J. Ch. 459 ; 3 R. 427 ; 68 L. T. 608 ; 41 W. R. 459... ... ... 189, 439
——— *v.* Nottingham Corporation, [1904] 1 Ch. 673 ; 68 J. P. 125 ; 73 L. J. Ch. 512 ; 90 L. T. 308 ; 52 W. R. 281 ; 2 L. G. R. 698 ; 20 T. L. R. 257 189
——— *v.* Wright, [1897] 2 Q. B. 318 ; 66 L. J. Q. B. 834 ; 77 L. T. 295 ; 46 W. R. 85 456
Augusta, The, 6 Asp. M. C. 58, 161 ; 57 L. T. 326 70
Australian Newspaper Co. *v.* Bennett, [1894] A. C. 284 ; 58 J. P. 604 ; 63 L. J. P. C. 105 ; 6 R. 484 ; 70 L. T. 597 209
Aynsley *v.* Glover, L. R. 18 Eq. 544 ; 43 L. J. Ch. 777 ; 31 L. T. 219 ; 23 W. R. 147 466
Ayre *v.* Craven, 2 Ad. & Ell. 2 ; 4 N. & M. 220 ; 4 L. J. K. B. 35 ; 41 R. R. 359 226

B.

Backhouse *v.* Bonomi, 9 H. L. Cas. 503 : 34 L. J. Q. B. 181 ; 7 Jur. (N.S.) 809 ; 4 L. T. 754 ; 9 W. R. 769 ... ... 141, 142, 448
Baily & Co. *v.* Clark, Son, and Moreland, [1902] 1 Ch. 649 ; 71 L. J. Ch. 396 ; 86 L. T. 309 ; 50 W. R. 511 467
Baldwin *v.* Casella, L. R. 7 Ex. 325 ; 41 L. J. Ex. 167 ; 26 L. T. 707 ; 21 W. R. 16 332
Ball, *Ex parte*, Shepherd, *Re*, 10 Ch. D. 667 ; 48 L. J. Bkcy. 57 ; 27 W. R. 563 ; 40 L. T. 141 ; 14 Cox C. C. 237 ... ... 47, 48, 50

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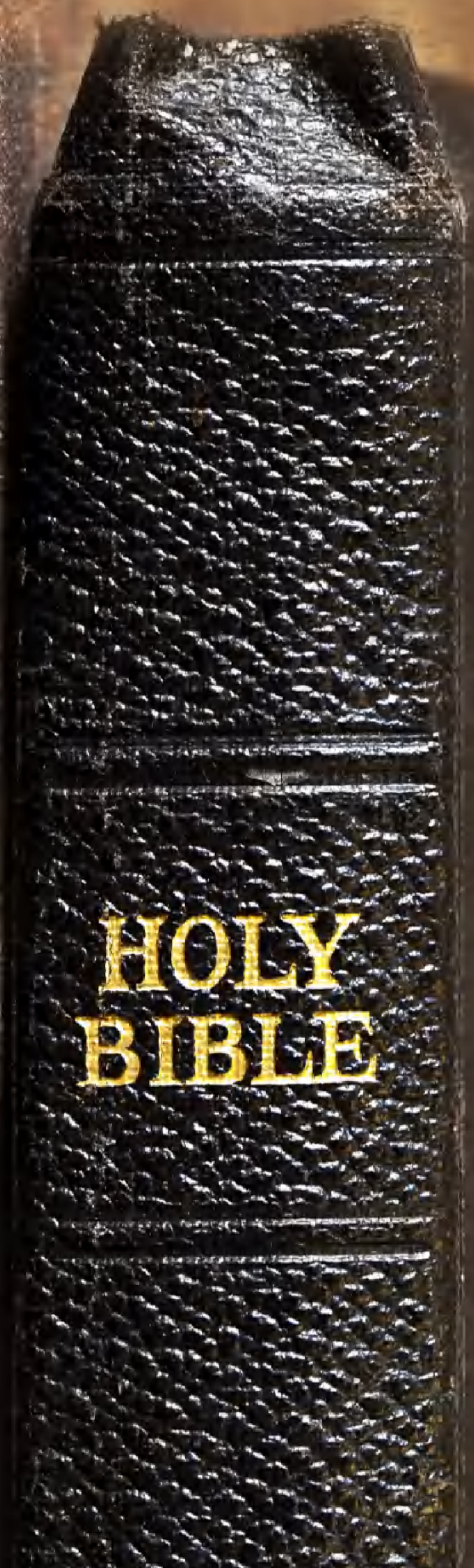

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PAGE

Berringer *v.* Great Eastern Rail. Co., 4 C. P. D. 163 ; 48 L. J. C. P. 400 ; 27 W. R. 681 22
Betts *v.* Gibbins, 2 A. & E. 57 ; 4 N. & M. 64 ; 4 L. J. K. B. 1 ; 41 R. R. 381 176
—— *v.* Thompson, L. R. 6 Ch. 732 ; 25 L. T. 363 ; 19 W. R. 1100 ... 483
—— *v.* Jones, 7 Q. B. 743 ; 15 L. J. Q. B. 82 ; 9 Jur. 870 ; 68 R. R. 564 ... ... 504, 506
Birmingham Corporation *v.* Allen, 6 Ch. D. 284 ; 46 L. J. Ch. 673 ; 37 L. T. 207 ; 25 W. R. 810 ... ...448, 449, 451
Black *v.* Christchurch Finance Co., [1894] A. C. 48 ; 58 J. P. 332 ; 63 L. J. P. C. 32 ; 6 R. 394 ; 70 L. T. 77 93
Blackman *v.* Bryant, 27 L. T. 491 221
Blades *v.* Higgs, 10 C. B. (N.S.) 713 ; 30 L. J. C. P. 347 ; 7 Jur. (N.S.) 1289 ; 4 L. T. 551 ; affirmed 11 H. L. Cas. 621 ; 20 C. B. (N.S.) 214 ; 34 L. J. C. P. 286 ; 11 Jur. (N.S.) 701 ; 12 L. T. 615 ; 13 W. R. 927 ... ... 510, 568
Blair *v.* Deakin, 57 L. T. 522 ; 52 J. P. 327 175
Blake *v.* Lanyon, 6 T. R. 221 ; 3 R. R. 162 280
—— *v.* Midland Rail. Co., 18 Q. B. 93 ; 21 L. J. Q. B. 233 ; 16 Jur. 562 163
Bliss *v.* Hall, 4 Bing. N. C. 183 ; 5 Scott, 500 ; 6 D. P. C. 442 ; 1 Arn. 19 ; 7 L. J. C. P. 122 ; 2 Jur. 110 ; 44 R. R. 697 437
Blissett *v.* Hart, Willes, 508 491
Bloodworth *v.* Gray, 7 Man. & G. 334 ; 8 Sco. N. R. 9 ; 66 R. R. 720 ... ... 215, 222
Bloomfield *v.* Johnston, 8 Ir. R. C. L. 97 487
Blount *v.* Layard, [1891] 2 Ch. 681 n 487
Blyth *v.* Birmingham Water Co., 25 L. J. Ex. 212 ; 11 Ex. 781 ; 2 Jur. (N.S.) 333 ; 4 W. R. 294 ... ... 323, 329
—— *v.* Fladgate, [1891] 1 Ch. 337 ; 60 L. J. Ch. 66 ; 63 L. T. 546 ; 39 W. R. 422 133
Boden *v.* Roscoe, [1894] 1 Q. B. 608 ; 58 J. P. 368 ; 63 L. J. Q. B. 767 ; 10 R. 173 ; 70 L. T. 450 ; 42 W. R. 445 550
Bolton *v.* Bolton, 11 Ch. D. 968 ; 48 L. J. Ch. 467 ; 40 L. T. 582 ... 475
Bonnard *v.* Perryman, [1891] 2 Ch. 269 ; 60 L. J. Ch. 617 ; 65 L. T. 506 ; 39 W. R. 435 ... ...180, 186, 187
Bonner *v.* Great Western Rail. Co., 24 Ch. D. 1 ; 47 J. P. 580 ; 48 L. T. 619 ; 32 W. R. 190 191
Bonomi *v.* Backhouse, E. B. & E. 622 452
Booth *v.* Arnold, [1895] 1 Q. B. 571 ; 59 J. P. 215 ; 64 L. J. Q. B. 443 ; 14 R. 326 ; 72 L. T. 310 ; 43 W. R. 360 ... ... 217, 227
Borlick *v.* Head, 50 J. P. 327 ; 34 W. R. 102 ; 53 L. T. 909 128
Boss *v.* Litton (1832), 4 C. & P. 407 364
Bound *v.* Lawrence, [1892] 1 Q. B. 226 ; 56 J. P. 118 ; 61 L. J. M. C. 21 ; 65 L. T. 844 ; 40 W. R. 1. 128
Bowen *v.* Anderson, [1894] 1 Q. B. 164 ; 10 R. 47 ; 42 W. R. 236 ... 443
—— *v.* Hall, 6 Q. B. D. 333 ; 45 J. P. 373 ; 50 L. J. Q. B. 305 ; 44 L. T. 75 ; 29 W. R. 367 317
Bower *v.* Peate, 1 Q. B. D. 321 ; 45 L. J. Q. B. 446 ; 35 L. T. 321 ... 93
Bowyer *v.* Cook, 4 C. B. 236 550
Box *v.* Jubb, 4 Ex. Div. 76 ; 48 L. J. Ex. 417 ; 41 L. T. 97 ; 27 W. R. 415 ... ... 30, 33, 34, 431
Boxsius *v.* Goblet Frères, [1894] 1 Q. B. 842 ; 58 J. P. 670 ; 63 L. J. Q. B. 401 ; 9 R. 224 ; 70 L. T. 368 ; 42 W. R. 392 229
Boyle *v.* Tamlyn, 6 B. & C. 329 ; 9 Dow. & R. 430 ; 5 L. J. (O.S.) K. B. 134 ; 30 R. R. 345 538
Bracegirdle *v.* Bailey, 1 F. & F. 536 171
Bradburn *v.* Morris, 3 Ch. D. 812 475

PAGE

Bradford Corporation *v.* Ferrand, [1902] 2 Ch. 655 ; 67 J. P. 21 ; 71 L. J. Ch. 859 ; 87 L. T. 388 ; 51 W. R. 122 ... ... 468, 472
——— *v.* Pickles, [1895] A. C. 587 : 60 J. P. 3 ; 64 L. J. Ch. 759 ; 11 R. 286 ; 73 L. T. 353 ; 44 W. R. 190 37, 418, 419, 429, 472
Bradlaugh *v.* Newdigate, 11 Q. B. D. 1 ; 52 L. J. Q. B. 454 ; 31 W. R. 792 .. .. 277, 278
Bradshaw *v.* Lancashire and Yorkshire Rail Co., L. R. 10 C. P. 189 ; 44 L. J. C. P. 148 ; 31 L. T. 847 ; 23 W. R. 310 415
Bramley *v.* Chesterton, 2 C. B. (N.S.) 605 ; 27 L. J. C. P. 23 ; 3 Jur. (N.S.) 1144 ; 5 W. R. 690 165
Brassington *v.* Llewellyn, 27 L. J. Ex. 297 554
Brewer *v.* Dew, 11 M. & W. 625 ; 1 D. & L. 383 ; 12 L. J. Ex. 448 ; 7 Jur. 953 ; 63 R. R. 690 ... ... 174, 197, 198
——— *v.* Sparrow, 7 B. & C. 310 ; 1 Man. & R. 2 ; 6 L. J. (O S.) K. B. 1 572
Brinsmead *v.* Harrison, L. R. 6 C. P. 584 ; 40 L. J. C. P. 281 ; 24 L. T. 798 ; 19 W. R. 956 ... 175, 569
British Mutual Banking Co. *v.* Charnwood, 18 Q. B. D. 714 ; 52 J. P. 150 ; 56 L. J. Q. B. 449 ; 57 L. T. 833 : 35 W. R. 590 ... 311
British S. Africa Co. *v.* The Companhia de Moçambique, [1893] A. C. 602 ; 63 L. J. Q. B. 70 ; 6 R. 1 ; 69 L. T. 604 71
Britton *v.* South Wales Rail. Co., 27 L. J. Ex. 355 153
Brocklebank *v.* Thompson, [1903] 2 Ch. 344 ; 72 L. J. Ch. 626 ; 89 L. T. 209 475
Bromage *v.* Prosser, 4 B. & C. 247 ; 6 Dow. & R. 296 ; 1 Car. & P. 475 ; 3 L. J. (O.S.) K. B. 203 ; 24 R. R. 241 38
Broomfield *v.* Williams, [1897] 1 Ch. 602 ; 66 L. J. Ch. 305 ; 76 L. T. 243 ; 45 W. R. 469 460
Brown *v.* Alabaster, 37 Ch. D. 490 ; 57 L. J. Ch. 255 ; 58 L. T. 265 ; 36 W. R. 155... 476
——— *v.* Boorman, 11 Cl. & F. 1 ; 3 Q. B. 511 ; 65 R. R. 1 ... 61
——— *v.* Hawkes, [1891] 2 Q. B. 718 ; 55 J. P. 823 ; 61 L. J. Q. B. 151 ; 65 L. T. 108 ... ... 267, 268
——— *v.* Robins, 4 H. & N. 186 ; 28 L. J. Ex. 250 ... ... 452. 454
Brunsden *v.* Humphrey, 14 Q. B. D. 141 ; 49 J. P. 4 ; 53 L. J. Q. B. 476 ; 51 L. T. 529 ; 32 W. R. 944... 168
Bryant *v.* Lefever, 4 C. P. D. 172 ; 48 L. J. C. P. 380 ; 40 L. T. 579 ; 27 W. R. 592 ... ... 459, 465
Buckley *v.* Buckley, [1898] 2 Q. B. 608 ; 67 L. J. Q. B. 953 ... 430
Bullew *v.* Langdon, Cro. Eliz. 876 483
Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351 ; 68 L. J. P. C. 49 ; 80 L. T. 430 ; 47 W. R. 545 ... ... 141, 159
Burnard *v.* Haggis, 14 C. B. (N.S.) 45 ; 32 L. J. C. P. 189 ; 9 Jur. (N.S.) 1325 ; 8 L. T. 320 ; 11 W. R. 644 74
Burrows *v.* Rhodes, [1899] 1 Q. B. 816 ; 63 J. P. 532 ; 68 L. J. Q. B. 545 ; 80 L. T. 591 ; 48 W. R. 13 309
Burton *v.* Hughes, 2 Bing. 173 ; 9 Moore, 334 ; 3 L. J. C. P. 243 ... 566
Butcher *v.* Butcher, 7 B. & C. 399 ; 1 Man. & R. 220 ; 6 L. J. (O.S.) K. B. 51 ; 31 R. R. 237 548
Butler *v.* Manchester, etc. Rail. Co., 21 Q. B. D. 207 ; 52 J. P. 611 ; 57 L. J. Q. B. 564 ; 60 L. T. 89 ; 36 W. R. 726 510
Butt *v.* Imperial Gas Co., L. R. 2 Ch. 158 ; 16 L. T. 820 ; 15 W. R. 92 18
Butterfield *v.* Forrester, 11 East, 60 ; 10 R. R. 433 ... ... 396, 400
Byne *v.* Moore, 5 Taunt, 187 ; 1 Marsh, 12 271
Byrne *v.* Boadle, 2 H. & C. 722 ; 33 L. J. Ex. 13 ; 9 L. T. 450 ; 12 W. R. 279 ... ... 402, 406

C.

PAGE

Cahill *v.* Fitzgibbon, 16 Ir. L. R. 371 526
Calder *v.* Halket, 3 Moo. P. C. C. 28 ; 50 R. R. 1 515
Caledonian Rail. Co. *v.* Mulholland, [1898] A. C. 216 ; 67 L. J. P. C. 1 ; 77 L. T. 570 ; 46 W. R. 236 326
Callendar *v.* Carleton Iron Co., Ltd. (1893), 9 Times L. R. 646 ; (1894), 10 Times L. R. 366 340
Cameron *v.* Nystrom, [1893] A. C. 308 ; 57 J. P. 550 ; 62 L. J. P. C. 85 ; 1 R. 362 ; 68 L. T. 772 ; 7 Asp. M. C. 320 116
Canadian Pacific Rail. Co. *v.* Parke, [1899] A. C. 535 ; 68 L. J. P. C. 89 ; 81 L. T. 127 ; 48 W. R. 118 440
Canon *v.* Rimington, 12 C. B. 1 ; 21 L. J. C. P. 137 555
Capital, etc. Bank *v.* Henty, 5 C. P. D. 514 ; 45 J. P. 188 ; 49 L. J. C. P. 830 ; 43 L. T. 651 ; 28 W. R. 851 211
——— *v.* ———, 7 App. Cas. 741 ; 47 J. P. 214 ; 52 L. J. Q. B. 232 ; 47 L. T. 662 ; 31 W. R. 151 ... ... 207, 212
Carlisle (Mayor of) *v.* Graham, L. R. 4 Ex. 361 ; 38 L. J. Ex. 226 ; 21 L. T. 133 ; 18 W. R. 318 488
Carlyon *v.* Lovering, 1 H. & N. 784 ; 26 L. J. Ex. 251 ; 5 W. R. 347 473
Carr *v.* Clarke, 2 Chit. R. 261 ; 23 R. R. 748 292
—— *v.* Lambert, L. R. 1 Ex. 168 ; 4 H. & C. 257 ; 35 L. J. Ex. 121 ; 12 Jur. (N.S.) 194 ; 14 L. T. 255 ; 14 W. R. 405 482
Carslake *v.* Mappledoram, 2 T. R. 473 222
Carter *v.* Clarke, 78 L. T. 76 129
——— *v.* St. Mary Abbotts, Kensington (Vestry of), 64 J. P. 548 ... 84
Castrique *v.* Behrens, 30 L. J. Q. B. 163 ; 3 El. & El. 709 ; 7 Jur. (N.S.) 1028 ; 4 L. T. 52 270
Chandler *v.* Robinson, 4 Ex. 163 ; 19 L. J. Ex. 170 455
Chaplin (W. H.) *v.* Westminster Corporation, [1901] 2 Ch. 329 ; 65 J. P. 661 ; 70 L. J. Ch. 679 ; 85 L. T. 88 ; 49 W. R. 586 ... 13
Chapman *v.* Pickersgill, 2 Wils. 146 22
Charles *v.* Taylor, 3 C. P. D. 492 ; 38 L. T. 773 ; 27 W. R. 32 ... 116
Charleston *v.* London Tramways Co., 36 W. R. 367 105
Chasemore *v.* Richards, 7 H. L. Cas. 349 ; 29 L. J. Ex. 81 ; 5 Jur. (N.S.) 873 ; 7 W. R. 685 ... ... 419, 468, 472
Chastey *v.* Ackland, [1895] 2 Ch. 389 ; 64 L. J. Q. B. 523 ; 12 R. 420 ; 72 L. T. 845 ; 43 W. R. 627 ... 459, 465
Chatterton *v.* Secretary of State for India, [1895] 2 Q. B. 189 ; 59 J. P. 596 ; 64 L. J. Q. B. 676 ; 14 R. 504 ; 72 L. T. 858 ... 239
Cheshire *v.* Bailey, [1905] 1 K. B. 237 ; 74 L. J. K. B. 176 ; 92 L. T. 142 ; 53 W. R. 322 108
Chinery *v.* Viall, 5 H. & N. 295 ; 29 L. J. Ex. 180 ; 2 L. T. 466 ; 8 W. R. 629 61
Christie *v.* Cowell, Peake, 4 ; 3 R. R. 642 220
——— *v.* Davey, [1893] 1 Ch. 316 ; 62 L. J. Ch. 439 ; 3 R. 210 ... ... 429, 436
Christopherson *v.* Bare, 11 Q. B. 477 ; 17 L. J. Q. B. 109 ; 12 Jur. 374 ... ... 502, 503
Churchill *v.* Siggers, 3 El. & Bl. 937 ; 2 C. L. R. 1509 ; 23 L. J. Q. B. 308 ; 18 Jur. 773 ; 2 W. R. 551 254
City Commissioners of Sewers *v.* Glasse, L. R. 19 Eq. 134 ; 44 L. J. Ch. 129 ; 31 L. T. 495 ; 23 W. R. 102 483
City of Lincoln, The, 15 P. D. 15 ; 59 L. J. P. & D. 1 ; 62 L. T. 49 ; 38 W. R. 345 ; 6 Asp. M. C. 475 164
City of London Brewery Co. *v.* Tennant, 9 Ch. App. 212 ; 43 L. J. Ch. 457 ; 29 L. T. 755 ; 22 W. R. 172 465

PAGE

Claridge *v.* South Staffordshire Tramway Co., [1892] 1 Q. B. 422 ; 56 J. P. 408 ; 61 L. J. Q. B. 503 ; 66 L. T. 655 566
Clark *v.* Freeman, 11 Beav. 112 ; 17 L. J. Ch. 142 ; 12 Jur. 149 ... 186
—— *v.* Molyneux, 3 Q. B. D. 237 ; 47 L. J. Q. B. 230 ; 37 L. T. 694 ; 26 W. R. 104 ; 14 Cox C. C. 10 ... ... 235, 237, 244
Clarke *v.* Army and Navy Co-operative Society, [1903] 1 K. B. 155 ; 78 L. J. K. B. 153 ; 88 L. T. 1 ... ... 312, 331
Cleary *v.* Booth, [1893] 1 Q. B. 465 ; 57 J. P. 375 ; 62 L. J. M. C. 87 ; 5 R. 263 ; 68 L. T. 349 ; 41 W. R. 391 ; 17 Cox C. C. 611 ... 510
Cleather *v.* Twisden, 28 Ch. D. 340 ; 54 L. J. Ch. 408 ; 52 L. T. 330 ; 33 W. R. 435 135
Clement *v.* Chivis, 9 B. & C. 172 ; 4 M. & R. 127 ; 7 L. J. (o.s.) K. B. 189 ; 32 R. R. 624 208
Clifford *v.* Holt, [1899] 1 Ch. 698 ; 63 J. P. 22 ; 68 L. J. Ch. 332 ; 80 L. T. 48 467
Cobbett *v.* Gray, 4 Ex. 744 ; 19 L. J. Ex. 137... 502
Cocke *v.* Jennor, Hob. 66 175
Cockroft *v.* Smith, 11 Mod. 43 508
Coggs *v.* Bernard, 1 Sm. L. C. 177 ; 2 Ld. Raym. 909 ... 67, 328
Collard *v.* Marshall, [1892] 1 Ch. 571 ; 61 L. J. Ch. 268 ; 66 L. T. 248 ; 40 W. R. 473 186
Collis *v.* Laugher, [1894] 3 Ch. 659 ; 63 L. J. Ch. 851 ; 8 R. 760 ; 71 L. T. 226 ; 43 W. R. 202 462
Coils *v.* Home and Colonial Stores, [1904] A. C. 179 ; 73 L. J. Ch. 484 ; 90 L. T. 687 ; 53 W. R. 30 ; 20 T. L. R. 475... 182, 460. 465, 466
Colwell *v.* St. Pancras Borough Council, [1904] 1 Ch. 707 ; 68 J. P. 286 ; 73 L. J. Ch. 275 ; 90 L. T. 153 ; 52 W. R. 523 ; 2 L. G. R. 518 ; 20 T. L. R. 236 430
Compton *v.* Richards, 1 Pr. 27 ; 15 R. R. 682... 461
Consolidated Co. *v.* Curtis & Son, [1892] 1 Q. B. 495 : 56 J. P. 565 ; 61 L. J. Q. B. 325 ; 40 W. R. 426 559
Cook *v.* Beal, Ld. Raym. 177 508
—— *v.* North Metropolitan Tramways Co., 18 Q. B. D. 683 ; 51 J. P. 630 ; 56 L. J. Q. B. 309 ; 56 L. T. 448 ; 57 L. T. 476 ; 35 W. R. 577 128
Cooke *v.* Wildes, 5 E. & B. 328 ; 3 C. L. R. 1090 ; 24 L. J. Q. B. 267 ; 1 Jur. (N.S.) 610 ; 3 W. R. 458 235
Cooper *v.* Booth, 3 Esp. 144 ; 4 Dougl. 339 ; 1 T. R. 535 n. ... 259
——— *v.* Hubbock, 31 L. J. Ch. 123 ; 30 Beav. 160 ; 7 Jur. (N.S.) 457 ; 9 W. R. 352 466
——— *v.* Marshall, 1 Burr. 259 ; 2 Ken. 1 ; 2 Wils. 51 496
——— *v.* Phibbs, L. R. 2 H. L. 149 ; 16 L. T. 678 ; 15 W. R. 1049 486
——— *v.* Shepherd, 3 C. B. 266 ; 4 D. & L. 214 ; 15 L. J. C. P. 237 ; 10 Jur. 758 ; 71 R. R. 349 569
——— *v.* Straker, 40 Ch. D. 21 ; 58 L. J. Ch. 26 ; 59 L. T. 849 ; 37 W. R. 137 463
——— *v.* Willomatt, 1 C. & B. 672 ; 14 L. J. C. P. 219 ; 9 Jur. 598 565, 566
Corby *v.* Hill. 4 C. B. (N.S.) 556 ; 27 L. J. C. P. 318 , 4 Jur. (N.S.) 512 ; 6 W. R. 575 335
Cornfoot *v.* Fowke, 6 M. & W. 358 ; 9 L. J. Ex. 297 ; 4 Jur. 919 ; 55 R. R. 655 311
Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392 ; 68 L. J. Q. B. 196 ; 80 L. T. 121 ; on appeal, [1900] 1 Q. B. 22 ; 68 L. J. Q. B. 1020 ; 81 L. T. 415 ... ... 76, 269
Corporation of London *v.* Riggs, 13 Ch. D. 798 ; 44 J. P. 345 ; 49 L. J. Ch. 297 ; 42 L. T. 580 ; 28 W. R. 610 475
Costar *v.* Hetherington, 28 L. J. M. C. 198 531

PAGE

Coughlin *v.* Gillison, [1899] 1 Q. B. 145 ; 68 L. J. Q. B. 147 ; 79 L. T. 627 ; 47 W. R. 113 331
Coulson *v.* Coulson, 3 T. L. R. 846 187
Coward *v.* Baddeley, 28 L. J. Ex. 261 ; 4 H. & N. 478 ; 5 Jur. (N.S.) 414 ; 7 W. R. 466 503
Cowles *v.* Potts, 34 L. J. Q. B. 247 ; 11 Jur. (N.S.) 946 ; 13 W. R. 858 245
Cowley *v.* Newmarket Local Board, [1892] A. C. 345 ; 56 J. P. 805 ; 62 L. J. Q. B. 65 ; 1 R. 45 : 67 L. T. 486... 426
Cowling *v.* Higginson, 4 M. & W. 245 ; 1 H. & N. 269 ; 7 L. J. Ex. 265 ; 51 R. R. 555 475
Cox *v.* Burbidge, 13 C. B. (N.S.) 430 ; 32 L. J. C. P. 89 ; 9 Jur. (N.S.) 970 : 11 W. R. 435 332
—— *v.* Glue, 17 L. J. C. P. 162 ; 5 C. B. 533 : 12 Jur. 185 549
—— *v.* Great Western Rail. Co., 9 Q. B. D. 106 ; 47 J. P. 116 ; 30 W. R. 816 130
—— *v.* Lee, L. R. 4 Ex. 284 ; 38 L. J. Ex. 219 ; 21 L. T. 178 ... 208
—— *v.* Mousley, 5 C. B. 533 548
Coxhead *v.* Richards, 15 L. J. C. P. 278 : 2 C. B. 569 : 10 Jur. 987 ; 69 R. R. 530 245
Creagh *v.* Gamble, 24 L. R. Ir. 458 527
Crespigny (de) *v.* Wellesley, 5 Bing. 392 ; 30 R. R. 665 : 12 M. & P. 695 ; 7 L. J. (O.S.) C. P. 100 250
Cresswell *v.* Hedges, 31 L. J. Ex. 497 : 1 H. & C. 421 ; 8 Jur. (N.S.) 767 ; 10 W. R. 777 549
Cripps *v.* Judge, 13 Q. B. D. 583 ; 49 J. P. 100 : 53 L. J. Q. B. 517 ; 51 L. T. 182 ; 33 W. R. 35 129
Croft *v.* Alison, 4 B. & A. 590 ; 23 R. R. 407 103
Crossley *v.* Lightowler, L. R. 2 Ch. 478 ; 36 L. J. Ch. 584 ; 16 L. T. 438 ; 15 W. R. 801 ... ... 438, 470
Crowhurst *v.* Amersham Burial Board, 4 Ex. D. 5 ; 48 L. J. Ex. 109 ; 39 L. T. 355 : 27 W. R. 95 28
Crump *v.* Lambert, L. R. 3 Eq. 409 : 15 L. T. 600 : 15 W. R. 417... 427
Cubitt *v.* Porter, 8 B. & C. 257 ; 2 Man. & R. 267 ; 6 L. J. (O.S.) K. B. 306 ; 32 R. R. 374 550
Cundy *v.* Lindsay, 3 App. Cas. 459 : 47 L. J. Q. B. 481 : 38 L. T. 573 ; 26 W. R. 406 ... ... 559, 560

D.

Dalton *v.* Angus, 6 App. Cas. 740 ; 46 J. P. 132 : 50 L. J. Q. B. 689 ; 44 L. T. 844 ; 30 W. R. 191 ... ... 93, 453, 455, 456
——— *v.* South Eastern Rail. Co., 4 C. B. (N.S.) 296 ; 27 L. J. C. P. 227 ; 4 Jur. (N.S.) 711 : 6 W. R. 574 ... ... 163, 415
Daly *v.* Dublin, etc. Rail. Co., 30 L. R. Ir. 514 416
Dand *v.* Sexton, 3 T. R. 37 558
Daniel *v.* Ferguson, [1891] 2 Ch. 27 : 39 W. R. 599 ... ... 191, 192
Dansey *v.* Richardson, 3 E. & B. 144 : 2 C. L. R. 1442 ; 23 L. J. Q. B. 217 : 18 Jur. 721 543
Darley Main Colliery Co. *v.* Mitchell, 11 App. Cas. 127 : 51 J. P. 148 ; 55 L. J. Q. B. 529 : 54 L. T. 882 ... ... 141, 142, 148, 167
Dauncey *v.* Holloway, [1901] 2 K. B. 441 ; 70 L. J. K. B. 695 ; 84 L. T. 649 ; 49 W. R. 546 224
Davey *v.* London and South Western Rail. Co., 12 Q. B. D. 70 ; 48 J. P. 279 ; 53 L. J. Q. B. 58 ; 49 L. T. 739 ... ... 403, 404
Davies *v.* Mann, 10 M. & W. 549 ; 12 L. J. Ex. 10 ; 6 Jur. 954 ; 62 R. R. 698 ... ... 328, 393

PAGE

Davies *v.* Petley, 15 Q. B. 276 496
——— *v.* Snead, L. R. 5 Q. B. 608 : 39 L. J. Q. B. 282 : 23 L. T. 126 245
——— *v.* Williams, 10 Q. B. 725 ; 16 L. J. Q. B. 369 : 11 Jur. 750 ; 74 R. R. 491 284
——— *v.* ———, 16 Q. B. 556 ; 20 L. J. Q. B. 330 ; 15 Jur. 752... 496
Davis *v.* London and North Western Rail. Co., 7 W. R. 105 ; 4 Jur. (N.S.) 1303 168
——— *v.* Russell, 5 Bing. 354 ; 2 M. & P. 590 ; 7 L. J. (O.S.) M. C 52 ; 30 R. R. 637 527
——— *v.* Shepstone, 11 App. Cas. 187 ; 50 J. P. 709 ; 55 L. J. P. C. 51 ; 55 L. T. 1 ; 34 W. R. 722 ... ... 232, 241
Daw *v.* Eley, L. R. 7 Eq. 49 ; 38 L. J. Ch. 113 : 17 W. R. 245 ... 519
Dawkins *v.* Lord Rokeby, L. R. 7 H. L. 744 ; 23 W. R. 931 ; 45 L. J. Q. B. 8 ; 33 L. T. 196 239
Dean *v.* Peel, 5 East, 45 ; 7 R. R. 653 ; 1 Smith, 333 293
Degg *v.* Midland Rail. Co., 1 H. & N. 773 ; 26 L. J. Ex. 171 : 3 Jur. (N.S.) 395 ; 5 W. R. 364 122
Delaney *v.* Fox, 26 L. J. C. P. 248 ; 2 C. B. (N.S.) 768 553
Dent *v.* Auction Mart Co., L. R. 2 Eq. 238 ; 35 L. J. Ch. 555 ; 12 Jur. (N.S.) 447 ; 14 L. T. 827 ; 14 W. R. 709 459
Derry *v.* Handley, 16 L. T. (N.S.) 263 249
—— *v.* Peeke, 14 App. Cas. 337 ; 54 J. P. 148 ; 58 L. J. Ch. 864 ; 61 L. T. 265 ; 38 W. R. 33 ; 1 Mag. 292 ... ...299, 308, 309
Devonshire (Duke of) *v.* Pattinson, 20 Q. B. D. 263 ; 52 J. P. 270 ; 57 L. J. Q. B. 189 ; 58 L. T. 392 ... ... 486, 487
Devo *v.* Brundage (1856), 13 Howard P. R. (S. C. N Y.) 221 ... 206
Dickenson *v.* North Eastern Rail. Co., 2 H. & C. 735 ; 33 L. J. Ex. 91 ; 9 L. T. 299 ; 12 W. R. 52 415
Digby *v.* Thompson, 4 B. & Ad. 821 ; 1 N. & M. 485 : 2 L. J. K. B. 140 ; 38 R. R. 378 204
Dillon *v.* Balfour, 20 L. R. Ir. 601 238
Dixon *v.* Bell, 5 M. & S. 198 ; 1 Stark. 287 ; 17 R. R. 308 ...162, 327, 330
Dobell *v.* Stevens, 3 B. & C. 623 ; 5 D. & R. 490 ; 3 L. J. (O.S.) K. B. 89 ; 27 R. R. 441 307
Dobson *v.* Blackmore, 9 Q. B. 991 ; 16 L. J. Q. B. 233 ; 11 Jur. 556 ; 72 R. R. 493 497
Doe *d.* Carter *v.* Bernard, 13 Q. B. 945... 552
—— *d.* Johnson *v.* Baytup, 3 A. & E. 188 ; 4 M. & N. 837 ; 1 H. & W. 270 ; 4 L. J. (N.S.) K. B. 263 ; 42 R. R. 359 553
—— *d.* Knight *v.* Smith, 4 M. & S. 347 553
—— *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065 ; 6 Car. & P. 208 ; 3 N. & M. 193 553
—— *d.* North *v.* Webber, 5 Scott, 189 ; 3 Bing. N. C. 922 ; 3 Hodges, 203 ; 6 L. J. C. P. 319 553
—— *d.* Oliver *v.* Powell, 1 A. & E. 531 ; 3 H. & M. 616 553
Donald *v.* Suckling, L. R. 1 Q. B. 585 ; 7 B. & S. 783 ; 35 L. J. Q. B. 232 ; 12 Jur. (N.S.) 795 ; 14 L. T. 772 ; 15 W. R. 13 562
Donovan *v.* Laing, Limited, [1893] 1 Q. B. 629 ; 57 J. P. 583 ; 63 L. J. Q. B. 25 ; 4 R. 317 ; 68 L. T. 512 ; 41 W. R. 455 100
Doorman *v.* Jenkins, 2 A. & E. 256 ; 4 N. & M. 170 ; 4 L. J. K. B. 29 ; 41 R. R. 429 68
Dormer *v.* Cook, 88 L. T. 629 516
Dormont *v.* Furness Rail. Co. 11 Q. B. D. 496 ; 47 J. P. 711 ; 52 L. J. Q. B. 331 ; 49 L. T. 134 ; 5 Asp. M. C. 127 54
Doswell *v.* Impey, 1 B. & C. 169 512
Doughty *v.* Firbank, 10 Q. B. D. 358 ; 48 J. P. 55 ; 52 L. J. Q. B. 480 ; 48 L. T. 530 131

PAGE

Dovaston *v.* Payne, 2 H. Bl. 527 ; 2 Sm. L. C. 157 : 3 R. R. 497 ... 542
Drury *v.* North Eastern Rail. Co., [1901] 2 K. B. 322 ; 70 L. J. K. B. 830 ; 84 L. T. 658 380
Dublin, etc. Rail. Co. *v.* Slattery, 3 App. Cas. 1155 ; 39 L. T. 365 ; 27 W. R. 191 ... ... 385, 402
Duck *v.* Mayeu, [1892] 2 Q. B. 511 ; 57 J. P. 23 ; 62 L. J. Q. B. 69 ; 4 R. 38 ; 67 L. T. 547 : 41 W. R. 56 176
Duke of Brunswick *v.* King of Hanover, 6 Bea. 1 ; 13 L. J. Ch. 107 ; 8 Jur. 253 ; 63 R. R. 1 74
Dulieu *v.* White & Sons. [1901] 2 K. B. 669 ; 70 L. J. K. B. 837 ; 85 L. T. 126 ; 50 W. R. 76 162
Dundonald, Earl of *v.* Masterman, L. R. 7 Eq. 504 ; 38 L. J. Ch. 350 ; 20 L. T. 271 ; 17 W. R. 548 131
Dunn *v.* Birmingham Canal Co., L. R. 8 Q. B. 42 ; 42 L. J. Q. B. 34 ; 27 L. T. 683 ; 21 W. R. 266 452
Durell *v.* Pritchard, L. R. 1 Ch. 244 ; 35 L. J. Ch. 223 ; 12 Jur. (N.S.) 16 ; 13 L. T. 545 ; 14 W. R. 212 ... ... 191, 192
Dyer *v.* Munday, [1895] 1 Q. B. 742 ; 59 J. P. 276 ; 64 L. J. Q. B. 448 ; 14 R. 306 ; 72 L. T. 448 ; 43 W. R. 440 108

E.

Eager *v.* Grimwood, 16 L. J. Ex. 236 ; 1 Ex. 61 ; 74 R. R. 584 ... 296
Eardley *v.* Lord Granville, 24 W. R. 528 ; 3 Ch. D. 826 ; 45 L. J. Ch. 669 ; 34 L. T. 609 541
Earl *v.* Lubbock, [1905] 1 K. B. 253 ; 74 L. J. K. B. 121 ; 53 W. R. 145 66
Earle *v.* Kingscote, [1900] 1 Ch. 203 80
Eastern, etc., Telegraph Co. *v.* Capetown Tramways Co., [1902] A. C. 381 ; 71 L. J. P. C. 122 ; 86 L. T. 457 ; 50 W. R. 657 ... 431
Eaton *v.* Johns, 1 Dowl. (N.S.) 602 208
Edwards *v.* Clay, 28 Beav. 145 142
——— *v.* Midland Rail. Co., 6 Q. B. D. 287 ; 45 J. P. 374 ; 50 L. J. Q. B. 281 ; 43 L. T. 694 ; 29 W. R. 609 ... ... 76, 269
Elliott, *Ex parte*, 3 Mont. & A. 110 ; 2 Deao. 172 ... ... 48, 49
——— *v.* North Eastern Rail. Co., 10 H. L. Cas. 333 ; 32 L. J. Ch. 402 ; 9 Jur. (N.S.) 555 ; 8 L. T. 337 ; 11 W. R. 604 189
Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10 ; 44 L. J. C. P. 24 ; 31 L. T. 483 ; 23 W. R. 246 540
—— *v.* Manchester Carriage Co., 2 C. P. D. 13 ; 35 L. T. 476 ; 25 W. R. 229 461
—— *v.* Sheffield Gas Co., 23 L. J. Q. B. 42 ; 2 El. & Bl. 767 ; 2 C. L. R. 249 ; 18 Jur. 146 ; 2 W. R. 19 ... ...90, 92
Embrey *v.* Owen, 6 Ex. 369 ; 20 L. J. Ex. 212 ; 15 Jur. 633... 467, 469, 470
Emmens *v.* Pottle, 16 Q. B. D. 354 ; 50 J. P. 228 ; 55 L. J. Q. B. 51 ; 53 L. T. 808 ; 34 W. R. 116 ... ... 75, 229
Englehart *v.* Farrant, [1897] 1 Q. B. 240 ; 66 L. J. Q. B. 122 ; 75 L. T. 617 ; 45 W. R. 179 ... ... 85, 400
Erlander *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218 ; 39 L. T. 269 ; 26 W. R. 65 314
Evans *v.* Walton, L. R. 2 C. P. 615 ; 36 L. J. C. P. 307 ; 17 L. T. 92 ; 15 W. R. 1062 ... ... 282, 284, 292
Every *v.* Smith, 26 L. J. Ex. 345 549

F.

Faldo *v.* Ridge, Yelv. 74 542
Falvey *v.* Standford, L. R. 10 Q. B. 54 ; 44 L. J. Q. B. 7 ; 31 L. T. 677 ; 23 W. R. 162 153

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PAGE

Gibbs *v.* Guild, 9 Q. B. D. 59 ; 51 L. J. Q. B. 313 ; 46 L. T. 248 ; 30 W. R. 591 ... ... 141, 314
—— *v.* Great Western Rail. Co., 12 Q. B. D. 208 ; 48 J. P. 230 ; 53 L. J. Q. B. 543 ; 50 L. T. 7 ; 32 W. R. 329 131
—— *v.* Wolliscott, 3 Salk. 290 486
Giblan *v.* Labourers' Union, [1903] 2 K. B. 600 ; 72 L. J. K. B. 907 ; 89 L. T. 386 ... ... 321, 322
Giles *v.* Walker. 24 Q. B. D. 656 ; 54 J. P. 599 ; 59 L. J. Q. B. 416 ; 62 L. T. 933 ; 38 W. R. 782 432
Gillard *v.* Laxton, 31 L. J. M. C. 123 526
Gilpin *v.* Fowler, 9 Ex. 615 ; 23 L. J. Ex. 152 ; 18 Jur. 292 ; 2 W. R. 272 247
Gipps *v.* Woollicott, Holt, 323 488
Gladwell *v.* Steggall, 5 Bing. N. C. 257 63
———— *v.* ————, 5 Bing. N. C. 753 ; 8 Scott, 60 ; 8 L. J. C. P. 361 ; 3 Jur. 535 ; 53 R. R. 257 329
Glamorgan Coal Co. *v.* South Wales Miners' Federation [1903] 2 K. B. 545 ; 72 L. J. K. B. 893 ; 89 L. T. 393 321
Glasier *v.* Rolls, 62 L. T. 133 307
Glover *v.* London and South Western Rail. Co., L. R. 3 Q. B. 25 ; 37 L. J. Q. B. 57 ; 17 L. T. 139 162
Glyn, Mills & Co. *v.* East and West India Docks Co., 7 App. Cas. 591 ; 52 L. J. Q. B. 146 ; 47 L. T. 309 ; 31 W. R. 201 559
Goff *v.* Great Northern Rail. Co., 3 El. & El. 672 ; 30 L. J. Q. B. 148 ; 7 Jur. (N.S.) 286 ; 3 L. T. 850 107
Goffin *v.* Donnelly, 6 Q. B. D. 307 ; 45 J. P. 439 ; 50 L. J. Q. B. 303 ; 44 L. T. 141 ; 29 W. R. 440 238
Goodman *v.* Saltash (Mayor of), 7 App. Cas. 633 ; 47 J. P. 276 ; 52 L. J. Q. B. 193 ; 48 L. T. 239 ; 31 W. R. 293 ... ... 456, 488
Goodtitle *v.* Alker, 1 Burr. 133 ; 1 Ld. Ken. 427 549
Gordon *v.* Cheltenham Rail. Co., 5 B. 233 ; 2 Rail. Cas. 800 ; 59 R. R. 486 193
Gorris *v.* Scott, L. R. 9 Ex. 125 ; 43 L. J. Ex. 92 ; 30 L. T. 431 ; 22 W. R. 575 ... ...55, 56
Gourley *v.* Plimsoll, L. R. 8 C. P. 362 ; 42 L. J. C. P. 121 ; 28 L. T. 598 ; 21 W. R. 683 203
Grainger *v.* Hill, 4 Bing. N. C. 212 ; 5 Scott, 561 ; 7 L. J. C. P. 85 272, 505
Grand Trunk Rail. Co. *v.* Jennings, 13 App. Cas. 800 ; 58 L. J. P. C. 1 ; 59 L. T. 679 ; 37 W. R. 403 ... ... 163, 416
Gray *v.* Borough of Danbury (1887), 54 Conn. 574 362
Great Western Rail. Co. *v.* Bennett, L. R. 2 H. L. 27 ; 36 L. J. Q. B. 133 ; 16 L. T. 186 ; 15 W. R. 647 452
Green *v.* Duckett, 11 Q. B. D. 275 ; 47 J. P. 487 ; 52 L. J. Q. B. 435 ; 48 L. T. 677 ; 31 W. R. 607 550
Greenslade *v.* Halliday, 6 Bing. 379 ; 4 Moo. & P. 71 ; 8 L. J. (O.S.) C. P. 124 ; 53 R. R. 241 497
Gregory *v.* Piper, 9 B. & C. 591 ; 4 Man. & R. 500 ; 33 R. R. 268 ... 535
——— *v.* Derley, 8 C. & P. 749 256
——— *v.* Williams, 1 C. & K. 568 164
Greta Holme, The, [1897] A. C. 596 ; 66 L. J. Adm. 166 ; 77 L. T. 23 ; 8 Asp. M. C. 317 159
Greville *v.* Chapman, 5 Q. B. 744 ; D. & M. 553 ; 13 L. J. Q. B. 172 ; 8 Jur. 189 208
Griffin *v.* Coleman, 28 L. J. Ex. 134 ; 4 H. & N. 265... 508, 527, 528
Griffiths *v.* Dudley (Earl of), 9 Q. B. D. 357 ; 51 L. J. Q. B. 543 ; 47 L. T. 10 ; 30 W. R. 797 126
——— *v.* Lewis, 7 Q. B. 64 ; 8 Q. B. 841 225

PAGE

Griffiths *v.* London & St. Katharine's Dock Co., 13 Q. B. D. 259 ; 49 J. P. 100 ; 53 L. J. Q. B. 504 ; 51 L. T. 533 ; 33 W. R. 35 117
——— *v.* Teetgen, 15 C. B. 344 ; 24 L. J. C. P. 35 ; 1 Jur. (N.S.) 426 ; 3 W. R. 11 294
Groves *v.* Lord Wimborne 324
Guy *v.* Churchill, 40 Ch. D. 481 ; 58 L. J. Ch. 345 ; 37 W. R. 504 : 278
Guy Mannering, *The*, 7 P. D. 52, 132 ; 58 L. J. Ch. 345 ; 60 L. T. 473 ; 37 W. R. 504 70
Gwilliam *v.* Twist, [1895] 2 Q. B. 84 ; 59 J. P. 484 ; 64 L. J. Q. B. 474 ; 14 R. 461 ; 72 L. T. 579 ; 43 W. R. 566 85
Gwinnell *v.* Eamer, L. R. 10 C. P. 658 ; 32 L. T. 835 443

H.

Haddrick *v.* Heslop, 12 Q. B. 267 ; 17 L. J. Q. B. 313 ; 12 Jur. 600 : 268
Haddesdon *v.* Gryssel, Cro. Jac. 195 558
Hadley *v.* Taylor, L. R. 1 C. P. 53 ; 11 Jur. (N.S.) 979 ; 13 L. T. 368 ; 14 W. R. 59 20
Halestrap *v.* Gregory, [1895] 1 Q. B. 561 ; 64 L. J. Q. B. 415 ; 15 R. 306 ; 72 L. T. 292 ; 43 W. R. 507 401
Hall *v.* Byron, 4 Ch. D. 667 ; 46 L. J. Ch. 297 ; 36 L. T. 367 ; 25 W. R. 317 484
——— *v.* Lichfield Brewery Co., 49 L. J. Ch. 655 ; 43 L. T. 380 ... 459
Halley, *The*, L. R. 2 P. C. 193 ; 7 Moo. P. C. (N.S.) 263 ; 37 L. J. Adm. 933 ; 18 L. T. 879 ; 16 W. R. 998 70
Hanbury *v.* Hanbury, 8 T. L. R. 560 75
Hancock *v.* Somes, 28 L. J. M. C. 196 ; 1 E. & E. 795 ; 5 Jur. (N.S.) 983 ; 7 W. R. 422 ; 8 Cox C. C. 172 531
Hannam *v.* Mockett, 2 B. & C. 939 ; 4 D. & R. 518 ; 2 L. J. (O.S.) K. B. 183 ; 26 R. R. 591 551
Hanson *v.* Waller, [1901] 1 K. B. 390 ; 70 L. J. K. B. 231 ; 84 L. T. 91 ; 49 W. R. 445 106
Hardy *v.* Ryle, 9 B. & C. 608 ; 4 M. & R. 295 ; 7 L. J. (O.S.) M. C. 118 147
Hargreave *v.* Spink, [1892] 1 Q. B. 25 ; 61 L. J. Q. B. 318 ; 65 L. T. 650 ; 40 W. R. 254 560
Hargroves Aronson & Co. *v.* Hartopp, [1905] 1 K. B. 472 ; 74 L. J. K. B. 233 ; 53 W. R. 262 ; 21 T. L. R. 226 ... ... 334, 444
Harman *v.* Johnson, 2 El. & Bl. 61 ; 3 Car. & Kir. 272 ; 22 L. J. Q. B. 297 ; 17 Jur. 1096 135
Harrington (Earl of) *v.* Derby Corporation, [1905] 1 Ch. 205 ; 69 J. P. 62 ; 74 L. J. Ch. 219 ; 92 L. T. 153 185
Harris *v.* Brisco, 17 Q. B. D. 504 ; 55 L. J. Q. B. 423 ; 55 L. T. 14 ; 34 W. R. 729 279
——— *v.* Butler, 2 M. & W. 542 ; M. & H. 117 ; 6 L. J. Ex. 133 ; 1 Jur. 608 ; 46 R. R. 695 287
——— *v.* Perry & Co., [1903] 2 K. B. 219 ; 72 L. J. K. B. 725 ; 89 L. T. 174 68
Harrison *v.* Rutland (Duke of), [1893] 1 Q. B. 142 ; 57 J. P. 278 ; 62 L. J. Q. B. 117 ; 4 R. 155 ; 68 L. T. 35 ; 41 W. R. 322 542
——— *v.* Southwark, etc. Water Co., [1891] 2 Ch. 409 ; 60 L. J. Ch. 630 ; 64 L. T. 864 ... ... 182, 430
Harrold *v.* Watney, [1898] 2 Q B. 320 ; 67 L. J. Q. B. 771 ; 78 L. T. 788 ; 46 W. R. 642 ... ...398, 399, 426
Hart *v.* Wall, 2 C. P. D. 146 ; 46 L. J. C. P. 227 ; 25 W. R. 373 ... 228

PAGE

Hartley *v.* Hindmarsh, L. R. 1 C. P. 553 ; 1 H. & R. 607 ; 35 L. J. M. C. 255 ; 12 Jur. (N.S.) 502 ; 14 L. T. 795 ; 14 W. R. 862 ... 531
Harvey *v.* Maine, 6 Ir. C. L. R. 417 505
Hatchard *v.* Mege, 18 Q. B. D. 771 ; 51 J. P. 277 ; 56 L. J. Q. B. 397 ; 56 L. T. 662 ; 35 W. R. 576 196
Hawkesley *v.* Bradshawe, 5 Q. B. D. 22, 302 ; 44 J. P. 473 ; 49 L. J. Q. B. 333 ; 42 L. T. 285 ; 28 W. R. 557 252
Haycroft *v.* Creasy, 2 East, 92 ; 6 R. R. 380 75
Haynes *v.* King, [1893] 3 Ch. 439 ; 63 L. J. Ch. 21 ; 3 R. 715 ; 69 L. T. 855 ; 42 W. R. 56 460
Head *v.* Briscoe, 5 C. & P. 484 ; 38 R. R. 841 81
Heaven *v.* Pender. 11 Q. B. D. 503 ; 47 J. P. 709 ; 52 L. J. Q. B. 702 ; 49 L. T. 357 ... ... 328, 333
Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54 ; 58 J. P. 620 ; 63 L. J. Q. B. 587 ; 9 R. 452 ; 70 L. T. 826 ; 42 W. R. 422 248
Hedges *v.* Tagg, L. R. 7 Ex. 283 ; 41 L. J. Ex. 169 ; 20 W. R. 976 ... ...284, 291, 292
Hedley *v.* Pinkney Co., [1892] 1 Q. B. 58 ; 56 J. P. 308 ; 61 L. J. Q. B. 179 ; 66 L. T. 71 ; 40 W. R. 113 ; 7 Asp. M. C. 135 ... 112
Heming *v.* Power, 10 M. & W. 564 ; 6 Jur. 858 ; 62 R. R. 705 ... 220
Henderson *v.* Preston, 21 Q. B. D. 362 ; 52 J. P. 820 ; 57 L. J. Q. B. 607 ; 36 W. R. 834 516
——— *v.* Williams, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308 ; 72 L. T. 98 ; 43 W. R. 274 569
Henwood *v.* Harrison, L. R. 7 C. P. 606 ; 41 L. J. C. P. 206 ; 26 L. T. 938 ; 20 W. R. 1000 232
Hermann-Loog *v.* Bean, 26 Ch. D. 306 ; 48 J. P. 708 ; 53 L. J. Ch. 1128 ; 51 L. T. 442 ; 32 W. R. 994 186
Heske *v.* Samuelson, 12 Q. B. D. 30 ; 53 L. J. Q. B. 45 ; 49 L. T. 474 129
Hetherington *v.* North Eastern Rail. Co., 9 Q. B. D. 160 ; 51 L. J. Q. B. 495 ; 30 W. R. 797 415
Hewlett *v.* Crutchley, 5 Taunt. 283 265
Hickman *v.* Maisey, [1900] 1 Q. B. 752 ; 69 L. J. Q. B. 511 ; 82 L. T. 321 ; 48 W. R. 385 ... ... 184, 542
Hicks *v.* Faulkner, 8 Q. B. D. 167 ; 51 L. J. Q. B. 268 ; 30 W. R. 545 ... ... 264, 269
Higham *v.* Rabett, 5 Bing. N. C. 622 ; 7 D. P. C. 653 ; 7 Scott, 827 ; 50 R. R. 811 475
Hill *v.* Metropolitan Asylums Board, 6 App. Cas. 193 ; 45 J. P. 664 ; 50 L. J. Q. B. 353 ; 44 L. T. 653 ; 29 W. R. 607 ... 190, 434
Hinton *v.* Heather, 14 M. & W. 131 ; 15 L. J. Ex. 39 268
Hiscox *v.* Greenwood, 4 Esp. 174 561
Hodgson *v.* Sidney, L. R. 1 Ex. 313 ; 4 H. & C. 492 ; 35 L. J. Ex. 182 ; 12 Jur. (N.S.) 694 ; 14 L. T. 624 ; 14 W. R. 923 ... 197, 198
Hodson *v.* Pare, [1899] 1 Q. B. 455 ; 68 L. J. Q. B. 309 ; 80 L. T. 13 ; 47 W. R. 241 239
Hogg *v.* Ward, 27 L. J. Ex. 443 ; 3 H. & N. 417 ; 4 Jur. (N.S.) 885 ; 6 W. R. 595 527
Hole *v.* Barlow, 27 L. J. C. P. 208 ; 4 C. B. (N.S.) 334 ; 4 Jur. (N.S.) 1019 ; 6 W. R. 619 437
—— *v.* Sittingbourne, etc. Rail. Co., 6 H. & N. 488 ; 30 L. J. Ex. 81 ; 3 L. T. 750 ; 9 W. R. 274 ... ...90, 92
Holford *v.* Bailey, 13 Q. B. 426 ; 18 L. J. Q. B. 109 ; 13 Jur. 278 ... 488
Holleran *v.* Bagnell, 4 L. R. Ir. 740 413
Holliday *v.* Holgate, L. R. 3 Ex. 299 ; 37 L. J. Ex. 174 ; 18 L. T. 656 ; 17 W. R. 13 562
Hollins *v.* Fowler. L. R. 7 H. L. 757 ; 44 L. J. Q. B. 169 ; 33 L. T. 73 558, 559, 560

PAGE

Hollins *v.* Verney, 13 Q. B. D. 304 ; 48 J. P. 580 ; 53 L. J. Q. B. 430 ; 51 L. T. 753 ; 33 W. R. 5 476
Holmes *v.* Goring, 2 Bing. 76 ; 9 Moore, 166 ; 2 L. J. C. P. 134 ; 27 R. R. 549 476
——— *v.* Mather, L. R. 10 Ex. 261 ; 44 L. J. Ex. 176 ; 33 L. T. 361 ; 23 W. R. 364 503
Holt *v.* Scholefield, 6 T. R. 691 ; 3 R. R. 318 220
Hope *v.* Evered, 17 Q. B. D. 338 ; 55 L. J. M. C. 146 ; 55 L. T. 320 ; 34 W. R. 742 ; 16 Cox C. C. 112 259
Horwood *v.* Smith, 2 T. R. 750 ; 2 Leach C. C. 586 n. ; 1 R. R. 613 561
Houlden *v.* Smith, 14 Q. B. 841 ; 19 L. J. Q. B. 170 ; 14 Jur. 598 ... 519
Hounsell *v.* Smyth, 29 L. J. C. P. 203 ; 7 C. B. (N.S.) 731 ; 6 Jur. (N.S.) 897 ; 1 L. T. 440 ; 8 W. R. 277 ... ...335, 336, 426
Howe *v.* Finch, 17 Q. B. D. 187 ; 51 J. P. 276 ; 34 W. R. 593 ... 129
Hubbuck & Co. *v.* Wilkinson & Co., [1899] 1 Q. B. 86 ; 68 L. J. Q. B. 34 ; 79 L. T. 429 ... ... 203, 214
Huckle *v.* Money, 2 Wils. 205 153
——— *v.* ———, 2 Wils. 587 154
Hughes *v.* Macfie, 2 H. & C. 744 ; 33 L. J. Ex. 177 ; 10 Jur. (N.S.) 682 ; 9 L. T. 513 ; 12 W. R. 315 398
——— *v.* Percival, 8 App. Cas. 443 ; 47 J. P. 772 ; 52 L. J. Q. B. 719 ; 49 L. T. 189 ; 31 W. R. 725 93
Hull *v.* Pickersgill, 1 B. & B. 286 ; 3 Moore, 612 ; 21 R. R. 598 ... 84
Hume *v.* Oldacre, 1 Stark. 252 ; 18 R. R. 779... 175
Humphries *v.* Brogden, 12 Q. B. 739 : 20 L. J. Q. B. 10 ; 15 Jur. 124 449
Hunt *v.* Great Northern Rail. Co., [1891] 2 Q. B. 189 ; 55 J. P. 648 ; 60 L. J. Q. B. 498 246
—— *v.* Peake, 29 L. J. Ch. 785 ; 1 Johns. 705 ; 6 Jur. (N.S.) 107... 457
Hutchinson *v.* York, Newcastle, and Berwick Rail. Co., 5 Ex. 343 ; 6 Rail. Cas. 580 : 19 L. J. Ex. 296 112

I.

I'Anson *v.* Stuart, 1 T. R. 748 ; 1 R. R. 392 205
Illidge *v.* Goodwin, 5 C. & P. 190 ; 38 R. R. 798 400
Imperial Bank of Canada *v.* Bank of Hamilton, A. C., 1903, 49 ... 87
Imperial Gaslight and Coke Co. *v.* Broadbent, 7 H. L. Cas. 600 ; 29 L. J. Ch. 377 ; 5 Jur. (N.S.) 1319 179
Inchbald *v.* Robinson, L. R. 4 Ch. 388 ; 20 L. T. 259 ; 17 W. R. 459 428
Indermaur *v.* Dames, L. R. 1 C. P. 274 ... ... 328, 333
——— *v.* ———, L. R. 2 C. P. 311 ; 36 L. J. C. P. 181 ; 16 L. T. 293 ; 15 W. R. 434 26
Irwin *v.* Brandwood, 2 H. & C. 960 ; 33 L. J. Ex. 257 ; 10 Jur. (N.S.) 370 ; 9 L. T. 772 ; 12 W. R. 438 223

J.

Jackson *v.* Normandy Brick Co., [1899] 1 Ch. 438 ; 68 L. J. Ch. 407 ; 80 L. T. 482 192
Jacobs *v.* Seward, L. R. 5 H. L. 464 ; 41 L. J. C. P. 221 ; 27 L. T. 185 ... ... 549, 567
Jenkins *v.* Jackson, 40 Ch. D. 71 ; 58 L. J. Ch. 124 ; 60 L. T. 105 ; 37 W. R. 253 429
Jenner *v.* A'Beckett, L. R. 7 Q. B. 11 ; 41 L. J. Q. B. 14 ; 25 L. T. 464 ; 20 W. R. 181 224
Jennings *v.* Rundall, 8 T. R. 335 ; 4 R. R. 680 75

PAGE

Jenoure *v.* Delmege, [1891] A. C. 73 ; 55 J. P. 500 ; 60 L. J. P. C. 11 ; 63 L. T. 814 ; 39 W. R. 388 235
Jewson *v.* Gatti, 2 T. L. R. 441 ... ... 398, 399
Job *v.* Potton, L. R. 20 Eq. 84 ; 44 L. J. Ch. 262 ; 32 L. T. 110 ... 549
Johnson *v.* Emerson, L. R. 6 Ex. 329 ; 40 L. J. Ex. 201 ; 25 L. T. 337 254
——— *v.* Lindsay, [1891] A. C. 371 ; 55 J. P. 644 ; 61 L. J. Q. B. 90 ; 65 L. T. 97 ; 40 W. R. 405 116
Jones *v.* Boyce, 1 Stark. 493 ; 18 R. R. 812 156
——— *v.* Chapman, 2 Ex. 821 548
——— *v.* Festiniog Rail. Co., L. R. 3 Q. B. 733 ; 9 B. & S. 835 ; 37 L. J. Q. B. 214 ; 18 L. T. 902 ; 17 W. R. 28 328
——— *v.* Gooday, 8 M. & W. 146 ; 1 D. (N.S.) 50 ; 10 L. J. Ex. 275 ; 58 R. R. 649 158
——— *v.* Herne, 2 Wils. 87 219
——— *v.* Scullard, [1898] 2 Q. B. 565 ; 67 L. J. Q. B. 895 ; 79 L. T. 386 100
——— *v.* Williams, 11 M. & W 176 ; 12 L. J Ex. 249 ; 63 R. R 564 495
Jordeson *v.* Sutton, etc. Gas Co., [1899] 2 Ch. 217 ; 63 J. P. 692 ; 68 L. J. Ch. 457 ; 80 L. T. 815 ... ... 449, 451
Joynt *v.* Cycle Trade Publishing Co., [1904] 2 K. B. 292 ; 73 L. J. K. B. 752 ; 91 L. T. 155 232

K.

Kansas Pacific Rail. Co. *v.* Mihlman, 17 Kansas Rep. 224 147
Keane *v.* Reynolds, 2 E. & B. 748 ; 2 C. L. R. 245 ; 18 Jur. 242 ... 542
Keates *v.* Cadogan, 20 L. J. C. P. 76 ; 10 C. B. 591 ; 15 Jur. 428 ... 444
Keen *v.* Henry, [1894] 1 Q. B. 292 ; 58 J. P. 262 ; 63 L. J. Q. B. 211 ; 9 R. 102 ; 69 L. T. 671 ; 42 W. R. 214 101
——— *v.* Milwall Docks Co., 8 Q. B. D. 482 ; 46 J. P. 435 ; 51 L. J. Q. B. 277 ; 46 L. T. 472 ; 30 W. R. 503 131
Keighley, Maxsted & Co. *v.* Durant, [1901] A. C. 240 ; 70 L. J. K. B. 662 ; 84 L. T. 777 84
Kellard *v.* Rooke, 21 Q. B. D. 367 ; 52 J. P. 820 ; 57 L. J. Q. B. 599 ; 36 W. R. 875 130
Kelly *v.* Metropolitan Rail. Co., [1895] 1 Q. B. 944 ; 59 J. P. 437 ; 64 L. J. Q. B. 568 ; 14 R. 417 ; 72 L. T. 551 ; 43 W. R. 497 ... ...60, 62
——— *v.* Sherlock, L. R. 1 Q. B. 686 ; 6 B. & S. 480 ; 35 L. J. Q. B. 209 ; 12 Jur. (N.S.) 937 ... ... 155, 172
——— *v.* Tinling, L. R. 1 Q. B. 699 ; 35 L. J. Q. B. 231 ; 12 Jur. (N.S.) 940 ; 13 L. T. 255 ; 14 W. R. 51 232
Kendillon *v.* Maltby, Car. & M. 402 ; 2 M. & Rob. 438 249
Kensit *v.* Great Eastern Rail. Co., 27 Ch. D. 122 ; 54 L. J. Ch. 19 ; 51 L. T. 862 ; 32 W. R. 885... 471
Keyse *v.* Powell, 22 L. J. Q. B. 305 ; 2 El. & Bl. 132 ; 17 Jur. 1052 549
Kidgill *v.* Moor, 9 C. B. 364 ; 1 L. M & P. 131 ; 19 L. J. C. P. 177 ... ... 477, 497, 498
Kimber *v.* Press Association, [1893] 1 Q. B. 65 ; 57 J. P. 247 ; 62 L. J. Q. B. 152 ; 4 R. 95 ; 67 L. T. 515 ; 41 W. R. 17 239
Kine *v.* Jolly, [1905] 1 Ch. 480 ; 74 L. J. Ch. 174 ; 53 W. R. 462 ... 466
King *v.* London Improved Cab Co., 23 Q. B. D. 281 ; 53 J. P. 788 ; 58 L. J. Q. B. 456 ; 61 L. T. 34 ; 37 W. R 737 100
——— *v.* Rose, 1 Freem. 347 561
Kirk *v.* Gregory, 1 Ex. D. 55 ; 45 L. J. Ex. 186 ; 34 L. T. 488 ; 24 W. R. 614 558

PAGE

Kirk *v.* Todd, 21 Ch. D. 484 ; 52 L. J. Ch. 224 ; 47 L. T. 676 ; 31 W. R. 69 ... ... 195, 197
Knight *v.* Fox, 5 Ex. 721 ; 20 L. J. Ex. 9 ; 14 Jur. 963 92
——— *v.* North Metropolitan Tramways Co., 78 L. T. 227 105
Knox *v.* Hayman, 67 L. T. 137 308
Krehl *v.* Burrell, 11 Ch. D. 146 ; 48 L. J. Ch. 252 ; 40 L. T. 637 ; 27 W. R. 805 191

L.

Lafond *v.* Ruddock, 13 C. B. 819 ; 1 C. L. R. 339 ; 22 L. J. C. P. 217 ; 17 Jur. 624 ; 1 W. R. 371 149
Lamine *v.* Dorrell, 2 Ld. Raym. 1216 571
Lancashire Waggon Co. *v.* Fitzhugh, 6 H. & N. 502 ; 30 L. J. Ex. 231 ; 3 L. T. 703 ... ... 559, 564, 566
Lane *v.* Capsey, [1891] 3 Ch. 411 : 61 L. J. Ch. 55 ; 65 L. T. 375 ; 40 W. R. 87 496
—— *v.* Cox, [1897] 1 Q. B. 415 ; 66 L. J. Q. B. 193 ; 76 L. T. 135 ; 45 W. R. 261 ... ... 334, 444
Langridge *v.* Levy, 2 M. & W. 519 : 6 L. J. Ex. 137 ; 46 R. R. 689 65, 304, 308
Latter *v.* Braddell, 29 W. R. 239 503
Lawrence *v.* Horton, 38 W. R. 555 : 59 L. J. Ch. 440 ; 62 L. T. 749 : 192
——— *v.* Obee, 1 Stark. 22 534
Lay *v.* Midland Rail. Co., 34 L. T. 30 399
Leake *v.* Loveday, 4 M. & G. 972 ; 5 Scott, N. R. 908 ; 2 Dowl. N. S. 624 ; 12 L. J. C. P. 65 ; 7 Jur. 17 ; 61 R. R. 707 ... 566
Lee *v.* Riley, 34 L. J. C. P. 212 ; 18 C. B. (N.S.) 722 ; 11 Jur. (N.S.) 527 ; 12 L. T. 388 ; 13 W. R. 751 537
Leggot *v.* Great Northern Rail. Co., 1 Q. B. D. 599 ; 45 L. J. Q. B. 557 ; 35 L. T. 334 ; 24 W. R. 784 415
Leith *v.* Pike, 2 W. Bla. 1326 267
Le Lievre *v.* Gould, [1893] 1 Q. B. 491 ; 57 J. P. 484 ; 62 L. J. Q. B. 353 ; 4 R. 274 ; 68 L. T. 626 ; 41 W. R. 468 ... ... 65, 299
Lemaitre *v.* Davis, 19 Ch. D. 281 ; 46 J. P. 324 ; 51 L. J. Ch. 173 ; 46 L. T. 407 ; 30 W. R. 360 456
Lemmon *v.* Webb. [1895] A. C. 1 ; 59 J. P. 564 ; 64 L. J. Ch. 205 ; 11 R. 116 ; 71 L. T. 647 ... ... 434, 494, 496
Lemon *v.* Simmons, 57 L. J. Q. B. 260 ; 36 W. R. 351 220
Lethbridge *v.* Kirkman, 25 L. J. Q. B. 89, 2 Jur. (N.S.) 378 ; 4 W. R. 90 145
Ley *v.* Peter, 27 L. J. Ex. 239 ; 3 H. & N. 101 ; 6 W. R. 437 ... 554
Leyman *v.* Latimer, 3 Ex. D. 352 ; 47 L. J. Ex. 470 ; 37 L. T. 819 ; 26 W. R. 305 ; 14 Cox C. C. 51 ... ... 203, 209
Limpus *v.* London General Omnibus Co., 1 H. & C. 526 ; 32 L. J. Ex. 34 ; 9 Jur. (N.S.) 333 ; 7 L. T. 641 ; 11 W. R. 149... 103, 104
Lister *v.* Perryman, L. R. 4 H. L. 521 ; 39 L. J. Ex. 177 ; 23 L. T. 269 ; 19 W. R. 9 ... ... 261, 262, 266
Littledale *v.* Liverpool College, [1900] 1 Ch. 19 : 69 L. J. Ch. 87 : 81 L. T. 564 ; 48 W. R. 177 555
London, Brighton and South Coast Rail. Co. *v.* Truman, 11 App. Cas. 45 ; 50 J. P. 388 ; 55 L. J. Ch. 354 ; 54 L. T. 250 ; 34 W. R. 657 ... ... 190, 439
Long *v.* Keightley, 11 Ir. R. C. L. 221... 291
Lotan *v.* Cross, 2 Camp. 464 566
Lovell *v.* Howell, 1 C. P. D. 161 : 45 L. J. C. P. 387 : 34 L. T. 183 : 24 W. R. 672... 113

PAGE

Low Moor Co. *v.* Stanley Co., 34 L. T. (N.S.) 186 555
Lumley *v.* Gye, 2 E. & B. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432 ... ... 217, 317, 318
Lynch *v.* Knight, 9 H. L. Cas. 577; 8 Jur. (N.S.) 724; 5 L. T. 291 215, 217
——— *v.* Nurdin, 1 Q. B. 29; 4 P. & D. 672; 10 L. J. Q. B. 73; 5 Jur. 797; 55 R. R. 191 ... ... 398, 400
Lyon *v.* Fishmongers' Co., 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165 13
Lyons, J. & Son *v.* Wilkins, [1899] 1 Ch. 255; 63 J. P. 339; 68 L. J. Ch. 146; 79 L. T. 709; 47 W. R. 291 ... ... 319, 322

M.

Macdougall *v.* Knight, 14 App. Cas. 194; 53 J. P. 691; 58 L. J. Q. B. 537; 60 L. T. 762; 38 W. R. 44 240
Machado *v.* Fontes, [1897] 2 Q. B. 231; 66 L. J. Q. B. 542; 76 L. T. 588; 45 W. R. 565 ... ...69, 70
Mackay *v.* Ford, 29 L. J. Ex. 404; 5 H. & N. 792; 6 Jur. (N.S.) 587; 2 L. T. 514; 8 W. R. 506 238
Macleod *v.* Wakley, 3 C. & P. 313 231
McCartney *v.* Londonderry and Lough Swilly Rail. Co. [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105 470
McCord *v.* Cammell, [1896] A. C. 57; 60 J. P. 180; 65 L. J. Q. B. 202; 73 L. T. 634 131
McDowall *v.* Great Western Rail. Co., [1903] 2 K. B. 331; 72 L. J. K. B. 652; 88 L. T. 825 400
McGriffen *v.* Palmers Shipbuilding Co., 10 Q. B. D. 5; 47 J. P. 70; 52 L. J. Q. B. 25; 47 L. T. 346; 31 W. R. 118 129
McLaughlin *v.* Pryor, 4 M. & G. 48 24
M'Gregor *v.* Thwaites, 3 B. & C. 35; 4 Dow. & Ry. 695; 2 L. J. K. B. 217; 27 R. R. 274 250
M'Pherson *v.* Daniels, 10 B. & C. 263; 5 M. & Ry. 251; 8 L. J. (O.S.) K. B. 14; 34 R. R. 397 ... ... 230, 249
McQuire *v.* Western Morning News, [1903] 2 K. B. 100; 72 L. J. K. B. 612; 88 L. T. 757; 51 W. R. 689 232
Magdalena Co. *v.* Martin, 28 L. J. Q. B. 310; 2 El & El. 94; 5 Jur. (N.S.) 1260; 7 W. R. 598 74
Magnolia Co. *v.* Atlas Metal Co., 14 R. P. C. 389 185
Malcomson *v.* O'Dea, 10 H. L. Cas. 593; 9 Jur. (N.S.) 1135; 9 L. T. 93; 12 W. R. 178 487
Manchester (Mayor of) *v.* Williams, [1891] 1 Q. B. 94; 54 J. P. 712; 60 L. J. Q. B. 23; 63 L. T. 805; 39 W. R. 302 ... 73, 203, 213
Mangan *v.* Atterton, L. R. 1 Ex. 239; 4 H. & C. 388; 35 L. J. Ex. 161; 14 W. R. 771 398
Manley *v.* Field, 29 L. J. C. P. 79; 7 C. B. (N.S.) 96; 6 Jur. (N.S.) 300 293
Manzoni *v.* Douglas, 6 Q. B. D. 145; 45 J. P. 291; 50 L. J. Q. B. 289; 29 W. R. 425 ... ... 28, 403
Marks *v.* Frogley, [1898] 1 Q. B. 888; 67 L. J. Q. B. 605; 78 L. T. 607; 46 W. R. 548 511
——— *v.* Samuel, [1904] 2 K. B. 287; 73 L. J. K. B. 587; 90 L. T. 590; 53 W. R. 88; 20 T. L. R. 430 221
Marsh *v.* Joseph, [1897] 1 Ch. 213; 66 L. J. Ch. 128; 75 L. T. 558; 45 W. R. 209 133
——— *v.* Keating, 1 Bing. N. C. 198; 1 Scott, 5; 2 Cl. & F. 250; 8 Bli. (N.S.) 651; 37 R. R. 75 48

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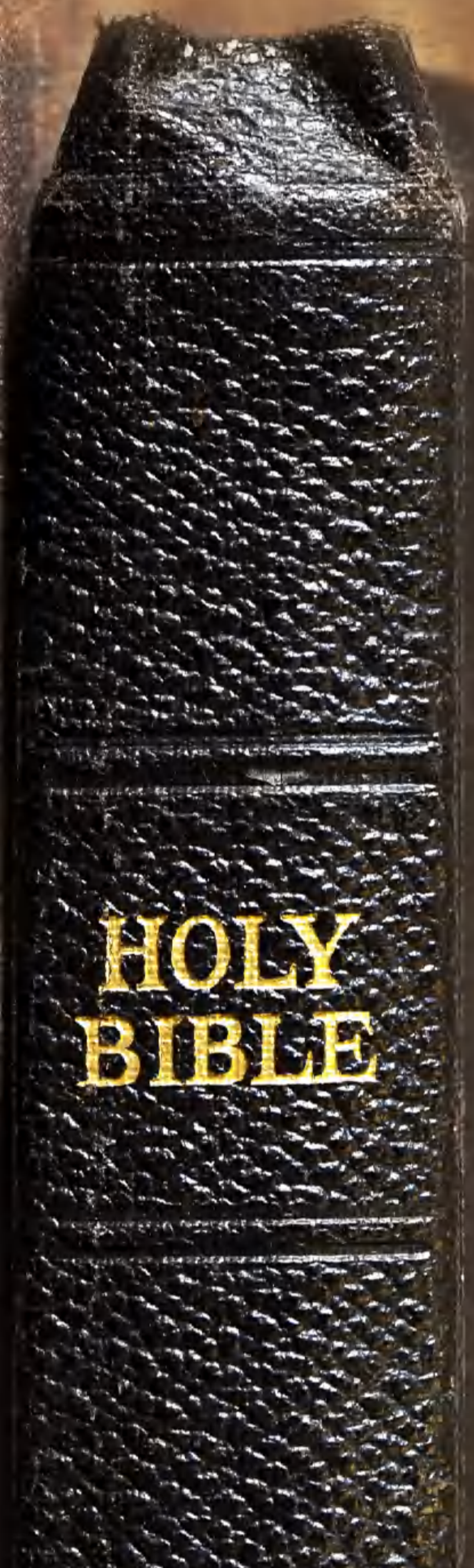

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PAGE

Mitchell *v.* Crassweller, 22 L. J. C. P. 100 ; 13 C. B. 237 ; 17 Jur. 716 ; 1 W. R. 153 102
Moffatt *v.* Bateman, L. R. 3 P. C. 115 ; 22 L. T. 140 : 6 Moo. P. C. (N.S.) 369 406
Mogul Steamship Co., Limited *v.* McGregor, 23 Q. B. D. 598 ... 321
Monson *v.* Tussaud, [1894] 1 Q. B. 671 ; 58 J. P. 524 ; 63 L. J. Q. B. 454 ; 9 R. 177 ; 70 L. T. 335 ... ... 180, 181, 210
Montreal *v.* Drummond, 1 App. Cas. 384 189
Moone *v.* Rose, L. R. 4 Q. B. 486 ; 38 L. J. Q. B. 236 ; 20 L. T. 606 ; 17 W. R. 729 516
Morgan *v.* Hutchins, 38 W. R. 412 ; 59 L. J. Q. B. 197 129
——— *v.* Lingen, 8 L. T. (N.S.) 800 208
——— *v.* London General Omnibus Co., 13 Q. B. D. 832 ; 48 J. P. 503 ; 53 L. J. Q. B. 352 ; 51 L. T. 213 ; 32 W. R. 759 128
——— *v.* Vale of Neath Rail. Co., L. R. 1 Q. B. 149 ; 5 B. & S. 736 ; 35 L. J. Q. B. 23 ; 13 L. T. 564 ; 14 W. R. 144 ... ... 111, 112
"Morocco Bound" Syndicate, Limited *v.* Harris, [1895] 1 Ch. 534 71
Mortimer *v.* Cradock, 12 L. J. C. P. 166 ; 7 Jur. 45 ; 61 R. R. 784 ... 160
Mostyn *v.* Fabrigas, 1 Sm. L. C. 628 ; 1 Cowp. 161 70
Moulton *v.* Edmonds, 1 De G. F. & J. 250 ; 29 L. J. Ch. 181 ; 6 Jur. (N.S.) 305 ; 8 W. R. 153 145
Moyle *v.* Jenkins, 8 Q. B. D. 116 ; 51 L. J. Q. B. 112 ; 46 L. T. 472 ; 30 W. R. 324 131
Mullett *v.* Mason, L. R. 1 C. P. 559 ; 1 H. & R. 779 ; 35 L. J. C. P. 299 ; 12 Jur. (N.S.) 547 ; 14 L. T. 558 ; 14 W. R. 898 164
Mumford *v.* Oxford, Worcester and Wolverhampton Rail. Co., 25 L. J. Ex. 265... 497
Munday *v.* Thames, etc. Co., 10 Q. B. D. 59 ; 52 L. J. Q. B. 119 ; 47 L. T. 351 128
Munster, The, 12 T. L. R. 264 160
Munster *v.* Lamb, 11 Q. B. D. 588 ; 47 J. P. 805 ; 52 L. J. Q. B. 726 ; 49 L. T. 252 ; 32 W. R. 248 238
Murray *v.* Hall, 7 C. B. 441 : 18 L. J. C. P. 161 ; 13 Jur. 262 ... 549

N.

Nat. Prov. Plate Glass Co. *v.* Prudential Ass. Co., 6 Ch. D. 757 ; 46 L. J. Ch. 871 ; 37 L. T. 91 : 26 W. R. 26 191
National Telephone Co. *v.* Baker, [1893] 2 Ch. 186 ; 57 J. P. 373 ; 62 L. J. Ch. 699 ; 3 R. 318 ; 68 L. T. 283 439
Neill *v.* Duke of Devonshire, 8 App. Cas. 135 : 31 W. R. 622 487, 488
Nelson *v.* Liverpool Brewery Co., 2 C. P. D. 311 ; 25 W. R. 877 ; 46 L. J. C. P. 675 442
Nevill *v.* Fine Arts, etc., Co., [1897] A. C. 68 ; 61 J. P. 500 ; 66 L. J. Q. B. 195 ; 75 L. T. 606 213
Newlands *v.* National Employers' Accident Assurance Co., 54 L. J. Q. B. 428 ; 49 J. P. 628 ; 53 L. T. 242 311
Newton *v.* Cubitt, 5 C. B .(N.S.) 627 ; 28 L. J. C. P. 176 ; 5 Jur. (N.S.) 847 491
Nicholls *v.* Bastard, 2 C. M. & R. 659 : 1 Tyr. & G. 156 : 1 Gale, 295 ; 5 L. J. Ex. 7 566
Nichols *v.* Marsland, L. R. 10 Ex. 255 ; on appeal, 2 Ex. D. 1 ; 46 L. J. Ex. 174 ; 35 L. T. 725 ; 25 W. R. 173 ... 29, 32, 33, 34, 431
Nitro Phosphate Co. *v.* London and St. Katharine Docks Co., 9 Ch. D. 503 ; 39 L. T. 433 ; 27 W. R. 267 ... ...44, 45
Norris *v.* Baker, 1 Roll. Rep. 393, fol. 15 495

PAGE

Northampton *v.* Ward, 1 Wils. 144 ; 2 Str. 1238 549
North Eastern Rail. Co. *v.* Elliott, 29 L. J. Ch. 808 453
Notley *v.* Buck, 6 B. & C. 160 ; 6 L. J. (o.s.) K. B. 271 ; 2 M. & R. 68 571

O.

Odger *v.* Mortimer, 28 L. T. 472 232
Oliver *v.* Bank of England, [1902] 1 Ch. 610 ; 71 L. J. Ch. 388 ; 86 L. T. 248 ; 50 W. R. 340 ; 7 Com. Cas. 89 314
Olliett *v.* Bessey, 2 W. Jones, 214 519
Onslow and Whalley's Case, Queen *v.* Castro, L. R. 9 Q. B. 219 ; 28 L. T. 222 ; 12 Cox C. C. 371 519
Onslow *v.* Horne, 2 W. Bl. 750 ; 3 Wils. 177 217
Osborn *v.* Gillett, L. R. 8 Ex. 88 ; 42 L. J. Ex. 53 ; 28 L. T. 197 ; 21 W. R. 409 ... ... 22, 50, 416
Osborne *v.* Choqueel, [1896] 2 Q. B. 109 ; 65 L. J. Q. B. 534 ; 74 L. T. 786 ; 44 W. R. 575 332
——— *v.* Jackson, 11 Q. B. D. 619 ; 48 L. T. 642 130
Oughton *v.* Seppings, 1 B. & Ad. 241 ; 8 L. J. (o.s.) K. B. 394 ; 35 R. R. 284 571
Oxley *v.* Watts, 1 T. R. 12 ; 1 R. R. 133 567

P.

Page *v.* Edulgee. L. R. 1 P. C. 127 ; 12 Jur. (N.S.) 361 ; 14 L. T. 176 565
Paley *v.* Garnett, 16 Q. B. D. 52 ; 50 J. P. 469 ; 34 W. R. 295 ... 129
Palmer *v.* Paul, 2 L. J. Ch. 154 188
Panton *v.* Williams, 2 Q. B. 169 ; 1 G. & D. 504 ; 10 L. J. Ex. 545 ; 57 R. R. 631 261
Paris *v.* Levy, 30 L. J. C. P. 11 : 9 C. B. (N.S.) 342 : 7 Jur. (N.S.) 289 ; 3 L. T. 323 ; 9 W. R. 71 232
Parker *v.* London County Council, [1904] 2 K. B. 501 ; 73 L. J. K. B. 561 ; 68 J. P. 239 ; 90 L. T. 415 ; 52 W. R. 476 : 2 L. G. R. 662 ; 20 T. L. R. 271 150
Parkins *v.* Scott, 1 H. & C. 153 ; 31 L. J. Ex. 331 : 8 Jur. (N.S.) 593 ; 6 L. T. 394 ; 10 W. R. 562 249
Partheriche *v.* Mason, 2 Chit. 658 486
Partridge *v.* Scott, 3 M. & W. 220 ; 7 L. J. Ex. 101 ; 49 R. R. 578 : 452, 454
Pasley *v.* Freeman, 2 Sm. L. C. 71 ; 3 T. R. 51 ; 1 R. R. 634 303, 306
Patrick *v.* Colerick, 3 M. & W. 485 ; 7 L. J. Ex. 135 ; 49 R. R. 696 542
Paul *v.* Summerhayes, 4 Q. B. D. 9 ; 48 L. J. M. C. 33 ; 39 L. T. 574 ; 27 W. R. 215 ; 14 Cox C. C. 202 535
Payne *v.* Rogers, 2 H. Bl. 350 ; 3 R. R. 415 443
Peake *v.* Oldham, 2 W. Bl. 960 ; Cowp. 275 219
Pearce *v.* Scotcher, 9 Q. B. D. 162 ; 46 J. P. 248 ; 46 L. T. 342 ... 487
Pearson *v.* Spencer, 1 B. & S. 584 ; 7 Jur. (N.S.) 1195 ; 4 L. T. 769 476
Peek *v.* Gurney, L. R. 6 H. L. 377 ; 43 L. J. Ch. 19 ; 22 W. R. 29 : 312
Peer *v.* Humphrey, 2 A. & E. 495 ; 4 N. & M. 430 ; 1 H. & W. 28 ; 4 L. J. K. B. 100 ; 41 R. R. 471 560
Pendarves *v.* Munro, [1892] 1 Ch. 611 ; 61 L. J. Ch. 494 460

PAGE

Penn *v.* Ward, 2 C. M. & R. 338 510
Penny *v.* Wimbledon District Council, [1899] 2 Q. B. 72 ; 63 J. P. 406 ; 68 L. J. Q. B. 704 ; 80 L. T. 615 ; 47 W. R. 565 ... ...89, 93
Perry *v.* Eames, [1891] 1 Ch. 658 ; 60 L. J. Ch. 345 ; 64 L. T. 438 ; 39 W. R. 602 463
Peter *v.* Kensal, 6 B. & C. 703 ; 5 L. J. (o.s.) K. B. 282 ; 30 R. R. 504 490
Petrel, The, [1893] P. 320 ; 62 L. J. P. 92 ; 1 R. 651 ; 70 L. T. 417 ; 7 Asp. M. C. 434 116
Phillips *v.* Barnet, 1 Q. B. D. 436 ; 45 L. J. Q. B. 277 ; 34 L. T. 177 ; 24 W. R. 345 73
——— *v.* Eyre, L. R. 4 Q. B. 225 ; 9 B. & S. 343 ; 38 L. J. Q. B. 113 ; 19 L. T. 770 ; 17 W. R. 375 ; affirmed L. R. 6 Q. B. 1 ; 10 B. & S. 1004 ; 40 L. J. Q. B. 28 ; 22 L. T. 869 70
——— *v.* Halliday, [1891] A. C. 231 ; 55 J. P. 741 ; 61 L. J. Q. B. 210 ; 64 L. T. 745 456
——— *v.* Homfray, 24 Ch. D. 439 ; 52 L. J. Ch. 833 ; 49 L. T. 5 ; 32 W. R. 6 194
——— *v.* Jansen, 2 Esp. 624 223
——— *v.* Low, [1892] 1 Ch. 47 ; 61 L. J. Ch. 44 ; 65 L. T. 552 ... 461
——— *v.* London and South Western Rail Co., 4 Q. B. D. 406 153, 161
Pictou (Municipality of) *v.* Geldert, [1893] A. C. 524 ; 63 L. J. P. C. 37 ; 1 R. 447 ; 69 L. T. 510 ; 42 W. R. 114 ... ...55, 78
Pippin *v.* Sheppard, 11 Price, 400 ; 25 R. R 746 ... ... 63, 329
Pittard *v.* Oliver, [1891] 1 Q. B. 474 ; 55 J. P. 100 ; 60 L. J. Q. B. 219 ; 64 L. T. 758 ; 39 W. R. 311 239
Pneumatic Tyre Co. *v.* Puncture Proof Tyre Co., 15 R. P. C. 405 ... 155
Polley *v.* Fordham, [1904] 2 K. B. 345 ; 68 J. P. 321 ; 73 L. J. K. B. 687 ; 90 L. T. 755 ; 53 W. R. 188 ; 20 T. L. R. 435 150
Popplewell *v.* Hodkinson, L. R. 4 Ex. 248 ; 38 L. J. Ex. 126 ; 20 L. T. 578 ; 17 W. R. 806... ... ... 449, 451
Port Glasgow and Newark Sailcloth Co. *v.* The Caledonian Rail. Co., 20 Ct. of Sess., 4 Ser. 35 391
Potter *v.* Faulkner, 1 B. & S. 800 ; 31 L. J. Q. B. 30 ; 8 Jur (N.S.) 259 ; 5 L. T. 455 ; 10 W. R. 93 122
Potts *v.* Smith, L. R. 6 Eq. 311 ; 38 L. J. Ch. 58 ; 18 L. T. 629 : 16 W. R. 891 467
Poulton *v.* London and South Western Rail. Co., L. R. 2 Q. B. 534 ; 8 B. & S. 616 ; 36 L. J. Q. B. 294 ; 17 L. T. 11 ; 16 W. R. 309 104
Pounder *v.* North Eastern Rail. Co., [1892] 1 Q. B. 385 98
Powell *v.* Fall, 5 Q. B. D. 597 ; 49 L. J. Q. B. 428 ; 43 L. T. 562... 59
Praed *v.* Graham, 24 Q. B. D. 53 ; 59 L. J. Q. B. 230 ; 38 W. R. 103 ... ... 153, 155
Preston *v.* Luck, 27 Ch. D. 497 180
Pretty *v.* Bickmore, L. R. 8 C. P. 401 ; 28 L. T. 704 ; 21 W. R. 733 443
Previdi *v.* Gatti, 36 W. R. 670 ; 52 J. P. 646 ; 58 L. T. 762... ... 131
Priestley *v.* Fowler, 3 M. & W. 1 ; M. & H. 305 ; 7 L. J. Ex. 42 ; 1 Jur. 987 ; 49 R. R. 495 111
Prudential Assurance Co. *v.* Knott, L. R. 10 Ch. 142 ; 44 L. J. Ch. 192 ; 31 L. T. 866 ; 23 W. R. 249 186
Pullman *v.* Hill & Co., [1891] 1 Q. B. 524 ; 60 L. J. Q. B. 299 ; 64 L. T. 691 ; 39 W. R. 263 ... ... 229, 235
Purcell *v.* McNamara, 1 Campbell, 199 261
Pursell *v.* Horn, 8 A. & E. 602 503
Pym *v.* Great Northern Rail. Co., 4 B. & S. 396 ; 32 L. J. Q. B. 377 ; 10 Jur. (N.S.) 199 ; 8 L. T. 734 ; 11 W. R. 922 ... ... 414, 415

Q.

PAGE

Quarman *v.* Burnett, 6 M. & W. 499 ; 4 Jur. 969 ; 9 L. J. Ex. 308 ; 55 R. R. 717 100
Quartz Hill, etc. Co. *v.* Evre, 11 Q. B. D. 674 ; 52 L. J. Q. B. 488 ; 49 L. T. 249 ; 31 W. R. 668 ... ... 254, 270
Quinn *v.* Leathem, [1901] A. C. 495 ; 65 J. P. 708 ; 70 L. J. P. C. 76 ; 85 L. T. 289 ; 50 W. R. 139 ... ... 317, 321, 322

R.

R. *v.* Brompton County Court Judge, [1893] 2 Q. B. 195 ; 57 J. P. 648 ; 62 L. J. Q. B. 604 ; 5 R. 462 ; 68 L. T. 829 ; 41 W. R. 648 519
— *v.* Burdett, 4 B. & Ald. 95 ; 22 R. R. 539 228
— *v.* Huggins, 2 Ld. Raym. 1583 ; 2 Str. 882 332
— *v.* Jackson, [1891] 1 Q. B. 671 ; 55 J. P. 246 ; 60 L. J. Q. B. 346 ; 64 L. T. 679 ; 39 W. R. 407 510
— *v.* Lefroy, L. R. 8 Q. B. 134 ; 42 L. J. Q. B. 121 ; 28 L. T. 132 ; 21 W. R. 332 519
— *v.* Light, 27 L. J. M. C. 1 ; Dears. & B. 332 ; 3 Jur. (N.S.) 1130 ; 7 Cox C. C. 389 525
— *v.* Pease, 4 B. & Ad. 30 ; 1 Nev. & M. 690 ; 2 L. J. M. C. 26 ; 38 R. R. 207 441
— *v.* Revel, 1 Stra. 421 519
— *v.* Rosewell, 2 Salk. 259 495
Radley *v.* London and North Western Rail. Co., 1 App. Cas. 754 ; 46 L. J. Ex. 573 ; 35 L. T. 637 ; 25 W. R. 147 385
Ramuz *v.* Southend Local Board, 67 L. T. 169 185
Rawlings *v.* Till, 3 M. & W. 28 502
Rawstron *v.* Taylor, 11 Ex. 369 ; 25 L. J. Ex. 33 472
Rayner *v.* Mitchell, 2 C. P. D. 357 ; 25 W. R. 633 101
Read *v.* Coker, 13 C. B. 850 ; 1 C. L. R. 746 ; 22 L. J. C. P. 201 ; 17 Jur. 990 ; 1 W. R. 413 501
—— *v.* Edwards, 34 L. J. C. P. 31 ; 5 N. R. 48 ; 17 C. B. (N.S.) 245 ; 11 L. T. 311 562
—— *v.* Great Eastern Rail. Co., L. R. 3 Q. B. 555 ; 9 B. & S. 714 ; 37 L. J. Q. B. 278 ; 18 L. T. 82 ; 16 W. R. 1040 416
Reddic *v.* Scoolt, 1 Peake, 316 294
Redgrave *v.* Hurd, 20 Ch. D. 1 ; 51 L. J. Ch. 118 ; 45 L. T. 489 ; 30 W. R. 251 313
Reed *v.* Nutt, 24 Q. B. D. 669 ; 54 J. P. 599 ; 59 L. J. Q. B. 311 ; 62 L. T. 635 ; 38 W. R. 621 530
Reedie *v.* London and North Western Rail. Co., 4 Ex. 244 ; 6 Rail. Cas. 184 ; 20 L. J. Ex. 65 92
Reinhardt *v.* Mentasti, 42 Ch. D. 685 ; 58 L. J. Ch. 787 ; 61 L. T. 328 ; 38 W. R. 10 436
Rhodes *v.* Moules, [1895] 1 Ch. 236 ; 64 L. J. Ch. 122 ; 12 R. 6 ; 71 L. T. 599 ; 43 W. R. 99 135
——— *v.* Smethurst, 4 M. & W. 42 ; 1 H. & H. 237 ; 7 L. J. Ex. 273 ; 2 Jur. 893 148
Rice *v.* Reed, [1900] 1 Q. B. 54 ; 69 L. J. Q. B. 33 ; 81 L. T. 410 ... 572
Rich *v.* Basterfield, 4 C. B. 783 ; 2 Car. & K. 257 ; 6 L. J. C. P. 273 ; 11 Jur. 696 ; 72 R. R. 716 443
Richards *v.* Jenkins, 17 Q. B. D. 544 ... ... 552, 566
——— *v.* Rose, 9 Ex. 218 ; 2 C. L. R. 311 ; 23 L. J. Ex. 3 ; 17 Jur. 1036 455

PAGE

Richardson *v.* Atkinson, 1 Stra. 576 557
——— *v.* Mellish, 2 Bing. 229 ; 9 Moore, 435 : 1 Car. & P, 241 ; R. & M. 66 ; 3 L. J. (o.s.) C. P. 265 ; 27 R. R. 603 166
——— *v.* Metropolitan Rail. Co., L. R. 3 C. P. 374 n : 37 L. J. C. P. 300 ; 18 L. T. 721 ; 16 W. R. 909 380
——— *v.* North Eastern Rail. Co., L. R. 7 C. P. 78 ; 41 L. J. C. P. 60 ; 26 L. T. 131 ; 20 W. R. 461 330
——— *v.* Silvester, L. R. 9 Q. B. 34 ; 43 L. J. Q. B. 1 ; 29 L. T. 395 ; 22 W. R. 74 307
Riding *v.* Smith, 1 Ex. D. 91 ; 24 W. R. 487 ; 45 L. J. Ex. 281 ; 34 L. T. 500 219
Roberts *v.* Rose, L. R. 1 Ex. 82 ; 4 H. & C. 103 ; 35 L. J. Ex. 62 ; 12 Jur. (N.S.) 78 ; 13 L. T. 471 ; 14 W. R. 225 494
Robertson *v.* Hartopp, 43 Ch. D. 484 ; 59 L. J. Ch. 553 ; 62 L. T. 585 484
Robinson *v.* Duleep Singh, 11 Ch. D. 798 ; 48 L. J. Ch. 758 ; 39 L. T. 313 ; 27 W. R. 21 483
Roope *v.* D'Avigdor, 10 Q. B. D. 412 ; 47 J. P. 248 ; 48 L. T. 761... 47
Rooth *v.* Wilson, 1 B. & A. 59 ; 18 R. R. 431 566
Rose *v.* Buckett, [1901] 2 K. B. 449 ; 70 L. J. K. B. 736 ; 84 L. T. 670 ; 50 W. R. 8 198
Rourke *v.* White Moss Co., 2 C. P. D. 205 : 46 L. J. C. P. 283 ; 36 L. T. 49 ; 25 W. R. 263 100
Rowbotham *v.* Wilson, 8 H. L. Cas. 348 ; 30 L. J. Q. B. 49 ; 6 Jur. (N.S.) 965 ; 2 L. T. 642 449
Royal Aquarium, etc. Society *v.* Parkinson, [1892] 1 Q. B. 431 ; 56 J. P. 404 ; 61 L. J. Q. B. 409 : 66 L. T. 513 ; 40 W. R. 450 ... 237, 239, 240
Royal Baking Powder Co. *v.* Wright, Crossley & Co., 15 Rep. Pat. Cas. 677 223
Ruabon Brick Co. *v.* Great Western Rail. Co., [1893] 1 Ch. 427 ; 62 L. J. Ch. 483 ; 2 R. 237 ; 68 L. T. 110 ; 41 W. R. 418... ... 452
Ruddiman *v.* Smith, 60 L. T. 708 ; 53 J. P. 518 ; 37 W. R. 528 ... 104
Russell *v.* Men of Devon, 2 T. R. 667 ; 1 R. R. 585 ... ... 426, 427
——— *v.* Stenton, 3 Q. B. 449 ; 2 G. & D. 573 ; 11 L. J. Q. B. 289 ; 6 Jur. 1059 ; 61 R. R. 249 442
——— *v.* Watts, 10 App. Cas. 590 ; 50 J. P. 68 ; 55 L. J. Ch. 158 ; 53 L. T. 876 ; 34 W. R. 277 461
Rust *v.* Victoria Dock Co., 56 L. T. 216 ; 36 Ch. D. 113 ; 35 W. R. 673 155
Ryan *v.* Clark, 14 Q. B. 65 548
Rylands *v.* Fletcher, L. R. 3 H. L. 330 ; 37 L. J. Ex. 161 ; 19 L. T. 220 ... ... 30, 31, 33, 34, 328, 430

S.

S. *v.* S., 16 Cox C. C. 566 50
Sadgrove *v.* Hole, [1901] 2 K. B. 70 L. J. K. B. 455 ; 84 L. T. 647 ; 49 W. R. 473 229
Sadler *v.* South Staffordshire Tramways Co., 23 Q. B. D. 17 ; 53 J. P. 694 ; 58 L. J. Q. B. 421 ; 37 W. R. 582 503
Sanitary Commissioners of Gibraltar *v.* Orfila, 15 App. Cas. 400 ; 59 L. J. P. C. 95 ; 63 L. T. 58 442
Saunders *v.* Merryweather, 35 L. J. Ex. 115 : 3 H. & C. 902 ; 11 Jur. (N.S) 655 ; 13 W. R. 814 553
Sayers *v.* Collyer, 28 Ch. D. 103 ; 49 J. P. 244 : 54 L. J. Ch. 1 ; 51 L. T. 723 ; 33 W. R. 91 179

PAGE

Scott *v.* London Dock Co., 34 L. J. Ex. 220 ; 3 H. & C. 596 ; 11 Jur. (N.S.) 204 ; 13 L. T. 148 ; 13 W. R. 410 ... ... 402, 406
—— *v.* Nixon, 3 Dru. & War. 388 ; 2 Con. & L. 185 ; 6 Ir. Eq. R. 8 145
—— *v.* Pape, 31 Ch. D. 554 ; 50 J. P. 645 ; 55 L. J. Ch. 426 ; 54 L. T. 399 ; 34 W. R. 465 460
—— *v.* Sampson, 8 Q. B. D. 491 ; 46 J. P. 408 ; 51 L. J. Q. B. 380 ; 46 L. T. 412 ; 30 W. R. 541 171
—— *v.* Shepherd, 2 Wm. Bl. 894 ; 3 Wils. K. B. 403 36
—— *v.* Stansfield, L. R. 3 Ex. 220 ; 37 L. J. Ex. 155 ; 18 L. T. 572 : 16 W. R. 911 ... ... 238, 513
Seaman *v.* Netherclift, 2 C. P. D. 53 ; 46 L. J. C. P. 128 ; 35 L. T. 784 ; 25 W. R. 159 239
Seear *v.* Lawson, 15 Ch. D. 426 ; 49 L. J. Bk. 69 ; 42 L. T. 893 ; 28 W. R. 929 278
Senior *v.* Ward, 28 L. J. Q. B. 139 ; 1 El. & El. 385 ; 5 Jur. (N.S.) 172 ; 7 W. R. 261 110
Seroka *v.* Kattenburg, 17 Q. B. D. 177 ; 55 L. J. Q. B. 375 ; 54 L. T. 649 ; 34 W. R. 543 ... ...80, 81
Serrao *v.* Noel, 15 Q. B. D. 549 179
Seward *v.* *The Vera Cruz*, 10 App. Cas. 59 ; 49 J. P. 324 ; 54 L. J. P. 9 ; 52 L. T. 474 ; 33 W. R. 477 ; 5 Asp. M. C. 386 415
Shaffers *v.* General Steam Navigation Co., 10 Q. B. D. 356 ; 47 J. P. 327 ; 52 L. J. Q. B. 260 ; 48 L. T. 228 ; 31 W. R. 656 130
Sharp *v.* Powell, L. R. 7 C. P. 258 ... ...42, 44
Sharrod *v.* London and North Western Rail. Co., 4 Ex. 580 ... 24
Shelfer *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287 ; 64 L. J. Ch. 216 ; 12 R. 112 ; 72 L. T. 34 ; 43 W. R. 238 ... 179
Shepheard *v.* Whitaker, L. R. 10 C. P. 502 ; 32 L. T. 402 210
Shepherd *v.* Midland Rail. Co., 20 W. R. 705 ; 25 L. T. 879 ... 44
Simmons *v.* Mitchell, 6 App. Cas. 156 ; 45 J. P. 237 ; 50 L. J. P. C. 11 ; 43 L. T. 710 ; 29 W. R. 401 221
Simpson *v.* Mayor of Godmanchester, [1896] 1 Ch. 214 456
———— *v.* Savage, 26 L. J. C. P. 50 ; 1 C. B. (N.S.) 347 ; 3 Jur. (N.S.) 161 ; 5 W. R. 147 498
Sims *v.* Brutton, 5 Ex. 802 ; 20 L. J. Ex. 41 136
Simson *v.* General Omnibus Co., L. R. 8 C. P. 390 ; 42 L. J. C. P. 112 ; 28 L. T. 560 ; 21 W. R. 595 332
Six Carpenters' Case, 1 Sm. L. C. 132 ; 8 Coke, 146a 544
Slater *v.* Swann, 2 Stra. 892 561
Smith *v.* Andrews, [1891] 2 Ch. 678 ; 65 L. T. 175 487
———*v.* Baker, L. R. 8 C. P. 350 ; 42 L. J. C. P. 155 ; 28 L. T. 637 572
———*v.* Baker & Sons, [1891] A. C. 325 ; 55 J. P. 660 ; 60 L. J. Q. B. 683 ; 65 L. T. 467 ; 40 W. R. 392 ... ...117, 119, 121
———*v.* Chadwick, 9 App. Cas. 187 ; 48 J. P. 644 ; 53 L. J. Ch. 873 ; 50 L. T. 697 ; 32 W. R. 687... ... ... 305, 307
———*v.* Giddy, [1904] 2 K. B. 448 ; 73 L. J. K. B. 894 ; 91 L. T. 296 ; 20 T. L. R. 596 434
———*v.* Lloyd, 23 L. J. Ex. 194 ; 9 Ex. 562 ; 2 C. L. R. 208 : 2 W. R. 271 555
———*v.* Thackerah, L. R. 1 C. P. 564 ; 35 L. J. C. P. 276 ; 12 Jur. (N.S.) 545 ; 14 L. T. 761 ; 14 W. R. 832 ; 1 H. & R. 615 ... ... 449, 451
———*v.* Webber, 1 A. & E. 119 ; 3 H. & N. 746 ; 3 L. J. (N.S.) K. B. 148 ; 40 R. R. 268 552
Snag *v.* Gee, 4 Co. Rep. 16 220
Snowden *v.* Baynes, 25 Q. B. D. 193 ; 55 J. P 133 ; 59 L. J. Q. B. 325 ; 38 W. R. 744 130

PAGE

Soltau *v.* De Held, 2 Sim. (N.S.) 133 : 21 L. J. Ch. 153 : 16 Jur. 326 182
Somerset (Duke of) *v.* Fogwell, 5 B. & C. 875 : 8 D. & R. 747 : 5 L. J. (O.S.) K. B. 49 : 29 R. R. 449 486
Southcote *v.* Stanley. 1 H. & N. 247 : 25 L. J. Ex. 339 335
Southee *v.* Denny. 17 L. J. Ex. 151 : 1 Ex. 196 223
South Hetton Coal Co. *v.* North Eastern News Association, [1894] 1 Q. B. 133 ; 58 J. P. 196 : 63 L. J. Q. B. 293 ; 9 R. 240 ; 68 L. T. 844 ; 42 W. R. 322 ... ... 202, 213
South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44 ; 65 L. J. Q. B. 460 ; 74 L. T. 761 : 44 W. R. 653 566
Spackman *v.* Foster, 11 Q. B. D. 99 ; 47 J. P. 455 ; 52 L. J. Q. B. 418 ; 48 L. T. 670 ; 31 W. R. 548 143
Spark *v.* Heslop, 28 L. J. Q. B. 197 : 1 El. & El. 563 : 5 Jur. (N.S.) 730 ; 7 W. R. 312 162
Speake *v.* Hughes, [1904] 1 K. B. 138 : 73 L. J. K. B. 172 ; 89 L. T. 576 218
Speight *v.* Gosnay, 60 L. J. Q. B. 231 : 55 J. P. 501 218
Spiering *v.* Andrea, 30 Am. Law. Rep. 744 227
Spoor *v.* Green, L. R. 9 Ex. 99 : 43 L. J. Ex. 57 : 30 L. T. 393 ; 22 W. R. 547 142
St. Helens Co. *v.* Tipping. 11 H. L. Cas. 642 : 35 L. J. Q. B. 66 ; 11 Jur. (N.S.) 785 ; 12 L. T. 776 ; 13 W. R. 1083 ... ... 435, 436
Stanford *v.* Hurlstone, L. R. 9 Ch. 116 : 30 L. T. 140 ; 22 W. R. 422 184
Stanley *v.* Powell, [1891] 1 Q. B. 86 : 55 J. P. 327 : 60 L. J. Q. B. 52 ; 63 L. T. 809 ; 39 W. R. 76 ... ... 28, 503
Starkey *v.* Bank of England. [1903] A. C. 114 : 72 L. J. Ch. 402 ; 88 L. T. 244 ; 51 W. R. 513 ; 8 Com. Cas. 142 313
Stedman *v.* Smith, 26 L. J. Q. B. 314 : 8 El. & B. 1 ; 3 Jur. (N.S.) 1248 550
Stevens *v.* Jeacocke, 11 Q. B. 741 : 17 L. J. Q. B. 163 : 12 Jur. 477 56
——— *v.* Midland Rail. Co., 10 Ex. 356 : 2 C. L. R. 1300 : 23 L. J. Ex. 328 : 18 Jur. 932 268
——— *v.* Woodward 6 Q. B. D. 318 : 45 J. P. 603 : 50 L. J. Q. B. 231 ; 44 L. T. 153 : 29 W. R. 506 104
Stiles *v.* Cardiff Steam Navigation Co., 33 L. J. Q. B. 310 : 10 Jur. (N.S.) 1199 ; 10 L. T. 844 ; 12 W. R. 1080 332
Stockdale *v.* Hansard, 9 A. & E. 1 : 2 P. & D. 1 : 8 L. J. Q. B. 294 ; 3 Jur. 905 ; 48 R. R. 326 238
Stone. *Ex parte*, 37 W. R. 767 : 61 L. T. 82 ; 6 Morrell. 158 ... 197
——— *v.* Hyde, 9 Q. B. D. 76 : 46 J. P. 788 : 51 L. J. Q. B. 452 ; 46 L. T. 421 ; 30 W. R. 816 131
Storey *v.* Ashton, L. R. 4 Q. B. 476 : 10 B. & S. 337 ; 38 L. J. Q. B. 223 ; 17 W. R. 727 101
Straight *v.* Burn. L. R. 5 Ch. 163 : 39 L. J. Ch. 289 ; 22 L. T. 831 ; 18 W. R. 243 466
Street *v.* Gugwell, Selwyn's N. P., 13th ed. 1090 434
——— *v.* Licensed Victuallers' Society, 22 W. R. 553 228
——— *v.* Union Bank, etc., 33 W. R. 901 : 55 L. J. Ch. 31 ; 30 Ch. D. 156 ; 53 L. T. 262 18
Stroyan *v.* Knowles, 6 H. & N. 454 ... ... 454, 457
Stuart *v.* Bell, [1891] 2 Q. B. 341 ; 60 L. J. Q. B. 577 ; 64 L. T. 633 ; 39 W. R. 612 ... ... 234, 241
Sturges *v.* Bridgman, 11 Ch. D. 852 : 48 L. J. Ch. 785 : 41 L. T. 219 ; 28 W. R. 200 437
Submarine Telegraph Co. *v.* Dickson, 15 C. B. (N.S.) 759 ; 33 L. J. C. P. 139 70
Sutcliffe *v.* Booth, 32 L. J. Q. B. 136 ; 9 Jur. (N.S.) 1037 467
Sutton *v.* Moody, 1 Ld. Raym. 250 558

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PAGE

Trinidad Asphalt Co. *v.* Ambard, [1899] 2 Ch. 260; A. C. 594; 68 L. J. P. C. 114; 81 L. T. 132; 48 W. R. 116 451
Tripp *v.* Frank, 4 T. R. 666; 2 R. R. 495 491
Trotter *v.* Harris, 2 Y. & J. 285; 31 R. R. 593 490
Trustees, etc. Co. *v.* Short, 13 App. Cas. 793; 53 J. P. 132; 59 L. T. 677; 58 L. J. P. C. 4; 37 W. R. 433 145
Tubervil *v.* Stamp, 1 Salk. 213 328
Tuberville *v.* Savage, 1 Mod. 3 502
Tuff *v.* Warman, 27 L. J. C. P. 322: 5 C. B. (N.S.) 573; 5 Jur. (N.S.) 222; 6 W. R. 693 ... ... 384, 391
Tullidge *v.* Wade, 3 Wils. 18 ... ... 154, 170, 296, 531
Tunney *v.* Midland Rail. Co., L. R. 1 C. P. 291; 12 Jur. (N.S.) 691... 114
Turner *v.* Doe d. Bennett, 9 M. & W. 645; 11 L. J. Ex. 453; 60 R. R. 850 553
——— *v.* Stallibrass, [1898] 1 Q. B. 56; 67 L. J. Q. B. 52; 77 L. T. 482; 46 W. R. 81 62

U.

United Merthyr Collieries Co., *Re.* L. R. 15 Eq. 46: 21 W. R. 117 159

V.

Vaughan *v.* Menlove, 3 Bing. N. C. 468; 4 Scott, 244; 3 Hodges, 51; 6 L. J. C. P. 92; 1 Jur. 215; 43 R. R. 711... 327, 328, 330
Venables *v.* Smith, 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 25 W. R. 584 100
Vere *v.* Earl Cawdor, 11 East, 569; 11 R. R. 268 562
Verry *v.* Watkins, 7 C. & P. 308 296
Vicars *v.* Wilcox, 2 Sm. L. C. 534: 8 East, 1; 9 R. R. 361... ... 217
Vine, *Ex parte*, 8 Ch. D. 364; 47 L. J. Bk. 116; 38 L. T. 730; 26 W. R. 582 197
Vizetelly *v.* Mudie's Select Library, Limited, [1900] 2 Q. B. 170: 69 L. J. Q. B. 645 229
Von Joel *v.* Hornsey, [1895] 2 Ch. 774; 65 L. J. Ch. 102: 73 L. T. 372 ... ... 191, 192

W.

Waite *v.* North Eastern Rail. Co., El. B. & E. 719; 28 L. J. Q. B. 258; 7 W. R. 311 399
Wakelin *v.* London and South Western Rail Co., 12 App. Cas. 41; 51 J. P. 404; 56 L. J. Q. B. 229; 55 L. T. 709; 35 W. R. 141: 403
Wakley *v.* Cooke, 4 Ex. 518; 19 L. J. Ex. 91 209
Walker *v.* Brewster, L. R. 5 Eq. 25: 37 L. J. Ch. 33; 17 L. T. 135; 16 W. R. 59 428
——— *v.* Brogden, 19 C. B. (N.S.) 65: 11 Jur. (N.S.) 671; 12 L. T. 495; 13 W. R. 809 205
——— *v.* Great Northern Rail. Co., 28 L. R. Ir. 69 73
Waller *v.* Loch, 7 Q. B. D. 619; 46 J. P. 484; 51 L. J. Q. B. 274; 45 L. T. 242; 30 W. R. 18 245
Walley *v.* Holt, 35 L. T. 631 75
Wallis *v.* Hands, [1893] 2 Ch. 75; 62 L. J. Ch. 586: 3 R. 351: 68 L. T. 428: 41 W. R. 471 545

PAGE

Walsh *v.* Lonsdale, 21 Ch. D. 9 ; 52 L. J. Ch. 2 ; 46 L. T. 858 ; 31 W. R. 109 553
——— *v.* Whiteley, 21 Q. B. D. 371 ; 53 J. P. 38 ; 57 L. J. Q. B. 586 ; 36 W. R. 876 129
Walter *v.* Selfe, 4 De G. & Sm. 322 ; 20 L. J. Ch. 433 ; 15 Jur. 416 : 427
Walton *v.* Waterhouse, 1 Wms. Saund. 418 553
Warburton *v.* Great Western Rail. Co., L. R. 2 Ex. 30 ; 4 H. & C. 695 ; 36 L. J. Ex. 9 : 15 L. T. 361 ; 15 W. R. 108 116
Ward *v.* Eyre, 2 Bulstr. 323 561
——— *v.* Hobbs, 4 App. Cas. 13 ; 48 L. J. Q. B. 281 ; 40 L. T. 73 ; 27 W. R. 114 312
——— *v.* Weeks, 4 Moo. & P. 808 ; 7 Bing. 211 ; 9 L. J. (o.s.) C. P. 6 250
Warwick *v.* Foulkes, 12 M. & W. 507 ; 1 D. & L. 638 ; 13 L. J. Ex. 109 ; 8 Jur. 85 170
Wason *v.* Walter, L. R. 4 Q. B. 73 ; 8 B. & S. 671 ; 38 L. J. Q. B. 34 ; 19 L. T. 409 ; 17 W. R. 169 238
Watkin *v.* Hall, L. R. 3 Q. B. 396 ; 9 B. & S. 279 ; 37 L. J. Q. B. 125 ; 18 L. T. 561 ; 16 W. R. 857 ... ... 203, 249
Watson *v.* Holliday, 20 Ch. D. 780 ; 51 L. J. Ch. 906 ; 46 L. T. 878 ; 30 W. R. 747 ; affirmed, 52 L. J. Ch. 543 ; 48 L. T. 545 ; 31 W. R. 536 197
Wear Commissioners *v.* Adamson, 1 Q. B. D. 546 24
Webb *v.* Beavan, 11 Q. B. D. 609 ; 47 J. P. 488 ; 52 L. J. Q. B. 544 ; 49 L. T. 201 215
——— *v.* Bird, 13 C. B. (N.S.) 841 ; 31 L. J. C. P. 335 ; 8 Jur. (N.S.) 621 465
Weldon *v.* Neal, 32 W. R. 828 ; 51 L. T. 289 149
Wellock *v.* Constantine, 2 H. & C. 146 ; 32 L. J. Ex. 285 ; 9 Jur. (N.S.) 232 ; 7 L. T. 751 49
Wells *v.* Abrahams, L. R. 7 Q. B. 554 ; 41 L. J. Q. B. 306 ; 26 L. T. 326 ; 20 W. R. 659 47
——— *v.* Head, 4 C. & P. 568 ; 34 R. R. 819 562
Wenman *v.* Ash, 13 C. B. 836 ; 1 C. L. R. 592 ; 22 L. J. C. P. 190 ; 17 Jur. 579 ; 1 W. R. 452 230
Wennhak *v* Morgan, 20 Q. B. D. 635 ; 52 J. P. 470 ; 57 L. J. Q. B. 241 ; 59 L. T. 28 ; 36 W. R. 697 229
Weston *v.* Beeman, 27 L. J. Ex. 57 258
Whalley *v.* Lancashire and Yorkshire Rail. Co., 13 Q. B. D. 131 ; 48 J. P. 500 ; 53 L. J. Q. B. 285 ; 50 L. T. 272 ; 32 W. R. 711... 432
Wheaton *v.* Maple & Co., [1893] 3 Ch. 48 ; 62 L. J. Ch. 963 ; 69 L. T. 203 ; 41 W. R. 677 463
Wheeldon *v.* Burrows, 12 Ch. D. 31 ; 48 L. J. Ch. 853 ; 41 L. T. 327 ; 28 W. R. 196 461
Wheeler *v.* Whiting, 9 C. & P. 265 ; 62 R. R. 749 510
Whitbourne *v.* Williams, [1901] 2 K. B. 722 ; 70 L. J. K. B. 933 ; 85 L. T. 271 293
White *v.* Bass, 7 H. & N. 722 ; 31 L. J. Ex. 283 ; 8 Jur. (N.S.) 312 ; 5 L. T. 843 461
——— *v.* France, 2 C. P. D. 308 ; 46 L. J. C. P. 823 ; 25 W. R. 878 : 26, 333
——— *v.* Mellin, [1895] A. C. 154 ; 59 J. P. 628 ; 64 L. J. Ch. 308 ; 11 R. 141 ; 72 L. T. 334 ; 43 W. R. 353 ... ... 213, 222
——— *v.* Spettigue, 13 M. & W. 603 ; 1 Car. & K. 673 ; 14 L. J. Ex. 99 ; 9 Jur. 70 ; 67 R. R. 753 50
Whitehouse *v.* Fellowes, 30 L. J. C. P. 305 ; 10 C. B. (N.S.) 765 ; 4 L. T. 177 ; 9 W. R. 557 146
Whitwham *v.* Westminster Brymbo Coal and Coke Co., [1896] 2 Ch. 538 ; 65 L. J. Ch. 741 ; 74 L. T. 804 ; 44 W. R. 698 158

PAGE

Wild *v.* Waygood, [1892] 1 Q. B. 783 ; 56 J. P. 389 ; 61 L. J. Q. B. 391 ; 66 L. T. 309 ; 40 W. R. 501 130
Wilkes *v.* The Hungerford Market Co., 2 Bing. N. C. 281 ... ...13, 14
Wilkinson *v.* Downton, [1897] 2 Q. B. 57 ; 66 L. J. Q. B. 493 ; 76 L. T. 493 ; 45 W. R. 525 ... ... 162, 309
——— *v.* Haygarth, 12 Q. B. 837 ; 16 L. J. Q. B. 103 ; 11 Jur. 104 549
Williams *v.* Birmingham Battery, etc. Co., [1899] 2 Q. B. 338 ; 68 L. J. Q. B. 918 ; 81 L. T. 62 ; 47 W. R. 680 ... 110, 119
——— *v.* Clough, 3 H. & N. 258 ; 27 L. J. Ex. 325 117
Williamson *v.* Freer, L. R. 9 C. P. 393 ; 43 L. J. C. P. 161 ; 30 L. T. 332 ; 22 W. R. 878. ... ... 228, 248
Wilson *v.* Barker, 4 B. & Ad. 614 ; 1 N. & M. 409 84
——— *v.* Queen's Club, [1891] 3 Ch. 522 ; 60 L. J. Ch. 698 ; 65 L. T. 42 ; 40 W. R. 172 460
——— *v.* Tumman, 6 Man. & Gr. 242 ; 6 Sco. N. R. 894 ; 1 D. & L. 573 ; 12 L. J. C. P. 306 ; 64 R. R. 770 ... ...83, 84
——— *v.* Waddell, 2 App. Cas. 95 ; 35 L. T. 639 ... ... 19, 33, 432
Wimbledon Conservators *v.* Dixon, 1 Ch. D. 362 ; 45 L. J. Ch. 353 ; 33 L. T. 679 ; 24 W. R. 466 475
Wingate *v.* Waite, 6 M. & W. 746 ; 9 L. J. Ex. 319 ; 4 Jur. 860 ... 515
Winkfield, The, [1902] P. 42 ; 71 L. J. P. 21 ; 85 L. T. 668 ; 50 W. R. 246 566
Winsmore *v.* Greenbank, Willes, 577 280
Winterbottom *v.* Lord Derby, L. R. 2 Ex. 316 ; 36 L. J. Ex. 194 ; 16 L. T. 771 ; 16 W. R. 15 ... ... 13, 19, 420
——— *v.* Wright, 10 M. & W. 109 ; 11 L. J. Ex. 415 ; 62 R. R. 534 66
Withers *v.* North Kent Rail. Co., 27 L. J. Ex. 417 ; 1 F. & F. 565... 329
Wolverhampton Waterworks Co. *v.* Hawksford, 28 L. J. C. P. 198 ; 5 C. B. (N.S.) 703 ; 5 Jur. (N.S.) 736 ; 7 W. R. 244 54
Wood *v.* Durham (Lord), 21 Q. B. D. 501 ; 57 L. J. Q. B. 547 ; 59 L. T. 142 ; 37 W. R. 222 ... ... 171, 230
——— *v.* Waud, 3 Ex. 748 ; 18 L. J. Ex. 305 ; 13 Jur. 742... ... 470
Worth *v.* Gilling, L. R. 2 C. P. 1 332
Wren *v.* Weild, L. R. 4 Q. B. 730 ; 10 B. & S. 51 ; 38 L. J. Q. B. 327 ; 20 L. T. 1007 214
Wright *v.* Fairfield, 2 B. & Ad. 727 197
——— *v.* London and North Western Rail. Co., 1 Q. B. D. 252 ; 45 L. J. Q. B. 570 ; 33 L. T. 830 122
——— *v.* Pearson, L. R. 4 Q. B. 582 ; 38 L. J. Q. B. 312 ; 20 L. T. 849 ; 17 W. R. 1099 ; 10 B. & S. 723 333
——— *v.* Williams, 1 M. & W. 77 ; 1 Tyr. & G. 375 ; 1 Gale, 410 ; 5 L. J. Ex. 107 ; 46 R. R. 265 438
Wyatt *v.* White, 29 L. J. Ex. 193 ; 5 H. & N. 371 ; 1 L. T. 517 ; 8 W. R. 307 259
Wyld *v.* Pickford, 8 M. & W. 443 ; 10 L. J. Ex. 382 ; 58 R. R. 775 : 565

Y.

Yarmouth *v.* France, 19 Q. B. D. 647 ; 57 L. J. Q. B. 7 ; 36 W. R. 281 ... ... 118, 129
Young *v.* Spencer, 10 B. & C. 145 ; 5 M. & Ry. 47 ; 8 L. J. (o.s.) K. B. 106 497

TABLE OF CANADIAN CASES.

SUPREME COURT REPORTS.

A.

PAGE

Adamson *v.* Adamson 143
Anctil *v.* City of Quebec..... 167
Anderson *v.* Tillet 493
Archibald *v.* McLaren..... 263
Ashdown *v.* The Manitoba Free Press..... 219
Attrill *v.* Platt 474

B.

Beaver *v.* Grand Trunk Railway Co. 104
Bell *v.* Macklin..... 300
Bell Telephone Co. *v.* The City of Chatham 361
British Columbia Mills Co. *v.* Scott 124
Brown *v.* Great Western Railway Co. 339

C.

Canada Atlantic Railway Co. *v.* Hurdman... 121
——— Railway Co. *v.* Moxley..... 34
Canadian Pacific Railway Co. *v.* Fleming..... 337
——— Railway Co. *v.* Robinson 410, 415
Canada Paint Co. *v.* Trainor 406
Canada Southern Railway Co. *v.* Jackson..... 124
——— Railway Co. *v.* Phelps ...31, 33
Carter *v.* Long and Bisby ... 571
Chandierie Machine and Foundry Co. *v.* Canada Atlantic Railway Co. 146
Chandler Electric Co. *v.* Fuller..... 431
Cornwall *v.* Derochie 77, 352

PAGE

Cossette *v.* Dun..... 237, 245
Creighton *v.* Kuhn 557
Crowe *v.* Adams 557

D.

Dallas *v.* Town of St. Louis 87
Dewe *v.* Waterbury..... 236
Dickson *v.* Kearney..... 535
Dinner *v.* Humberstone 492
Dominion Telegraph Co. *v.* Silver 228
——— Co. *v.* Gilchrist 537
Drysdale *v.* Dugas 152, 418

E.

Eaton *v.* Sangster 398
Ellice, Tp. of *v.* Hills 360
Ells *v.* Black 478, 536

F.

Faulds *v.* Harper 149
Francis *v.* Turner..... 571

G.

Galarneau *v.* Guilbault 491
Gareau *v.* Montreal Street Railway Co. 152, 167
Gates *v.* Davison 552
Grand Trunk Railway Co. *v.* Anderson ... 337
——— Railway Co. *v.* Beckett..163, 338
——— Railway Co. *v.* Games 370
——— Railway Co. *v.* McKay..... 344
——— Railway Co. *v.* Rosenberger 338

PAGE

Grand Trunk Railway Co. *v.* Sibbald..161, 338
——— Railway Co. *v.* Weegar 124
Green *v.* Miller..... 234

H.

Halifax, City of *v.* Lordly... 86, 375
Halifax Electric Tramway Co. *v.* Inglis 350
Halifax St. Railway Co. *v.* Joyce 442
Hamburg American Packet Co. *v.* The King 480
Hamilton Bridge Co. *v.* O'Connor 124
Hawley *v.* Wright 381
Headford *v.* The McClary Mfg. Co. 379
Hett *v.* Van Pong 64
Higgins *v.* Walkern..... 211
Howard *v.* O'Donohoe..... 144
Houston *v.* Merchants Bank of Halifax..... 565

I.

Ince *v.* City of Toronto 355
Innes *v.* Ferguson 474

J.

Jackson *v.* Grand Trunk Railway Co..... 391
James *v.* Grank Trunk Railway Co..... 371
Jones *v.* Grand Trunk Railway Co..... 406

K.

Kearney *v.* Oakes..... 535
Kent *v.* Ellis..... 565
Kerr *v.* The Atlantic and N.W. Railway Co. 82
King *v.* Bailey 147
Kingston and Bath Road Co. *v.* Campbell..... 87, 323
Kingston, City of *v.* Drennan 352, 354
Knock *v.* Knock 479

L.

Lake Erie and Detroit Railway Co. *v.* Barclay 343
Lake Simcoe Ice and Cold Storage Co. *v.* McDonald 543

PAGE

London and Canadian Loan and Agency Co. *v.* Warin 470
London, City of *v.* Goldsmith 356
London Street Railway Co. *v.* Brown 351

M.

McConaghy *v.* Denmark..144. 545
McDonald *v.* Lane 571
——— *v.* McPherson..... 571
McSorley *v.* Mayor, &c. of St. John..... 273
Manitoba Free Press *v.* Martin 211, 232
Martley *v.* Carson 469
Merritt *v.* Hepenstall.....94, 398
Milburn *v.* Wilson 298
Miloebe *v.* McGuire..... 276
Moffatt *v.* Merchants Bank 299
Monaghan *v.* Horn 410
Montreal, City of *v.* Mulcair 352
——— *v.* McGee.. 167
Mooney *v.* McIntosh 464
Moore *v.* Ontario Investment Association 299

N.

New Brunswick Railway Co. *v.* Robinson.. 388, 390, 397
——— Railway Co. *v.* Van Wart 338, 405
New Westminster, City of *v.* Brighouse 541
North Shore Railway Co. *v.* McWillie 390

O.

O'Connor *v.* The Nova Scotia Telephone Co. 546
Ostrom *v.* Sills 431

P.

Pagnuelo *v.* Choquette 303
Peers *v.* Elliott..... 390
Petrie *v.* Guelph Lumber Co. 300
Portland, Town of *v.* Griffith 401
Prescott, Town of *v.* Connell 36
Price *v.* Mercier 276
Provincial Fisheries, *In re*... 485
Pugsley *v.* Ring 459

R.

R. *v.* McArthur 16
— *v.* Robertson 485

PAGE

Rogers *v.* Duncan..... 478
Ross *v.* Hunter 454, 537
Ryan *v.* Ryan 144

S.

St. John, City of *v.* Christie... 18
——————— *v.* Campbell 77, 352
St. John, Mayor of *v.* Macdonald 67
——————— *v.* Pattison... 18
St. John's Gas Light Co. *v.* Hatfield..... 111
St. Lawrence and Ottawa Railway Co. *v.* Lett..... 415
Sherren *v.* Pearson 535
Sibbald *v.* Grand Trunk Railway Co..... 56
Sleeth *v.* Hurlbert 521, 571
Smith *v.* Canadian Pacific Railway Co. 344

T.

Taylor *v.* Robertson..... 325
Toronto Railway Co. *v.* Gosnell..... 346

PAGE

Toronto Railway Co. *v.* Grinsted..... 161
Truro, Town of *v.* Archibald 146

U.

Union Colliery Co. *v.* The Queen..... 58

V.

Vaughan *v.* Wood 332
Venning *v.* Steadman ... 485, 522

W.

Walker *v.* McMillan 454
Ward *v.* Township of Grenville 446, 470
Webster *v.* Foley 119, 121
White *v.* Parker 410
Williams *v.* City of Portland 18
Williams *v.* Stephenson 152
Wood *v.* Esson 468, 469

Y.

York *v.* The Canada Atlantic Railway Co. 397

PRIVY COUNCIL REPORTS.

P.

Peart *v.* The Grand Trunk Railway Co. 338
Pictou *v.* Geldert 352, 442

S.

Sydney, Municipal Council of *v.* Burke 352

BRITISH COLUMBIA REPORTS.

A.

Adams *v.* The National Electric Tramway 106

B.

Bank Shipping Co. *v.* "The City of Seattle" 324
Briggs and Gregerich *v.* Fleutot 276

C.

Crewe *v.* Mottershaw 324

E.

Earl *v.* Corp. of Victoria ... 397

F.

Foley *v.* Webster... 120

G.

Gordon *v.* City of Victoria... 44

H.

Harris *v.* Brunette 102
Hugo *v.* Todd 208

L.

Lindell *v.* Corporation of Victoria 357
Lion Brewery Co. *v.* The Bradstreet Co. 248
Love *v.* The New Fairview Corporation, Ltd..... 324

M.

PAGE

McEwan *v.* Anderson 468
McMillan *v.* Western Dredging Co. 402

N.

Nightingale *v.* Union Colliery 345

P.

Patterson *v.* City of Victoria 434
Plath and Ballard *v.* The Grand Forks and Kettle River Valley Railway Co. 372

R.

PAGE

Robitaille *v.* Mason and Young 258

S.

Scott *v.* B. C. Milling Co. ... 120, 124

U.

Union Colliery Co. *v.* The Queen..... 58

W.

Wolfenden *v.* Giles 180

MANITOBA REPORTS.

A.

Acheson *v.* Portage La Prairie 354, 357
Ashdown *v.* The Free Press 229

B.

Booth *v.* Moffatt 31
Budd *v.* McLaughlin 299

C.

Chaz *v.* Cisterciens Réformés 31

D.

Davidson *v.* Stuart 410
Dixon *v.* Winnipeg Electric Street Railway Co. 121
Down *v.* Lee..... 99

F.

Ferrin *v.* Canadian Pacific Railway..... 369
Foster *v.* Municipality of Lansdown 428
Francis *v.* Turner..... 571
Freeborn *v.* The Singer Sewing Machine Co. 76

G.

Garriock *v.* McKay 533
Grey *v.* Canadian Northern Railway Co. 344

H.

Hebb *v.* Lawrance 290

K.

Kennedy *v.* Portage La Prairie 360

L.

Lines *v.* Winnipeg Electric Street Railway Co. 346

M.

McBean *v.* Wyllie 494
McFie *v.* Canadian Pacific Railway Co. 369, 380
McGinney *v.* Canadian Pacific Railway Co. 380
McKiller *v.* Canadian Pacific Railway Co. 344
Manitoba Farmers' Hoop and Wire Fence Co. *v.* Stoort Co. 253
Martin *v.* Manitoba Free Press 241
Miller *v.* Campbell 326
—— *v.* Manitoba Lumber and Fuel Co..... 76, 94, 263
Moggy *v.* Canadian Pacific Railway Co. 338

N.

North-West Navigation Co. *v.* Walker 468

O.

Owen *v.* Burgess 31

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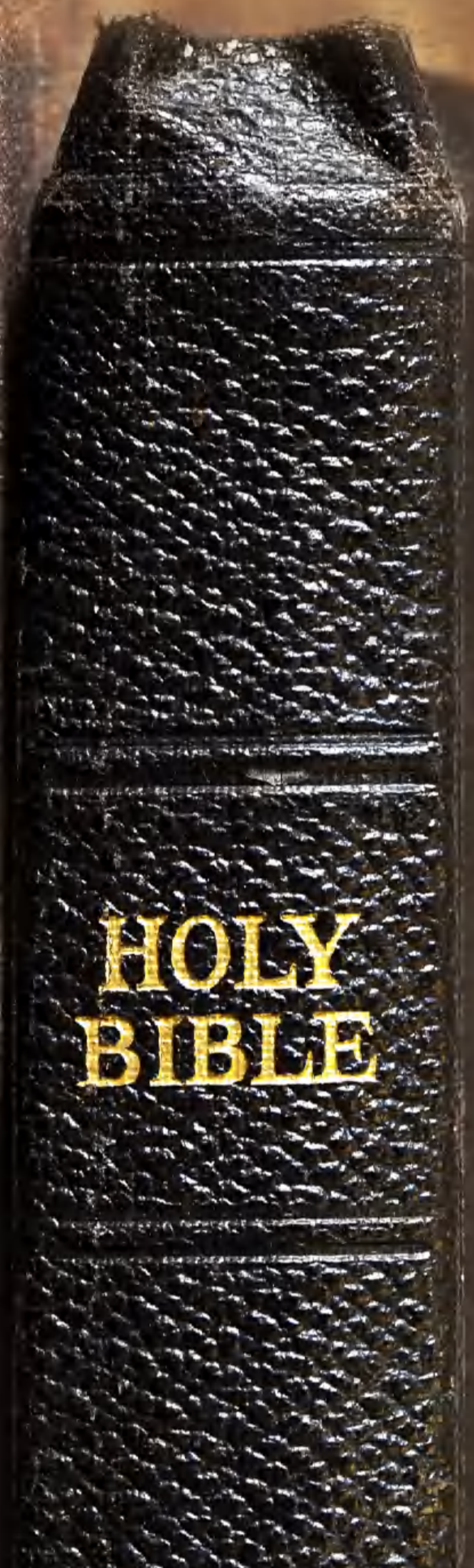

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NOVA SCOTIA REPORTS.

A.

PAGE

Anderson *v.* Bell 263
Archibald *v.* Town of Truro 555
Arnold *v.* Diggdon 333

B.

Barrett *v.* Suttis 407
Bedford *v.* City of Halifax... 380
Bell *v.* The W. & A. Railway Co. 102
Bowers *v.* Hutchison 213
Brookman *v.* Conway 538
Bundy *v.* Carter 389
Burkstrom *v.* Beck 517

C.

Campbell *et al.* *v.* Dickie ... 540
——— *v.* The General Mining Association 112
Casey *v.* Archibald 60
Collins *v.* Barrs 476
Conlon *v.* Connolly 389
Cox *v.* Gunn 266
——— *v.* The Nova Scotia Telephone Co. 425
Creighton *v.* Kuhn 557
Crosskill *v.* The Morning Herald 229
Curwin *v.* The W. & A. Railway..... 389

D.

Davis *v.* Commercial 557
Davison *v.* Burnham 552
Diamond *v.* Municipality of East Hants 357
Dickie *v.* Campbell 548
Dixon *v.* Dauphinée..... 556
Drake *v.* Town of Dartmouth 379

E.

Eisenhaur *v.* Whynar 556

F.

Ferguson *v.* Inman 213
Foster *v.* Fowler 472
Francklin *v.* People 557
Fuller *v.* Pearson 418

G.

Geldert *v.* Pictou 357
Gilbert *v.* Municipality of Yarmouth 357

PAGE

Grant *v.* Booth..... 262
——— *v.* Simpson 213
——— *v.* Town of New Glasgow 355
——— *v.* Wolfe..... 556

H.

Hall *v.* Carty 220
Handspiker *v.* Adams..... 229
Hawley Administrator *v.* Wright 382
Hennessey *v.* Farquhar 524
Hubley *v.* Boak 500

I.

Inglefield *v.* Merkel 501
Inglis *v.* Halifax 557

J.

Johnston *v.* Logan 557

K.

Keith *v.* Intercolonial Coal Mining Co. 389
King *v.* Municipality of Kings 357
Koch *v.* Dauphiner 546

L.

Lordly *v.* City of Halifax ... 357
Lownd *v.* Robinson 347
Lutts *v.* Nott..... 500

M.

Martin *v.* Taylor 333
McAdam *v.* Ross 379
McDougall *v.* McDonald ... 323
——— *v.* McNeil..... 73
McInnes *v.* Ferguson 557
McInnis *v.* Malaga Mining Co. 121
McKay *v.* Campbell 298
McKenzie *v.* Blackmore 333
McKinlay *v.* City of Halifax 355
McLennan *v.* Dominion Coal Co. 555
McLeod *v.* The W. & A. Railway 409
McMullin *v.* Archibald 423
McQuarrie *v.* Municipality of St. Mary's 355
Martyr *v.* Prior..... 500

PAGE

Menervey *v.* Wallace 516
Messenger *v.* Town of Bridgetown 361, 480
Miller *v.* Corkum 556
Milner *v.* Sanford..... 262
Moore *et al. v.* Ritchie *et al.* 556

N.

Neal *v.* Allan 323

O.

Oakes *v.* Blois 500
——— *v.* Keating..... 220

P.

Paint *v.* McLean 214
Parker *v.* Etter..... 526
Peers *v.* Elliott..... 389

Q.

Qwicker *v.* Morash 556

R.

Ramie *v.* Walker 389
Raymond *v.* Bider 263
Robertson *v.* Halifax Coal Co. 368, 423

S.

Sanford *v.* Bowles 73
Shannahan *v.* Ryan..... 406, 423
Silver *v.* Dominion Telegraph Co. 205
Sleeth *v.* Hurlbirt 521, 571

PAGE

Smith *v.* Intercolonial Coal Mining Co. 348
——— *v.* Canadian Pacific Railway 346

T.

Tobin *v.* Gannon 226
Truro, Town of *v.* Archibald 146
Tuff *v.* Warman 395
Tupper *v.* Crowe 300
Turner *v.* Isnor... 102

V.

Viets *v.* Wood 361

W.

Walker *v.* City of Halifax 352, 357
——— *v.* Town of Sydney 506
Ward *v.* City of Halifax ... 357
Watson *v.* Municipality of Colchester 355
West *v.* Boutilier 389
Whitman *v.* The W. & A. Railway Co. 369
Whyte *v.* The Sydney and Louisbourg Coal Co. 121
Wilkie *v.* Richards 556
Williams *v.* Woodworth 557
Wright *v.* Morning Herald Co. 229

Y.

York *et al. v.* Canada Atlantic Railway Co. 423

ONTARIO REPORTS.

A.

Abernethy *v.* McPherson ... 292
Ackland *v.* Adams 500
Acme Silver Co. *v.* Stacey ... 202, 222
Adair *v.* Corporation of Kingston 360
Adamson *v.* Adamson 545
——— *v.* McNab..... 496
Aitken *v.* City of Hamilton 356
Albrecht *v.* Burkholder 206
Algri *v.* Caledon 29
Amer *v.* Rogers *et ux.* 80
Anderson *v.* G. T. R. W. Co. 337, 397
Anderson *v.* Northern R. W. Co. 36, 389
——— *v.* Rannie..... 288
——— *v.* Stewart 211
——— *v.* Stiver 24
Anonymous 209
Applegarth *v.* Rhymal 473
Appleton *v.* Lepper 511, 512
Archibald *v.* Cummings 205
Armour *v.* Boswell 518
Armstrong *v.* Lewin 10
——— *v.* Canada Atlantic R. W. Co..... 367
Arnold *v.* White 180
Arnott *v.* Bradley 485
Ashford *v.* Choate 24, 217

PAGE

Ashley *v.* Dundas..... 517
Atcheson *v.* Grand Trunk Railway Co. 340
Atkinson *v.* City of Chatham..... 397, 423
——— *v.* G. T. R. W. Co. 43, 354
Att.-Gen. *v.* McLaughlin ... 180
Auger *v.* Ontario, Simcoe and Huron R. W. Co. 441
Ayre *v.* Corporation of Toronto 360

B.

Backus *v.* Smith 454
Badams *v.* Toronto..... 20, 352
Baird *v.* Wilson 19
Baker *et al. v.* Flint 563
——— *v.* Jones 257
——— *v.* Mills 545
Balfour *v.* Toronto Railway Co. 96
Ball *v.* Goodman 194
Bank of Upper Canada *v.* Lewis..... 500
Barber *v.* Cleave 59
Barbour *v.* Gittings..... 261
Beadstead *v.* Wyllie..... 294
Beamer *v.* Darling 373
Beamish *v.* Barrett 184
Beathour *v.* Bolster 473
Beaton *v.* Springer 31
Beatson *v.* Intelligence Printing Co. 233
Beatty *v.* Davis..... 485
——— *v.* Neelon 299
Beckett *v.* G. T. R. W. Co.... 163, 389
Bell *v.* Golding..... 480
Bell Telephone Co. *v.* Belville Electric Light Co. ... 185
Belling *v.* City of Hamilton 364
Belleisle *v.* The Corporation of the Town of Hawkesbury 367
Bender *v.* Canada Southern R. W. Co. 386
Bennett *v.* G. T. R. W. Co.... 402
Benson *v.* Connor..... 166
Biggs *v.* Burnham 285
Binyea *v.* Rose 545
Black *v.* Alcock 210
——— *v.* Ontario Wheel Co. 129
Blacklock *v.* Milliken ... 534, 551
Blackmore *v.* Toronto Street R. W. Co. 406
Blagden *v.* Bennett 235, 245

PAGE

Blain *v.* Canadian Pacific Railway Co. 98
Blake *v.* Canadian Pacific R. W. Co. 34
Bleakely *v.* Corporation of Prescott 353
Bleakley *v.* Town of Prescott 361
Bliss *v.* Boeckh..... 360
Boggs *v.* Great Western R. W. Co. 397
Bond *v.* Conmee 511
——— *v.* Connell 522
——— *v.* Toronto R. W. Co.... 124
Boulton *et al. v.* Shields 24
Bourgard *v.* Barthelmes 248
Bowman *v.* Fielding *et al.* ... 563
Boyle *v.* Dundas ... 353, 358, 361
Boys *v.* Cramer..... 545
Brace *v.* Union Forwarding Co. 397, 497
Bradley *v.* Brown..... 393
Breeze *v.* Sails 221
Brennan *v.* Brennan ... 304, 307
——— *v.* Hatelie 520
Bricker *v.* Campbell 224
Bridges *v.* Ontario Rolling Mills Co. 129
Briggs *v.* G. T. R. W. Co. ... 376
——— *v.* Spilsbury 512, 520
Brooks *v.* Williams 534
Bross *v.* Huber 511
Brown *v.* Beatty 209
——— *v.* Beatty *et al.* 164
——— *v.* Dalby 46
——— *v.* G. W. R. W. Co. ... 54
——— *v.* Hirely 74
——— *v.* London Street Railway..... 348
——— *v.* Moyer 241
Brunskill *v.* Harris 534
Buchanan *v.* Young..... 30
Bunting *v.* Hicks..... 471
Bur *v.* Stroud 471
Burford *v.* Oliver..... 489
Burney *v.* Gorham 514
Burnham *v.* Garvey..... 462
Burwell *v.* London Free Press Publishing Co. 251

C.

C. *v.* D. 11
Caldwell *v.* Mills 331
Cameron *v.* Playter 175
——— *v.* Walker 143
Campbell *v.* Campbell..... 214

	PAGE
Campbell *v.* Cushman	563
——— *v.* G. W. R. W. Co.	368
——— *v.* Hill	353
——— *v.* Howland	545
——— *v.* McDonell	267
Canada Central R. Co. *v.* McLaren	10, 389
Carr *et al. v.* Tannahill	276
Carrier *v.* Garrant	228
Carrol *v.* Freeman	330
——— *v.* Pemberthy Injector Co.	229
Carson *v.* Village of Weston *et al.*	362
Carter *v.* Grasett	462
Cartwright *v.* Gray	180
Casey *v.* C. P. R.	389
Castor *v.* Uxbridge	374, 430
Caswell *v.* St. Mary's Road Co.	77, 360
Chase *v.* McDonald	558
Chesnut *v.* Day	545
Chisholm *v.* G. W. Ry.	369
Church *v.* Foulds	545
Church of St. Margaret *v.* Stephens	428
Clapp *v.* Laurason	520
Clarke *v.* Rutherford	46
Clarke, *In re*	518
——— *v.* McDonnell	149
Clayton *v.* G. W. Ry.	369
Clegg *v.* G. T. Ry. Co.	116
Clelland *v.* Robinson	520
Clissold *v.* Machell and Moosley	174
Clouse *v.* Can. Southern R. W. Co.	189
Coffey *v.* Scane	522
Coffin *v.* N. A. Land Co.	144, 148
Colbert *v.* Hicks	256
Cole *v.* Hubble	282
Coll *v.* Toronto R. W. Co.	106, 347
Colvin *v.* McKay	235
Conkey *v.* Thompson	220
Connors *v.* Darling	511, 512
——— *v.* G. W. Ry. Co.	369
Consolidated Bank *v.* Henderson	80
Conway *v.* C. P. R.	52
Copeland *v.* Blenheim	360
Corbett *v.* Jackson	243, 244
Cornish *v.* Toronto Ry. Co.	347
Corp. of United Counties *v.* Hales	545
Corridan *v.* Wilkinson	170
Cotton *v.* Beatty	169
Cottrell *v.* Hueston	516
Cousins *v.* Merrill	24
Cowan v. Landell	239
Coward *v.* Baddeley	532
Cowling *v.* Dixon	304
Cox *v.* Hamilton Sewer Pipe Co.	131
Craig *v.* G. W. Ry. Co.	376
Crain *v.* Ryan	88
Crandall *v.* Crandall	267, 272
——— *v.* Moonie	468, 493
Crawford *v.* Beattie	514
——— *v.* Upper	28, 403
Crewson *v.* G. T. Ry. Co.	473
Cromie *v.* Skene	290
Cross *v.* Goodman	297
—— *v.* Wilcox	520
Croukhite *v.* Sommerville	511
Cull *v.* Wakefield	61
Culverwell *v.* Lockington	447, 455
Cummins *v.* Moore	520, 522
Cunningham *v.* G. T. Ry. Co.	95
Curry *v.* C. P. R.	28
Curtis *v.* G. T. R.	104

D.

Dame *v.* Carbery	563
Danger *v.* London Street R. W. Co.	349
Daniels *v.* G. T. Ry. Co.	52
Davidson *v.* G. T. Ry. Co.	371
Davies *v.* Toronto	193
Davis *v.* Lennon	532
—— *v.* Minor	10, 17
—— *v.* Stewart	205
Dawdy *v.* The Hamilton, Grimsby and Beamsville Electric Ry. Co.	97
Day *v.* Hagerman	568
Dean *v.* McCarty	30, 35, 36
—— *v.* Ontario Cotton Mills Co.	117
Decow *v.* Tate	216
Delehanty *v.* Michigan Central Railway Co.	107
Denny *v.* Montreal	28, 379
Derinzy *v.* Corp. of Ottawa	431
Deverill *v.* G. T. R.	111, 112
Devlin *v.* Bain	389
Deyo *v.* The Kingston and Pembroke Railway Co.	342
Dickson *v.* Crabbe	514
——— *v.* Jarvis	139, 143, 314
Dobbyn *v.* Dicow	151

PAGE

Donnelly *v.* Donnelly 188
Donovan *v.* Herbert..... 545
Douglas *v.* Fox 8, 53
——— *v.* G. T. R. 52, 369
——— *v.* Stephenson 232
Downey *v.* Armstrong..... 170
——— *v.* Sterton.....169, 170
Doyle *v.* Diamond Flint Glass Co. 412
—— *v.* Walker 534
Drennan *v.* Kingston 361
Drew *v.* Baby 21
—— *v.* Corp. of E. Whitby. 115
Driffil *v.* McFall 557
Duck *v.* Toronto 33
Dunham *v.* Powell 532
Duragh *v.* Dunn 485
Durnsford *v.* Michigan Central Railway Co. 339
Durochie *v.* Town of Cornwall 44

E.

Eakins *v.* Christopher..... 265
Eastwood *v.* Helliwell..... 473
Eaton *v.* Sangster 398
Eberts *v.* Smythe..... 373
Edgar *v.* Newell 171
—— *v.* Northern Railway Co. 389, 422
Entner *v.* Benneweiss..... 290
Erickson *v.* Brand 272
Evans *v.* Watt 292
Ewing *v.* City of Toronto ... 423

F.

Fairbank *v.* G. W. Railway Co. 20, 376, 418
——— *v.* Township of Yarmouth 56
Fairweather *v.* Owen Sound Quarry Co. 121
Fallis *v.* The Gartshore, Thompson Pipe and Foundry Co..... 83
Farmer *v.* G. T. Railway Co. 403
——— *v.* Hamilton Tribune 232, 251
Faucitt *v.* Booth 204
Fellowes *v.* Hutchinson 266
Fenelon Falls *v.* Victoria ... 178, 189
Fensom *v.* C. P. R. W. Co. ... 372
——— *v.* The Michigan Central Railway Co. 370

PAGE

Fenton *v.* Macdonald 244
Ferguson *v.* Adams 520
——— *v.* Roblin 107, 538
——— *v.* Southwold 422
Ferris *v.* Dyer 512
—— *v.* Irwin 216
Fido *v.* Wood 508
Fields *v.* Rutherford 407
Finch *v.* Gilray 148
Finlay *v.* Miscampble ...54, 119, 403
Flett *v.* Coulter 385
Flint *v.* Bird..... 545
Flood *v.* Village of London West 397
Foley *v.* Township of E. Flanborough..... 423
Follet *v.* Toronto St. Railway Co. 403
Ford *v.* Gourlay 151
—— *v.* The Metropolitan Railway Co. 82
Forester *v.* Clarke 529
Forsythe *v.* Canniff..... 88
Forwood *v.* Toronto 354, 406
Fowler *v.* Benjamin 302, 306
Fraser *v.* London St. R. W. Co. 151, 503
Friel *v.* Ferguson 511, 522
Fullarton *v.* Switzer 514
Furlong *v.* Carroll 31

G.

Gage *v.* Bates 485
Gallinger *v.* The Toronto Railway..... 350
Gardner *v.* Burwell..... 514
Garland *v.* Thompson ...299, 306
——— *v.* Toronto 124
Garner *v.* Township of Stamford 425
Gaston *v.* Wald..... 377
Gates *v.* Devenish 520
Gaul *v.* Corp. of the Township of Ellice 273
Gibson *v.* Midland Railway 342, 415
Gilchrist *v.* Carden 358
Gildner *v.* Basse 233
Gillie *v.* G. W. Railway Co.. 369
Gillson *v.* N. Grey Railway Co. 30, 35
Gilmour *v.* Bay of Quinté Bridge Co..... 406
Gilpin *v.* Royal Canadian Bank 310

PAGE

Glass *v.* O'Grady 509, 532
Goldsmith *v.* London 361
Gorst *v.* Barr..... 248
Gould *v.* Erskine 291
Graham *v.* Crozier 245
——— *v.* G. W. R. 377
——— *v.* McArthur 520
——— *v.* Toronto G. & B. R. W. Co. 387
Grant *v.* Hare 143
Grantham *v.* Severs..... 174
Gray *v.* McCarty 520
Greaves *v.* Hilliard 544
Green *v.* Minnis 208
——— *v.* Toronto Railway Co. 402
——— *v.* Wright 286
Grieve *v.* Ontario and St. Lawrence Steamboat Co. . 396
Griffith *v.* Brown 144
Grimes *v.* Miller.....261, 521
Gross *v.* Brodrecht 172

H.

Haacke *v.* Adamson 514
Hagarty *v.* G. W. Railway Co. 266
Haight *v.* Hamilton St. Railway Co. 347
——— *v.* Wortman and Ward Mfg. Co. 119
Hall *v.* Alexander 445
—— *v.* Evans 464
Ham *v.* G. T. Railway Co.... 337
Hamilton and Brock Rd. Co. *v.* G. W. R. 15
——— Bridge Co. *v.* O'Connor..... 124
——— *v.* Cousineau 266
——— *v.* Grosback ...129, 131
——— *v.* McDonnell 545, 563
——— St. R. W. Co. *v.* Moran 124
——— *v.* Walters.....202, 223
Hanes *v.* Burnham 239, 243
Hargreaves *v.* Sinclair 245
Harris *v.* Mudie 144
Harrison *v.* Prentice 289
Hasson *v.* Wood 421
Hathaway *v.* Doig 180
Hay *v.* Bingham 206
—— *v.* G. W. R. Co. 396
Haydon *v.* Crawford..... 73, 563
Hayle *v.* Hayle..... 293

PAGE

Headford *v.* McClary Mfg. Co. 119, 124
Healey *v.* Crummer..... 194
Heenan *v.* Dewar..... 180
Henderson *v.* Barnes 407
——— *v.* Canada Atlantic Railway Co. 34, 161
——— *v.* Moodie 563
Hesketh *v.* Toronto.....76, 88, 99
Hewitt *v.* Ontario Copper Lightning Rod Co. 281
——— *v.* Ontario, Simcoe and Huron Railway..... 396
Hickley *v.* Gildersleeve 493
Hicks *v.* Ross.....284, 287
Higgins *v.* Hogan 489, 493
Hill *v.* Asbridge 143
Hilliard *v.* Thurston 58
Hogan *et ux.* *v.* Ackman..... 287
Hogg *v.* The Corp. of the Township of Brook 366
Hogle *v.* Ham 294
—— *v.* Hogle..... 220
Holliday *v.* Ontario Farmers' Mutual Insurance Co. . 247, 248
Hollings *v.* C. P. R..... 389
Holmes *v.* McLeod 509
——— *v.* Midland 377, 390
Homewood *v.* City of Hamilton 98, 363
Hopkin *v.* Hamilton Electric Light and Contract Power Co. 178
Hopkins *v.* Corp. of Township of Owen Sound. 421
——— *v.* Hopkins..... 143
Howard *v.* Herrington 571
——— *v.* Jackson 447
——— *v.* St. Thomas ...65, 360
Howarth *v.* Kilgour..... 245
——— *v.* McGregan 426
Howe *v.* Hamilton and North Western..... 333
Howell *v.* Armour 511, 523
Huber *v.* Crookal 211
Hughes *v.* Hughes 149
Hunt *et al.* *v.* Hespeler 473
Hunter *v.* Gilkison 511
——— *v.* Hunter 208, 243
—— *v.* Ogden 66
Hurd *v.* G. T. Railway Co.... 333
Hurdman *v.* Canada Atlantic 116
Huskinson *v.* Lawrence 558
Hutchinson *v.* C. P. R. 380
Hutton *v.* Windsor 375
Hynes *v.* Fisher..... ....187, 315

I.

PAGE

Innes *et al.* *v.* Ferguson 474
Irving *v.* Hagerman 26
Irwin *v.* Freeman 139
Ives *v.* Calvin.....490, 493

J.

Jackson *v.* G. T. R. Co. 392
——— *v.* Hide.....266, 393, 407
——— *v.* Macdonald..... 211
——— *v.* Staley..... 229
Jacques *v.* Nichols 373
Jaffrey *v.* Toronto, Grey and Bruce Railway Co. ...389, 390
James *v.* G. T. R. Co. 373
——— *v.* Hawkins 290
Jeffries *v.* Markland 156
Johnson *v.* Christie..... 545
——— *v.* Eastman 171
——— *v.* G. T. R..... 34
——— *v.* McGillis..... 544
Johnston *v.* Ewart 215
——— *v.* Northern Ry. ... 376
——— *v.* Port Dover Harbour Co. 331
Joice, *In re* 514
Joint *v.* Thompson 261, 263
Jones *v.* Bain 138
——— *v.* Frazer..... 493
——— *v.* Glassford 518
——— *v.* Grace 511, 523
——— *v.* G. T. R. Co. ... 402, 407
——— *v.* Ross 373
Journal Printing Co. of Ottawa *v.* McLean 202
Jowett *v.* Haacke *et al.* 545

K.

Keachie *v.* Toronto 356
Keith *v.* Ottawa and New York Railway Co. ... 341, 384
Kelly *v.* Archibald 522
——— *v.* Barton 522
Kent *v.* Kent 143
Kerby *v.* Lewis 489, 493
Kerr *v.* Little 480
Kerwin *v.* Canadian Coloured Cotton Co..... 406
Killington *v.* Herring *et al.* 563
Kimball *v.* Smith..... 281, 283
Kinney *v.* Morley..... 409
Kirk *v.* City of Toronto 89
——— *v.* Long 288, 290
Krug Furniture Co. *v.* Berlin Union of Amalgamated Woodworkers 316

L.

PAGE

Lampman *v.* Corp of Gainsborough 414
Landreville *v.* Gouin 43
Laughlin *v.* Harvey..... 151
Lawrie *v.* Rathbone *et al.* 545
Lazarus *v.* Corp. of Toronto 43, 354, 433
Le May *v.* Chamberlain 210, 246
——— *v.* C. P. R. 55, 126
Lennox *v.* Harrison..... 57
L'Esperance *v.* Duchene ... 283
Lett *v.* The St. Lawrence and Ottawa Ry. 163
Levry *v.* Midland R. W. Co. 337
Linter *v.* Linter 557
Little *v.* Ince 495
Livingston *v.* Trout..... 172
Lott *v.* Drury 223
Lucas *v.* Moore..... 356, 358
Lucy *v.* Smith 255, 262
Ludlow *v.* Batson 215
Lyden *v.* McGee 87, 99, 104, 526

M.

Marchall *et al.* *v.* The Industrial Association of Toronto *et al.* 325
Macdonald *v.* Dick 115
——— *v.* Mail Printing Co..... 207
——— *v.* Henwood 267
Macdonell *v.* Robinson 232
McAlpine r. G. T. R. 52
McBean *v.* Williams 211
McCallam *v.* Hutchinson ... 430
McCann *v.* Chisholm 457
McClothery *v.* The Gale Mfg. Co. 124
McCreary *v.* Bettis 262
McCurdy *v.* Swift 532
McDonald *v.* Cameron... 151, 255
——— *v.* Hamilton and Pt. Dover Rd. Co. 357
——— *v.* Moore..... 208
——— *v.* Yarmouth 423
McFarlane *v.* Gilmour 114
McFie *v.* C. P. R..... 52
McGarr *v.* The Town of Prescott 365
McGarvey *v.* Strathroy 189
McGee *v.* Kane 306

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PAGE

Newman *v.* Kissock..... 306
Nicholls *v.* G. W. R. Way Co. 375
Nicholson *v.* Page 545
Nolan *v.* Tipping 248
Nourse *v.* Calcutt..... 266
——— *v.* Foster 256
Nouverre *v.* City of Toronto 421

O.

Oatman *v.* Michigan Central R. W. Co. 392
O'Brien *v.* Sanford 118
O'Connor *v.* Hamilton Bridge Co. 124
O'Hearn *v.* Town of Port Arthur 349
Oliphant *v.* Leslie..... 522
Olliver *v.* Lockie 447
O'Neill *v.* Windham 21
Ontario Copper Lightning Rod Co. *v.* Hewitt 10, 17, 300
Ontario Wind Engine and Pump Co. *v.* Lockie 557
Orr *v.* Spooner 514
Osborn *v.* Kingston 432
Ostrom *v.* Sills..... 472
O'Sullivan *v.* Victoria R. W. Co. 112
Owen Sound Building and Savings Society *v.* Meir ... 208

P.

Palmer *v.* Michigan Central Railway ... 365, 370
——— *v.* Solmes 219, 220
Park *v.* White 418
Parker *v.* Elliott 485
Parsons *v.* Crabbe 511
Paterson *v.* Collins 208
Patterson *v.* Scott... 260, 264, 526
——— *v.* Fanning ... 327, 385
Patubaugh *v.* Gold Medal Furniture Co. 227
Peart *v.* G. T. Rail. Co. ...34, 404
Percy *v.* Glasco..... 506
Perrin *v.* Joyce..... 504
Perry *v.* Buck 545
Peterborough, Town of *v.* Edwards 138
Peters *v.* Devinney 36
Petrie *v.* Guelph 299
Phillips *v.* Odell 211

PAGE

Phillips *v.* The G. T. R. of Canada 339
Pinke *v.* Bornhold 181
Plant *v.* G. T. R. Way Co. ... 112
Poll *v.* Hewitt 119
Pope *v.* Peate 435
Porter *v.* Flintoff..... 563
Powell *v.* Williamson 507
Prentice *v.* Hamilton 248
Priestman *v.* Kendrick and Barnard..... 557
Pring *v.* Wyatt 258

Q.

Quick *v.* Church 10
Quirk *v.* Dudley 181

R.

R. *v.* Brewster 433, 437, 456
— *v.* Davenport 493
— *v.* Dingman..... 532
— *v.* Faneuf 532
— *v.* Gomez 532
— *v.* Harmer..... 532
— *v.* Johnson 541
— *v.* McEvoy 532
— *v.* Osler..... 425
— *v.* Playton 440
— *v.* Scott 518
— *v.* Shaw..... 501, 502, 532
— *v.* Tinning 493
— *v.* Wilkinson 232
Radenhurst *v.* Coate 180
Rainville *v.* The G. T. R...389, 390
Rastrick *v.* G. T. Railway. Co. 375
Ray *v.* Petrolia..... 353
Reid *v.* Inglis 529
——— *v.* Maybee..... 267
——— *v.* McWhinnie 521
Rice *v.* Saunders 263
——— *v.* Town of Whitby..361, 423
Richards *v.* Boulton..... 235
Riddell *v.* Brown 261
Ridley *v.* Lamb..... 374
Ridout *v.* Harris 534
Ringland *v.* Toronto 353
Roberts *v.* Climie..... 235
Robinson *v.* Blitcher 26
——— *v.* Dunn ...235, 237, 246
——— *v.* Toronto Ry. Co. 106
Rodgers *v.* Hamilton Cotton Co. 118
Roe *v.* Corp. of Lucknow ... 77
Rogers *v.* Hassard 260
——— *v.* Spalding 243

PAGE

Rogers *v.* Toronto Public School Board 27
Ross *v.* Bucke 234
—— *v.* Burke 245, 246
—— *v.* Merritt 281
Rounds *v.* The Corp. of Stratford 77, 357, 420
Routhier *v.* McLaurin..... 268
Routley *v.* Harris..... 215
Rowe *v.* Rochester 473
Rudd *v.* Bell 117
Ryan *v.* Miller 285
—— *v.* Canada Southern Railway Co. 110, 421

S.

St. Denis *v.* Shoultz..... 266, 269
St. Vincent *v.* Greenfield ... 178, 189
Sangster *v.* T. Eaton & Co. 399
Sanson *v.* Northern R. W. Co. 193
Saunders *v.* City of Toronto 95
Scarth *v.* Ont. Power and Flat Co..... 571
Schaffer *v.* Dumble 538
Scott *v.* McAlpine 166
—— *v.* Reburn 522
Scougall *v.* Stapleton ...262, 266
Shaver *v.* Linton 245
Shaw *v.* McCreary ... 80, 332, 431
Sherwood *v.* Hamilton...360, 395, 398
—— *v.* O'Reilly 254
Shields *v.* The G. T. R. Way Co. 397
Shoebrink *v.* Canada A. R. Way Co. 406
Short *v.* Lewis 532
Sibbald *v.* The G. T. Railway Co. 34, 155, 430, 543
Silverthorne *v.* Hunter 304
Simpson *v.* G. W. Railway Co. 369, 563
Sinclair *v.* Haynes 256
Sinden *v.* Brown 511, 522
Skelton *v.* Thompson 44
Sloman *v.* Chisholm 221
Small *v.* G. T. R. 13
Smart *v.* Hay 289, 290
Smiley *v.* McDougall 204
Smith *v.* Armstrong 243
—— *v.* Collins 205
—— *v.* Crooker 286
—— *v.* McKay 263
—— *v.* Midland R. W. Co. 143

U.

PAGE

Smith *v.* Onderdonk 65
—— *v.* Petersville..... 189
—— *v.* Ratté 493
—— *v.* Thompson 87, 99
Snarr *v.* Granite Curling and Skating Co. 448
Sombra, Tp. of *v.* Tp. of Moore..... 361
Sornberger *v.* C. P. R. Way Co. 151
Soule *v.* G. T. R. 19
Spahr *v.* Bean 79
Sparkes *v.* Joseph..... 304
Spence *v.* G. T. R. Way Co. 387
Spires *v.* Barrick ...509, 532, 562
Sproule *v.* Stratford 181
Sprung *v.* Anderson..... 511
Stanley *v.* Hayes 75
Stanton *v.* Andrews. 242
Starr *v.* Gardiner 216, 224
Steinhoff *v.* Kent 360
Stewart *v.* Rowlands 204
—— *v.* Sculthorpe..... 235
Stephens *v.* Stephens 500
—— *v.* Tp. of Moore ... 163
Stirtin *v.* Gummer 170
Stone *v.* Knapp..... 80
Stott *et ux. v.* G. T. R. 102
Stovel *v.* Gregory..... 535
Strathy *v.* Crooks..... 72
Straughan *v.* Smith..... 293
Street *v.* Crooks 544
—— *v.* Hamilton 562
Streetsville Plank Road Co. *v.* The Hamilton and Toronto Railway Co. 15
Stretton *v.* Holmes 65
Stride *v.* Diamond Glass Co. 126
Sullivan *v.* McWilliam 29
—— *v.* Town of Barrie... 139
Sutton *v.* Johnstone..... 268
Swan *v.* Adams..... 180
Switzer *v.* Laidman..... 233

T.

Taggard *v.* Innes 501
Taylor, *In re*..... 149
—— *v.* Massey 211
—— *v.* McCullough 48
Tench *v* G. W. Railway Co. 242, 247
Terry *v.* Starkweather 224
Thatcher *v.* G. W. R. 396
Thompson *v.* G. T. R. 376
—— *v.* G. W. R. Co. ... 339
—— *v.* Wright 119

PAGE

Thorne *v.* Mason... 261
Thorp *v.* Fowler 167
Thorpe *v.* Oliver 514
Tighe *v.* Wicks 222
Todd *v.* Dun Wiman 246
Toms *v.* Corp. of Whitby 360, 394, 395
Toronto Brewing and Malting Co. *v.* Blake.....186, 191
Toronto Railway Co. *v.* Bond 124
——— *v.* Grinsted..... 161
Town of Elizabeth *v.* Town of Brockville..... 189
Trice *v.* Robinson..... 412
Truax *v.* Dixon..... 521
Truesdale *v.* Macdonald 494
Truman *v.* Rudolph 124
Tweedie *v.* Bogie 292
Tyler *v.* Babbington 263
Tyson *v.* G. T. R. Way Co.... 338, 385

U.

Union Bank of Canada *v.* Rideau Lumber Co. ...152, 159

V.

Vail *v.* Duggan..... 63
Valle *v.* G. T. R. Co. 340
Vanhorn *v.* G. T. R..... 468
Vankeuren *v.* Griffiths..... 204
Vansyele *v.* Parish 233
Vars *v.* G. T. R. Co. 7, 398
Vicary *v.* Keith..... 375
Vincent *v.* Sprague 46

W.

Wadsworth *v.* McDougall ... 473
Wagner *v.* Jefferson.... 80
Wallace *v.* G. T. R. 468
Walker *v.* Sharp 64, 104
Walsh *v.* Nattrass 48
Walton *v.* York 356, 358, 360
Ward *v.* Caledon 29, 430, 431
Washington *v.* G. T. R. 124
Waters *et ux. v.* Power 288

PAGE

Watson *v.* N. R. C. 386
——— *v.* Toronto Gas Co.... 15
Watt *v.* Clark 268
Webb *v.* The Barton Road Co. 139
Webber *v.* McLeod 256
Weber *et al. v.* Town of Berlin 541
Weir *v.* C. P. R. 34, 405
Wells *v.* Crew 556
——— *v.* Lindop 235, 246
Wemp *v.* Mormon 72
Westacott *v.* Powell..... 290
Western Bank of Canada *v.* Greey 545
Wheelhouse *v.* Darch 82, 453
Whelan *v.* Stephens..... 514
White *v.* Sage.....300, 305
Whitfield *v.* Todd..... 285
Willcock *v.* Howell 176, 235
Williams *v.* Portland 352
——— *v.* Robinson 48
Williamson *v.* G. T. R. ...106, 163
Wilkinson *v.* Harvey 557
Wilson *v.* Hotchkiss..... 132
——— *v.* Hume 113
——— *v.* Tennant 267
——— *v.* Woods 172
Wilton *v.* N. R. C. 389
Winckler *v.* G. W. R.....337, 389
Winfield *v.* Keen 269
Winterbottom *v.* Board of Commissioners of Police for the City of London... 88
Wray *v.* Morrison...178, 188, 455
Wright *v.* Turner 179, 184

Y.

Young *v.* Nichol 269
——— *v.* Sloan..... 216
——— *v.* Vickars 300, 303
Younger *v.* Erie and Huron Railway Co. 373

Z.

Zimmer *v.* G. T. R. 409

TABLE OF STATUTES.

		PAGE
4 Edw. 3, c. 7.	(Administration of Estates)	196
25 Edw. 3, c. 5.	(Administration of Estates)	196
21 Hen. 8, c. 11.	(Restitution of Goods Stolen)	560
21 Jac. 1, c. 16.	(Limitation Act, 1623)—	144, 147, 296, 314, 535
	s. 3	253, 297, 573
	s. 7	148
31 Car. 2, c. 2.	(Habeas Corpus)	533
14 Geo. 3, c. 78.	(Highways Act, 1773), s. 86	31, 376
56 Geo. 3, c. 100.	(Habeas Corpus)	533
5 Geo. 4, c. 83.	(Vagrants)	529
9 Geo. 4, c. 14.	(Lord Tenterden's Act), s. 6	135, 305
c. 32.	(Criminal Law), s. 3	208
2 & 3 Will. 4, c. 71.	(Prescription Act)	456, 479
	s. 2	465, 476
	ss. 3, 4	462
3 & 4 Will. 4, c. 27.	(Real Property Limitation Act, 1833)—	
	s. 2	554
	ss. 3, 10, 11	555
	s. 16	148
	ss. 17, 29	554
c. 42.	(Administration of Estates Act, 1833), s. 2 ...	195
2 & 3 Vict. c. 47.	(Metropolitan Police Act, 1839), s. 54 ...	41
6 & 7 Vict. c. 86.	(London Hackney Carriages Act, 1843) ...	100
c. 96.	(Libel Act, 1843), s. 2	252
8 & 9 Vict. c. 20.	(Railways Clauses Consolidation Act, 1845) ...	452
	s. 154	530
9 & 10 Vict. c. 93.	(Lord Campbell's Act) 51, 163, 196, 343, 354, 409,	410
	s. 1	196, 411
	s. 2	413
	s. 4	413
11 & 12 Vict. c. 44.	(Jervis' Act)	516
14 & 15 Vict. c. 19.	(Criminal Law Act, 1851), s. 11	529
15 & 16 Vict. c. 76.	(Common Law Procedure Act, 1852)	8
20 & 21 Vict. c. 85.	(Matrimonial Causes Act, 1857), s. 26 ...	81
24 & 25 Vict. c. 70.	(Locomotives Act, 1861)	51
c. 96.	(Larceny Act, 1861)—	
	s. 23	551
	s. 100	530, 572
c. 97.	(Malicious Damage Act, 1861)...	529
27 & 28 Vict. c. 95.	(The Fatal Accidents Act, 1864), s. I	414
	(Administration of Estates Act, 1864), s. 1 ...	413
28 & 29 Vict. c. 60.	(Dogs Act, 1865), s. 1	333
c. 83.	(Locomotives Act, 1865)	57
29 & 30 Vict. c. 122.	(Commons (Metropolis) Act, 1866)	484
32 & 33 Vict. c. 70.	(Contagious Diseases (Animals) Act, 1869 ...	56
c. 107.	(Commons Act, 1869)	484

			PAGE
33 & 34 Vict.	c. 23.	(Forfeiture Act, 1870), ss. 8, 30	72
	c. 78.	(Tramways Act, 1870), s. 52	105
34 & 35 Vict.	c. 31.	(Trade Union Act, 1871)	78
36 & 37 Vict.	c. 66.	(Judicature Act, 1873)	186
		s. 25 (8)...	186
37 & 38 Vict.	c. 57.	(Real Property Limitation Act, 1874)—	
		s. 1	554
		s. 2	555
		ss. 3, 4	554
		s. 5	149, 554
38 & 39 Vict.	86.	(Conspiracy Act, 1875), s. 7	319
39 & 40 Vict.	22.	(Trade Unions Act, 1876)	78
	56.	(Commons Act, 1876)	184
40 & 41 Vict.	16.	(Removal of Wrecks Act, 1877)	53
43 & 44 Vict.	42.	(Employers' Liability Act, 1880) ...	109, 122
44 & 45 Vict.	60.	(Libel Act, 1881). s. 6	252
45 & 46 Vict.	c. 75.	(Married Women's Property Act, 1882)	80, 149
		s. 1	73, 80
		s. 12	73
		ss. 13—15	79
46 & 47 Vict.	c. 52.	(Bankruptcy Act, 1883)—	
		ss. 30 (2). 37	197
48 & 49 Vict.	c. 69.	(Criminal Law Amendment Act, 1885), s. 10...	259
51 & 52 Vict.	c. 43.	(County Courts Act, 1888)—	
		s. 134	570
		s. 135	571
		ss. 136, 137	570
		s. 152	519
	c. 64.	(Law of Libel Amendment Act, 1888) ...	252
		s. 3	239, 251
		s. 4	240
		s. 5	252
53 & 54 Vict.	c. 39.	(Partnership Act, 1890)—	
		s. 10	132, 133
		s. 11	133, 134
	. 64.	(Directors' Liability Act, 1890) ...	300, 308
54 & 55 Vict.	51.	(Slander of Women Act, 1891)	218
56 & 57 Vict.	57.	(Law of Commons Amendment Act, 1893)	482, 484
	61.	(Public Authorities Protection Act, 1893)	149, 150
	c. 71.	(Sale of Goods Act, 1893)	
		ss. 21, 22	559
		s. 23	559
		s. 24	560
		(2)	572
		s. 25 (2)	559
60 & 61 Vict.	c. 37.	(Workmen's Compensation Act, 1897)	109, 120
63 & 64 Vict.	c. 22.	(Workmen's Compensation Act, 1900) ...	109
3 Edw. 7,	c. 31.	(Board of Agriculture and Fisheries Act, 1903)	482
	c. 36.	(Motor Car Act, 1903)	530

TABLE OF CANADIAN STATUTES.

CANADA.

PAGE

51 Vict. c. 29 (The Railway Act).....54, 131, 337, 338, 340, 341, 342, 362, 369
55 & 56 Vict. c. 27 (Railway Act Amendment Act, 1892) 341, 344
55 & 56 Vict. c. 28 371
55 & 56 Vict. c. 29 (An Act respecting the Criminal Law [The Criminal Code]) 58, 201, 205, 215, 216, 227, 238, 272, 509, 541, 573
C. S. U. C., c. 77 (Seduction) 286, 297
C. S. U. C., c. 88 464
R. S. O., 1877, c. 57 (Seduction) 291

ONTARIO.

R. S. O., 1897, c. 243 (An Act to encourage the Planting and Growing of Trees) ... 8
16 Vict. c. 54..... 13
16 Vict. c. 190 (The Road Companies Act) 51
R. S. O., 1897, c. 163 (An Act respecting the Property of Married Women) ...79, 80, 288
R. S. O., 1897, c. 160 (An Act to secure Compensation to Workmen in Certain Cases) 82, 122, 124, 128 *et seq.*, 413
R. S. O., 1897, c. 248 (An Act respecting the Public Health) 88, 439
R. S. O., 1897, c. 266 (Railway Accidents Act)..... 124
R. S. O., 1897, c. 199 (Gas and Water Companies), s. 26... 88
R. S. O., 1897, c. 256 (An Act for the Protection of Persons employed in Factories) 131

PAGE

R. S. O., 1897, c. 72 (An Act respecting the Limitation of Certain Actions) 138
R. S. O., 1897, c. 176 (The Ontario Medical Act) 132
R. S. O., 1897, c. 193 (The General Road Companies Act) 57, 138, 355
R. S. O., 1897, c. 200 (Companies Act) 178
R. S. O., 1897, c. 223 (The Municipal Act) ...88, 139, 140, 351, 354, 355, 356, 365, 372, 427
R. S. O., 1897, c. 51 (The Ontario Judicature Act)... 157, 166, 177, 184
R. S. O., 1897, c. 129 (An Act respecting Trustees and Executors) 195
R. S. O., 1897, c. 68 (An Act respecting Actions of Libel and Slander).....219, 239, 240, 251, 252
R. S. O., 1897, c. 80 (An Act respecting Arrest and Imprisonment for Debt) 257
R. S. O., 1897, c. 69 (An Act respecting the Action for Seduction)...280, 283, 284, 285, 286, 288, 289, 290, 297
R. S. O., 1897, c. 207 (An Act respecting Railways) 369
R. S. O., 1897, c. 166 (Lord Campbell's Act, Compensation to the Families of Persons killed by Accident and in Duels)...409, 410, 413, 414
R. S. O., 1897, c. 160 413
R. S. O., 1897, c. 133 464
R. S. O., 1897, c. 142 (An Act for Protecting the Public Interest in Rivers, Streams, and Creeks) 468
R. S. O., 1897, c. 139 (An Act respecting Ferries) 490

PAGE

R. S. O., 1897, c. 90 (An Act respecting Procedure before Justices of the Peace and Summary Convictions and Appeals to General Sessions) 511
R. S. O., 1897, c. 88 (An Act to Protect Justices of the Peace and others from Vexatious Actions) ...273, 519, 521, 522
R. S. O., 1897, c. 66 (An Act respecting Actions of Replevin) 570
62 Vict. c. 26, s. 28 (O.) 88
3 Edw. 7, c. 19 (O.) (Municipal Act) 367

NOVA SCOTIA.

R. S. N. S., c. 95, s. 17 ...539, 548
Revised Statutes, 5th series, c. 112 (Statute of Limitations) 479, 524

NEW BRUNSWICK.

Consolidated Statutes, c. 86... 410

MANITOBA.

55 Vict. c. 43 (The Manitoba Seduction Act)..... 280

PAGE

56 Vict. c. 39 (An Act to secure Compensation to Workmen in Certain Cases) 124, 127, 130, 409
R. S. M., 1891, c. 146 (An Act respecting Trustees and Executors) 195
50 Vict. c. 22 (An Act respecting the Law of Libel)..... 219
R. S. M., 1891, c. 26 (An Act respecting Compensation to Families of Persons killed by Accident)..... 409

BRITISH COLUMBIA.

R. S. B. C., 1897, c. 69 (An Act to secure Compensation for Personal Injuries suffered by Workmen in Certain Cases) 124, 127, 130
R. S. B. C., 1897, c. 120 (An Act respecting Actions of Libel and Slander) 219

THE NORTH-WEST TERRITORIES.

R. S. B. C., c. 80 (Fire Escape Act) 324
Consolidated Ordinances, 1898, c. 30 (An Ordinance to Amend the Law relating to Slander) 219

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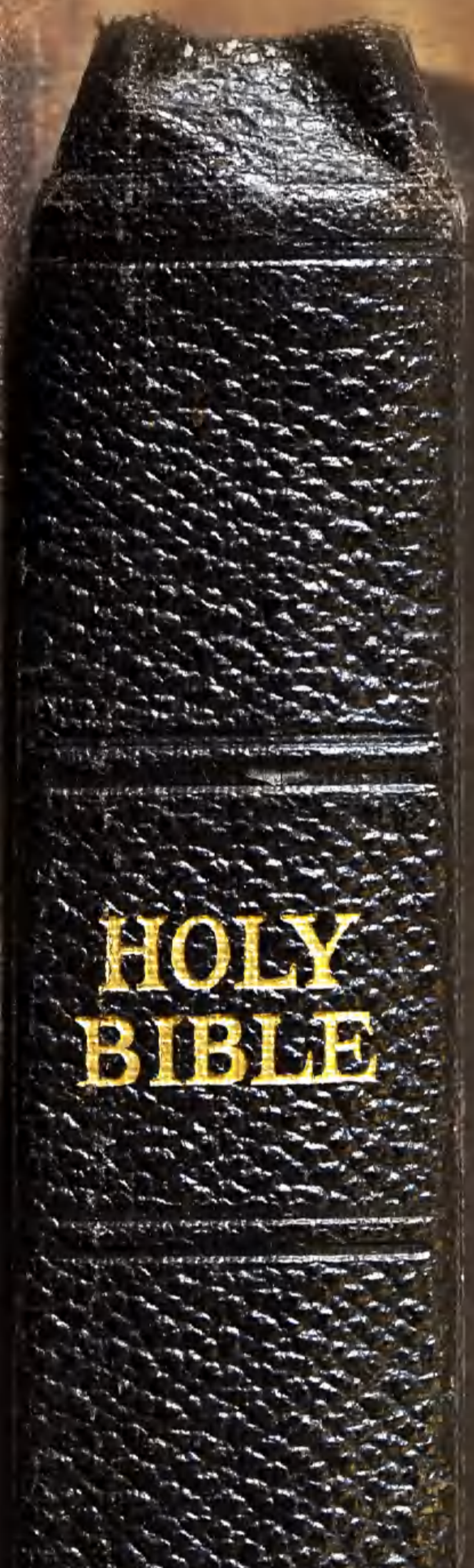

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INTRODUCTION.

"THE maxims of law," says Justinian, "are these: To live honestly, to hurt no man, and to give every one his due." The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and insuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former consist of offences against the community at large, or offences—commonly called crimes—which, although primarily affecting individuals, are subversive of law and order; and as no redress can be given to the community, except by the prevention of such acts for the future, they are either stopped by injunction at the suit of the Attorney-General, or (in the case of crimes) visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are merely violations or deprivations of the legal rights of individuals. These admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation; and in some cases also restrains him by injunction from repeating the wrong.

But as injuries are divided into criminal and civil, so the latter are sub-divided into two classes, of injuries *ex contractu* and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by

contract, and the latter (commonly called torts) such as spring from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border line between them is by no means well defined. Indeed, from the very nature of things, each division must to some extent overlap the others. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively placed in any one of the three classes.

In this work an attempt has been made to state the principles which the law applies to those facts which constitute torts.

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT..

ART. 1.—*Definition of a Tort.*

A TORT is an act or omission which, independent of contract, is unauthorised by law, and results either—

(a) in the infringement of some absolute right to which another is entitled; or

(b) in the infringement of some qualified right of another causing damage; or

(c) in the infringement of some public right resulting in some substantial and particular damage to some person beyond that which is suffered by the public generally.[1]

No one has yet succeeded in formulating a perfectly satisfactory definition of a Tort; indeed, it may be

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Canadian Cases.

[1] "There is no case, that I am aware of, that supports the proposition, that a wrongful act committed by a defendant, which causes damage to another, without any default of the person receiving the damage, is not actionable" (*Vars* v. *Grand Trunk R. W. Co.*, 23 U. C. C. P. 150—Gwynne, J.).

Art. 1.

doubted whether a scientific definition, which would at the same time convey any notion to the mind of the student, is possible.

Comment on various definitions of Tort.

A tort is described in the Common Law Procedure Act, 1852, as "a wrong independent of contract." If we use the word "wrong," as equivalent to violation of a right recognised and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid; for it gives no clue as to what constitutes a wrong or violation of a right recognised and enforced by law.[2]

A recently published text book (Bigelow's Elements of the Law of Torts), by a distinguished American Lawyer, defines a tort as a breach of duty fixed by law, and redressible by a suit for damages; but this definition does not seem to convey much information to the reader, and confessedly requires an elaborate explanatory dissertation.

Perhaps Sir Frederick Pollock in his work on torts (see Pollock on Torts, 6th ed., p. 19) gives the most complete definition; but I cannot help thinking that, excellent as it is, the student is more likely to grasp the legal meaning of the word "tort" from the brief definition which I have attempted.

Canadian Cases.

[2] The owner of land adjoining a highway has, under R. S. O., c. 187 [now R. S. O., 1897, c. 243, sect. 6], such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrongdoer to recover damages for the cutting down or destroying such trees, and he is not restricted to the penalty given by section 5 (*Douglas* v. *Fox*, 31 U. C. C. P. 140; and see *post*, p. 53).

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Art. 1. breach of law which consists in the violation of another's absolute private rights.[3]

Canadian Cases.

[3] An action on the case in the nature of a conspiracy, does not lie against a person for supplanting another in the purchase of goods, which had first been contracted for by the latter party, and in every action on the case in the nature of a conspiracy, the declaration must expressly aver malice on the part of the defendant (*Davis* v. *Minor*, 2 U. C. R. 464. But see *Ont. Copper Lightning Rod Co.* v. *Hewitt*, 30 U. C. C. P. 180, p. 17, and *Armstrong* v. *Lewin*, 34 U. C. R. 629).

Whenever an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it (*Mitchell* v. *Barry*, 26 U. C. R. 416).

"The rule has been firmly established that a railway company authorised by law to use locomotive engines, cannot be held liable for injuries occasioned, by sparks escaping from the engine, without proof of negligence. The statutory authority is their warrant, and any loss occasioned by the engine would be *damnum absque injuriâ*" (*Canada Central R. W. Co.* v. *McLaren*, 8 O. A. R. 583—Burton, J. A.; and *post*, p. 389).

Where a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means and support, an action lies at common law against such a woman (*Quick* v. *Church*, 23 O. R. 262).

An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away

Read by the light of these observations, both the maxims in question are correct. For the interruption of

Art. 1.

Canadian Cases.

from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society; and substantial damages may be awarded in such a case (*Metcalf* v. *Roberts et al.*, 23 O. R. 130).

Husband and Wife — Divorce — Foreign Divorce — Criminal Conversation — Alienation of Affections — Hearsay Evidence — Damages.

The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained in the United States a divorce from him not valid according to the law of the Province. She then went through the ceremony of marriage with the defendant and lived with him as his wife for many years, before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum:—

Held, MacMahon, J., dissenting, that notwithstanding the separation and the divorce the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence of rumours of infidelity of the plaintiff's wife with the defendant long previous to going through the ceremony of marriage, a new trial was granted.

Per MacMahon, J., the separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff and were a bar to the action.

Judgment of Anglin, J., at the trial, reversed (*C.* v. *D.*, 8 O. L. R., 308).

Art. 1.

an absolute right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation; and substantial damages have more than once (in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But when no absolute private right (*ex. gr.* liberty) has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

Infringement of absolute rights.

The reason for all this is very clear. In the case of the invasion of an absolute private right, there is a wrong done to the plaintiff by the mere infringement of that right, and for every wrong there is a remedy by action "*ubi jus ibi remedium.*"

A man has an absolute right to his property, to the immunity of his person, and to his liberty. Thus, in actions of trespass, whether to goods, lands, or the person (including assault and false imprisonment), damage is not a part of the cause of action, and a plaintiff is entitled to nominal damages for the mere infringement of these rights.

Infringement of qualified private rights.

But there are some private rights which are only qualified rights, that is, rights to be saved from pecuniary loss, and no action will lie for an infringement of these rights without proof of damage. Thus, a person has not an absolute right not to be deceived, and in an action for fraud it is necessary for the plaintiff to show that the deceit complained of resulted in damage. So, too, in actions for nuisance (with some exceptions), malicious prosecution and negligence, damage is an essential part of the cause of action; as in all these cases the right infringed is only a qualified right—a right to be preserved from damage by certain acts or omissions of other persons.

Art. 1.

Infringement of public rights.

Lastly, a tort may consist in the infringement of a public right, *i.e.*, a right which all men enjoy in common, coupled with particular damage. Take, for example, rights of highway. If a highway is obstructed, an injury is done to the public, and for that wrong the remedy is by indictment or by proceedings by the Attorney-General on behalf of the public. If every member of the public could bring an action, the number of possible actions for one breach of duty would be without limit (see *Winterbotham* v. *Lord Derby*, L. R. 2 Ex. 316; *W. H. Chaplin & Co.* v. *Westminster Corporation*, [1901] 2 Ch. 329). But if, in addition to the injury to the public, a special, peculiar, and substantial damage is occasioned to an individual beyond the injury suffered by the public generally, then it is only just that he should have some private redress (see *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; and *Fritz* v. *Hobson*, 14 Ch. D. 542).[4]

Canadian Cases.

[4] "The cases on the question, whether the party suing has sustained a particular damage, so as to entitle him to sue in a civil action for what constitutes a public nuisance, are numerous. In *Wilkes* v. *The Hungerford Market Co.* (2 Bing. N. C. 281) the point was carefully considered; and from the judgment there given as well as from the cases cited in it, we conclude that it is not enough to entitle a party to sue in such a case, that his land, in common with all the other land situated upon the river, is rendered less valuable by the obstruction of the navigation, though it must be confessed that it is not easy to determine where a line can be drawn" (*Small* v. *Grand Trunk Rail. Co.*, 15 U. C. R. 286—Robinson, C.J.).

"There can be no doubt, we think, that the fifth section of the statute 16 Vict. c. 54, does make it incumbent on the defendants to maintain

Art. 1.

It will, therefore, be seen, that there must be an unauthorised act or omission either causing (a) an infringement of some absolute private right, or (b) an infringement of a qualified private right resulting in

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Canadian Cases.

in a proper state of repair the bridge which they were by that Act allowed to make over the eastern extremity of the Des Jardines Canal. But the real question in this case is whether the failure to do so gives any right of action to the plaintiffs. We think it does not. If the defendants did suffer the bridge to be for a time out of repair, so that the public could not safely and conveniently pass over, that no doubt would be a wrong done to the public, who had a right to use the alleged highway between Hamilton and the plaintiff's toll road, of which alleged highway we think we must take the bridge in question to form part. That would in the first place point to a prosecution by the Crown for the public wrong and would not give to each of the many individuals who might be incommoded by the nuisance a right to bring a separate action for his share of the injury. Where the circumstances in any such case have been such as to occasion a special injury to a particular person, then such person has been allowed to maintain an action for his particular damage. This seems to us to be an attempt to push the principle considerably further than was done in *Wilkes* v. *The Hungerford Market Co.* (2 Bing. N. C. 281), though undoubtedly the plaintiff's action appears to receive a good deal of support from the language of the judgment given in that case. There was, however, in the case referred to, an actual obstruction of a thoroughfare, upon the very site of which the plaintiff's shop was situated. Here the complaint is, that the plaintiffs

damage, or (c) an infringement of a public right resulting in substantial and particular damage to some person beyond that suffered by the public. Art. 1.

But in addition to this, the injury must fall within some class recognised by law, and for which an action Injury must be remediable by damages.

Canadian Cases.

received less toll upon their road, because another road which crosses it, or leads into it, has been suffered to go out of repair. The case cited of *The Streetsville Plank Road Co.* against *The Hamilton and Toronto Railway Co.* (13 U. C. R. 600) is very distinguishable from the present, because in that case the plaintiffs' road was rendered almost impassable for loaded trams, by the obstruction which the defendants for their own purposes had placed across it." (*Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 U. C. R. 570 *et seq.*—Robinson, C.J.).

A person throwing noxious matter into Lake Ontario or any other public navigable water is liable *both* to an indictment for committing a public nuisance and to a private action at the suit of any individual *distinctly and peculiarly* injured (*Watson* v. *Toronto Gas Co.*, 4 U. C. R. 158).

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which any other individual has to use the water in its unadulterated state, whether he possess land, mills or houses, on its banks or not (*Idem*).

In any case in which a party is indictable for a common nuisance any person suffering particularly from the nuisance may have his action on the case. This was decided in the case of *Watson* v. *The Gas Co.*, 4 U. C. R. 158, where the plaintiff alleged

Art. 1.

for damages is the appropriate remedy. For instance, murder is an act unauthorised by law, and it may inflict most cruel and particular damage on the family of the murdered man; but, nevertheless, that gives them no civil remedy against the murderer. So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society. So a breach of trust, although certainly an act unauthorised by law, and usually followed by private and particular loss to the beneficiaries, does not fall within the class of civil injuries remediable by an action for damages, and therefore cannot properly be said to constitute a tort. It would appear that since the abolition of the action of *crim. con.* the same remarks apply to adultery, and consequently that subject is omitted from this work.

Canadian Cases.

that the defendants corrupted and injured the water of the Bay of Toronto, whereby his distillery adjoining the defendant's premises was injured.

The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient. The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated, as it arises from the subsequent use of the work and not its construction, and is an inconvenience common to the public generally. The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner. Where there is a remedy by indictment, mere inconvenience to an individual or loss of trade or business is not the subject of compensation (*R.* v. *McArthur*, 34 S. C. R. 570).

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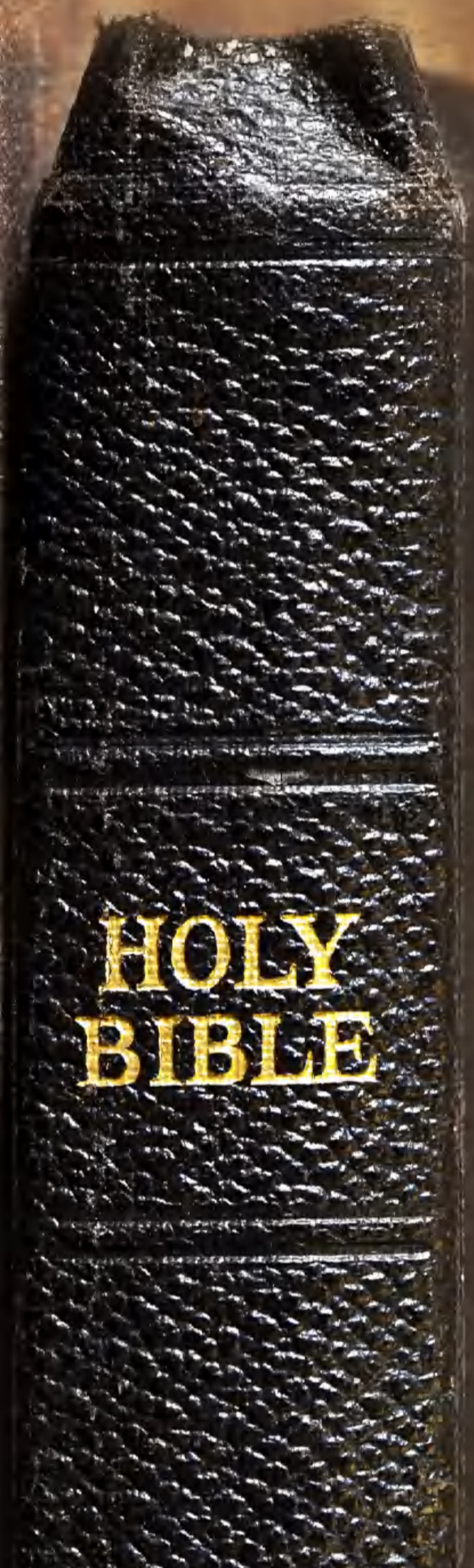

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Art. 1.

doing an act authorised by law, namely, building upon their own land (*Butt* v. *Imperial Gas Co.*, L. R. 2 Ch. App. 158). Although, therefore, the element of substantial damage is present, the element of an unauthorised act is not; it is a case of *dammum absque injuriâ*, and no tort is committed (see also *Street* v. *Union Bank, etc.*, 33 W. R. 901).[6]

(3) So where a landowner by working his mines caused a subsidence of his surface, in consequence of which the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal mine, it

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Canadian Cases.

[6] W. was owner and occupier of a house in Portland situate several feet back from the street with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house, and his wife in going down these planks in the necessary course of her daily avocations slipped and fell, receiving severe injuries. She had used the planks before and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received, it was *held*, affirming the judgment of the Supreme Court of New Brunswick, that the corporation, having authority to do the work, and it not being shown that it was negligently or improperly done, the city was not liable. *Held* also that the wife of W. was guilty of contributory negligence in using the planks as she did, knowing that such use was dangerous (*Williams* v. *City of Portland*, 19 S. C. R. 159. See *The Mayor of St. John* v. *Pattison*, *Cassel's Digest*, 96, and *City of St. John* v. *Christie*, 21 S. C. R. 1).

was held that the owner of the latter could sustain no action. For the right to work mines is a right of property, which, when duly exercised, begets no responsibility. The damage suffered by the adjacent owner was therefore a *damnum absque injuriâ* (*Wilson* v. *Waddell*, 2 App. Cas. 95).

Injuriâ sine damno.

(4) A legally qualified voter duly tenders his vote to the returning officer, who wrongly refuses to register it. The candidate for whom the vote was tendered gains the seat, and no loss whatever, either in money, comfort, or health, is suffered by the rejected voter; yet his absolute right to vote at the election is infringed, and that by an unauthorised act of the returning officer, and hence we have the two elements sufficient to support an action of tort (*Ashby* v. *White*, 1 Sm. L. C. 251). This is an instance of *injuriâ sine damno.*

Infringement of public right.

(5) A man erects an obstruction in a public way. The plaintiff is delayed on several occasions in passing along it, being obliged, in common with everyone else who attempts to use the road, either to pursue his journey by a less direct route, or else remove the obstruction. He, nevertheless, cannot maintain an action; because, although the element of an unauthorised or unlawful act on the part of the defendant is present, yet there is no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbotham* v. *Lord Derby*, L. R. 2 Ex. 316).[7]

(6) The defendant leaves an unfenced hole upon premises adjoining a highway. The plaintiff, in passing along the highway at night, falls into the hole, and is

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Canadian Cases.

[7] *Soule* v. *Grand Trunk Railway Co.*, 21 U. C. C. P. 308 *Baird* v. *Wilson*, 22 U. C. C. P. 491.

Art. 1.

injured. Here both elements of a tort are present; for the law does not authorise the leaving of an unfenced hole adjacent to a highway, and likely to be a danger to persons lawfully using it, and the plaintiff clearly suffers a special and substantial damage beyond that suffered by the rest of the public, and accordingly he can recover damages (*Hadley* v. *Taylor*, L. R. 1 C. P. 53).[8]

Canadian Cases.

[8] The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff walking along the road and crossing the railway fell into this culvert and was injured. It was *held* that the company was liable; for their duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness; and in substituting this open culvert, which they could readily have covered, for the former ditch, they had unnecessarily made it more dangerous (*Fairbank* v. *G. W. R. Co.*, 35 U. C. R. 523).

A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway; such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe (*Badams* v. *City of Toronto*, 24 O. A. R. 8).

A municipal corporation is not responsible for

Art. 1.

(7) The plaintiff kept a coffee-house in a narrow street. The defendants were auctioneers, carrying on an extensive business in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from their vans. The vans intercepted the light from the plaintiff's coffee-house to such an extent that he was obliged to burn gas nearly all day, and access to his shop was obstructed, and the smell from the horses' manure made the house uncomfortable. Here there was an unauthorised state of facts constituting a public nuisance, but there was also a direct and substantial private and particular damage to the plaintiff, beyond that suffered by the rest of the public, so as to entitle him to maintain an action (*Benjamin* v. *Storr*, L. R. 9 C. P. 400).[9]

Infringement of qualified rights.

(8) A person is guilty of negligence, or violence, whereby the plaintiff's servant is injured, and incapacitated from performing his usual duties. Here the loss of service is a substantial deprivation of comfort

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Canadian Cases.

damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible (*O'Neil* v. *Windham*, 24 O. A. R. 341).

[9] The plaintiff was the owner of an inn at the side of a much frequented highway leading to a ferry. The defendant by building across and blocking up the highway committed a public wrong. It was held that by this act the plaintiff had sustained special damage. Per Robinson, C.J., "Whoever suffers more than others by the public wrong may sue for the damage or inconvenience" (*Drew* v. *Baby*, 1 U. C. R. 438; and *ante*, p. 13 *et seq*).

Art. 1.

sufficient to give the plaintiff a right of action (*Berringer* v. *Great Eastern Rail. Co.*, 4 C. P. D. 163). There is, however, a curious exception to this, viz., that where the servant is killed on the spot, no action lies by the master (*Osborn* v. *Gillett*, L. R. 8 Ex. 88).

Art. 2.—*Classification of unauthorised Acts or Omissions constituting one element of a Tort.*

Acts unauthorised by law, and which, when coupled with the invasion of a right or the infliction of substantial damage, constitute a tort, may be conveniently divided into the following classes, viz. :

(a Acts without legal justification directly infringing another's private rights.

(b) Negligent acts or omissions ;

(c) Acts or omissions in relation to the user of property or otherwise not directly infringing another's private rights and independent of negligence.

Examination of rule.

In the words of Pratt, C.J., "torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief" (see *Chapman* v. *Pickersgill*, 2 Wils. 146). It is, therefore, hopeless to attempt any definition of what constitutes an unauthorised act or omission, upon which an action for tort may be founded; but, broadly speaking, the above classification may, perhaps, give the student some standard by which to measure particular cases.

Class (a) requires some explanation, because it is the one class where, at first sight, the unauthorised act and

the consequent injury appear to be inseparable. And no doubt the same *act* does often constitute both elements of a tort, as, for instance, where one beats another, the act of beating is *primâ facie* both an unauthorised act and an invasion of a right. It is not, however, necessarily so, for suppose the beating is administered by the order of a court having jurisdiction to inflict "the cat," there the beating is not an unauthorised act, although it is an interference with the general right of the subject to immunity from battery. Consequently, although the same act may, and often does, of itself combine both elements of a tort, it is divisible, for the purposes of legal analysis, into the two elements which must co-exist if the act is actionable. In all such cases we must ask ourselves the questions, (1) Is the act one which is unauthorised? and (2) Is it an act which if unauthorised violates a legal right? This class embraces all those unauthorised violations of the rights of person and property conferred by law on every member of the community, including assault and battery, false imprisonment, trespass on and dispossession of lands, trespass to and conversion of personal property, and deceit. It also embraces invasions of a man's right to his reputation, and to security from molestation in his business and domestic relations, and security from being improperly harassed by legal proceedings. This last group includes defamation, seduction, malicious prosecution, maintenance, and actions for procuring breaches of contract.

Class (b) comprises all actions for breach of the duty to take care.

Class (c) includes all misuser of property coming within the maxim "*sic utere tuo ut alienum non ledas.*"

Generally, the classification above attempted makes no pretence to scientific accuracy. Some of the classes may, and doubtless do, overlap one another. All that is attempted is to give the student a rough idea of the

Art. 2. various kinds of unauthorised acts or omissions, which may constitute the first element of a tort, and in the absence of which no amount of loss or damage will suffice to give a right of action.

ART. 3.—*Of Volition and Intention in relation to the unauthorised Act or Omission.*

(1) The unauthorised act or omission must be attributable to active or passive volition on the part of the party to be charged, otherwise it will not constitute an element of a tort (see *Wear Commissioners* v. *Adamson*, 1 Q. B. D. 546).[10]

Canadian Cases.

[10] "I have no doubt whatever on the abstract proposition that trespass would lie. It is enough to quote the language of two cases, *McLaughlin* v. *Pryor* (4 M. & G. 48) and *Sharrod* v. *The London and North Western Railway Co.* (4 Ex. 580). In the former, Tindal, C.J., says: 'The enquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any enquiry into the immediate intention is quite unnecessary.' And in the latter, Parke, B., observes: 'The law is well established that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass'" (*Anderson* v. *Stiver*, 26 U. C. R. 528—Draper, C.J.).

Slander of title, *Ashford* v. *Choate*, 20 U. C. C. P. 471; *Cousins* v. *Merrill*, 16 U. C. C. P. 114; *Boulton et al.* v. *Shields*, 3 U. C. R. 21. And see note [1], *post*, p. 202.

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Art. 3.

omission from which the damage to the plaintiff arose. No doubt the butcher never intended to hurt the plaintiff, nor did he voluntarily cause the horse to run away; but having once voluntarily omitted to take a precaution which the law required of him, the fact that he did not foresee, and from past experience had no reason to apprehend the result, affords no excuse.

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft was an unauthorised omission, and the fall of the plaintiff was the probable consequence of it (*Indermaur* v. *Dames*, L. R. 2 C. P. 311;[12] *White* v. *France*, 2 C. P. D. 308).

Canadian Cases.

while he was drinking or idling in a tavern (which we have often seen), and the horses had run away, and committed an injury to some one, in such case the right to recover would be clear: but here the question was whether the defendants' driver was driving negligently or unskilfully when he upset his sleigh (which really was not charged in the record though it was intended to be), and so from his carelessness his horses got away from him, I told them, if they looked upon it as an accident not fairly imputable to negligence or want of skill, they should find for the defendants" (*Robinson* v. *Blitcher*, 15 U. C. R. 160—Robinson, C.J.).

"In a case of collision between two vessels the owner of the vessel not in fault may recover the value of goods on board, not owned by him but in his custody as a carrier" (*Irving* v. *Hagarman*, 22 U. C. R. 545).

[12] A person entering upon premises on the

Art. 3.

(3) The defendants, a burial board, planted on their own land, and about four feet distant from their boundary railings, a yew tree, *which grew through and beyond the railings, so as to project over plaintiff's meadow*. The plaintiff's horse, feeding in the meadow, ate of that portion of the tree which projected, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants:—*Held*, that the

Canadian Cases.

express or implied invitation o he occupant is entitled to assume that they will be in reasonably safe condition, but one who visits them for his own purposes and without the knowledge of the occupant, does so at his own peril.

The superintendent of a coal company, before the time arranged for delivery, without the knowledge of the defendants, went to a school house to look at the coal bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar. *Held*, reversing the judgment at the trial, that he could not recover damages (*Rogers* v. *Toronto Public School Board*, 23 O. A. R. 597).

"It is clear law that a person going upon business which concerns the defendant, and upon his invitation express or implied, using reasonable care on his own part, for his own safety, is entitled to expect that the occupier of the premises shall on his own part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know, exists. Assuming that the defendants may, for the present argument, be looked upon as the occupiers, how can they be considered as having extended an invitation to the deceased to visit the premises on this occasion?" (*Ibid.*—Burton, J.A. 599).

Art. 3.

defendants were liable (*Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5).[13]

(4) On the other hand, where a horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and knocked down the plaintiff, it was held that the defendant was not liable, as the accident was not attributable to any wrongful act or negligence of the defendant or his servant (*Manzoni* v. *Douglas*, 6 Q. B. D. 145).[14]

(5) So, too, where a man accidentally shot another without intending to do so, and without being guilty of any negligence or want of care in the use of his gun, it was held that no action would lie (*Stanley* v. *Powell*, [1891] 1 Q. B. 86).[15]

Canadian Cases.

[13] "A person may be on the highway passing along, with the intention of committing a highway robbery a little way off; but if he fell into an excavation which some person or body was liable for leaving in that state, and was injured before he committed the robbery, I imagine there is no doubt he would be entitled to recover damages for the injury he had sustained, although he contemplated committing a felony" (*Denny* v. *Montreal Telegraph Co.*, 42 U. C. R. 596, Wilson, J.; *Curry* v. *Canadian Pacific R. W. Co.*, 17 O. R. 71).

[14] *Crawford* v. *Upper*, 16 O. A. R. 440; and *post*, p. 403.

[15] It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let go the reins while he alights from the vehicle to fasten a head-weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not

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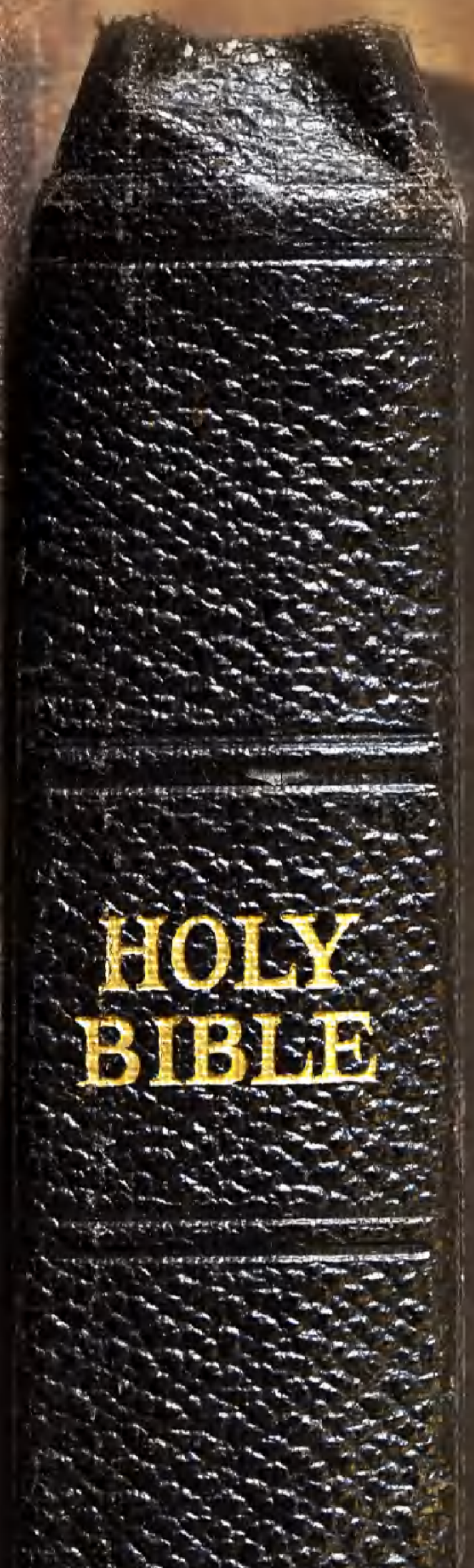

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Art. 1.

defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, and that the rainfall was most excessive, and amounted to a *vis major* or visitation of God. Under these circumstances, it was held that no action was maintainable.

Box v. *Jubb.*

(7) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; for the overflow was not caused by anything which he had done, nor had he any reasonable means of preventing it. As POLLOCK, B., said: "Here this water has not been accumulated by the defendants, but has come from elsewhere and added to that which was properly and safely there. For this the defendants . . . cannot be held liable" (*Box* v. *Jubb*, 4 Ex. D. 76).

Rylands v. *Fletcher.*

(8) The last cited cases must be carefully distinguished from the well-known leading case of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330),[17] the facts of which were as follows:

Canadian Cases.

[17] The leading case in the Ontario Courts on the subject of fires kindled for the purpose of clearing land, or for a purpose necessary in the ordinary use and enjoyment of land, is *Dean* v. *McCarty*, 2 U. C. R. 448, *post*, pp. 34 and 35. (See also *Buchanan* v. *Young*, 23 U. C. C. P. 101; and *Gillson* v. *North Grey R. W. Co.*, 33 U. C. R. 128, and 35 U. C. R. 475; and *post*, p. 35).

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, he is not responsible for damage occasioned by it. But where the defendant, while harvesting in his own field, threw upon the ground a lighted match

Art. 3.

The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and *employed competent persons* to construct it, so that there was no question of negligence. The plaintiff had worked his mines up to a

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Canadian Cases.

thinking he had extinguished it, which, however, set fire to combustible material, and the defendant, on afterwards discovering it, though he could easily have put it out, after confining it to one spot, left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises and destroyed his barn, the Court considered that the principle and doctrine established in *Fletcher* v. *Rylands* applied, and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence (*Furlong* v. *Carroll*, 7 O. A. R. 145).

"In the absence of legislative authority for the use of fire, the common law liability for damage done exists" (*Ibid.*—Patterson, J.A. 165).

The statute 14 Geo. 3, c. 78, s. 86, which exonerates any person in whose house, &c., a fire accidentally begins from all liability, does not apply where the cause of the fire is negligence (*Canada Southern R. W. Co.* v. *Phelps*, 14 S. C. R. 132, and *post*, p. 33).

Where a person uses fire in his field in a customary way for the purposes of agriculture or other industrial purposes, he is not liable for damages arising from the escape of the fire to other lands, unless the escape is due to his negligence (*Furlong* v. *Carroll*, 7 O. A. R. followed; *Owens* v. *Burgess*, 11 M. R. 75; *Booth* v. *Moffatt*, *ibid.* 25; *Chaz* v. *Cisterciens Réformes*, 12 M. R. 330; *Beaton* v. *Springer*, 24 O. A. R. 297).

Art. 3.

spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. It was contended on behalf of the defendant that there was no negligence on his part, and that, if he were held liable, it would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously, whereas, he argued, knowledge of possible mischief was the very essence of the liability incurred by occasioning it. The House of Lords, however, held the defendant to be liable on the ground that "a person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* responsible for all the damage which is the natural consequence of its escape." It therefore appears that the act which was not authorised by law was *the allowing the water to escape*, and whether this was the result of negligence, or whether it was the *result of a latent and undiscovered defect in the engineering works*, was quite immaterial. The escape of the water was caused by something of which the defendant was *ignorant*, not by something altogether beyond his control or volition, like a visitation of Providence or the act of a stranger over whom he has no control, and which he could not reasonably have anticipated. As MELLISH, L.J., said in *Nichols* v. *Marsland* (2 Ex. D. at p. 5): "If, indeed the damages were caused by the act of the party *without more*—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* establishes that he must be

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Art. 3.

The rule to be derived from these cases is, therefore, that a person who brings on to his land a thing of a dangerous nature, which if it escapes is likely to do damage, does it *at his peril*, and is liable for the consequences whether he is negligent or not (*Rylands* v. *Fletcher*), unless he can show that he took all reasonable precautions, but that the thing escaped by reason of the happening of some natural event which he could not reasonably have been expected to provide against (*Nichols* v. *Marsland*), or by reason of the interference of some third person over whom he had no control, and whose interference he could not reasonably have anticipated (*Box* v. *Jubb*).[19]

Canadian Cases.

himself by showing either that the escape was owing to the plaintiff's fault or was the consequence of a *vis major*, or the act of God." And again, at p. 164, "Unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorises the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute" (and *Canada Atlantic* v. *Moxley*, 15 S. C. R. 145. The following cases refer to liability for omission to whistle at railway crossings: *Weir* v. *Canadian Pacific R. W. Co.*, 16 O. A. R. 100; *Peart* v. *Grand Trunk R. W. Co.*, 10 A. R. 191; *Blake* v. *Canadian Pacific R. W. Co.*, 17 O. R. 177; *Johnson* v. *Grand Trunk R. W. Co.*, 21 O. A. R. 408; and see *post*, 55, *Sibbald* v. *Grand Trunk R. W. Co.*, 20 S. C. R. 259; *Henderson* v. *Canada Atlantic Railway*, 25 O. A. R. 437).

[19] A person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks

(9) A person wrongfully threw a squib on to a stall, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away,

Art. 3.

Causa causans.

Canadian Cases.

for any injurious consequences that may ensue to the property of his neighbours (*Dean* v. *McCarty*, 2 U. C. R. 448, *ante*, p. 30).

"It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, '*Sic utere tuo ut alienum non lædas*,' but this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain injury to his neighbours; or, for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply for his own purposes, but he must not so use it as to diminish the value of the stream to his neighbour, unless he has a prescriptive right. But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under risks to which parties would then be exposed. In such cases the question for the jury is one of negligence. In this case the objection taken is the broad one that the defendant must be liable, at all events, a doctrine which cannot be maintained" (*Ibid.*—Robinson, C.J.).

A proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence (*Dean* v. *McCarty*, 2 U. C. R. 448, followed; *Gillson* v. *North Grey Railway Co.*, 35 U. C. R. 475).

Art. 3.

and, finally exploding, blinded the plaintiff. The liability of the persons who threw it away from their stalls in self-defence was not the question before the court, but a dictum of De Grey, C.J., is a good illustration of the rule. He said: "It has been urged that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*Scott* v. *Shepherd*, 2 W. Bl. 894). The first illustration to Art. 1 (*supra*) is another example of the rule that a person acting under the influence of pressing danger is not a voluntary agent.[20]

Canadian Cases.

Where the necessary and unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill-dam) is to produce an injury to his neighbour, an action lies for such injury; but it is otherwise if such an act *per se* would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. In such case *negligence* must be proved to render a defendant liable (*Peters* v. *Devinney*, 6 U. C. C. P. 389; and see *Dean* v. *McCarty*, *ante*, p. 35; *Mills* v. *Dixon*, 4 U. C. C. P. 222).

[20] Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger, in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the dangerous situation is responsible in damages (*Anderson* v. *Northern R. W. Co.*, 25 U. C. C. P. 301, distinguished and questioned; *Town of Prescot* v. *Connell*, 22 S. C. R. 147).

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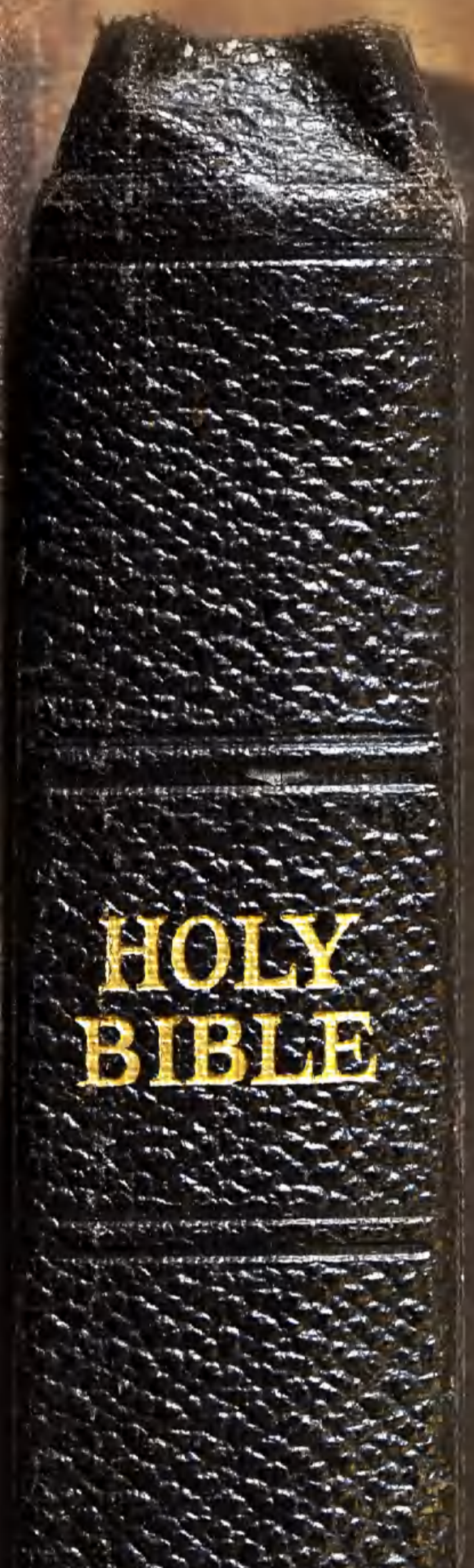

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Art. 4.

wrongful act done intentionally without just cause or excuse" (*per* BAYLEY, J., in *Bromage* v. *Prosser*, 4 B. & C. 247, 255).

It is true to say of some acts that they are not tortious unless done maliciously, provided that the term "maliciously" is used in its strict legal sense. Thus, it is not actionable to make an untrue statement if it is believed to be true; but if a person intentionally and without just cause or excuse makes an untrue statement, intending that another shall act upon it (*i.e.*, maliciously), his act is wrongful, and is actionable if it results in damage. So, too, if A. intentionally and without just cause or excuse induce B. to break his contract of service with C., and damage results, A. commits a tort and may be sued by C.; and it is immaterial whether in either of the examples the person is influenced by good or bad motives. A. in the last example may honestly think he is acting in the best interests of B. and C. His motive is then good; there is no "malice" in the sense of ill-will; but the act is malicious in the sense in which the term is used by BAYLEY, J. It is only in this sense of the term that a conspiracy must be malicious in order to be actionable.

Conversely, if A. induces B. not to enter into a contract of service with C., A. commits no wrong, and C. has no cause of action however much damage he may suffer, and although A. may be acting from the most wicked and selfish motives (*Allen* v. *Flood*, [1898] A. C. 1. See especially the opinion of Lord HERSCHELL, at p. 124); for A.'s evil motive does not make wrongful his act, which, apart from motive, is not a tort.

Malicious prosecution and libel.

The one kind of action in which evil motive is a necessary ingredient is malicious prosecution, including malicious arrest and maliciously taking proceedings in bankruptcy and liquidation, and there is an apparent exception in the case of libel and slander. As to these

Lord HERSCHELL says (in *Allen* v. *Flood*, [1898] A. C., at p. 125): "Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient. I have always understood, and I think that has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is *primâ facie* wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander."

Art. 4.

Moral turpitude.

As evil motive has generally no place in the law of torts, so, too, the moral turpitude of the defendant is generally immaterial. In the case of torts which consist of infringements of absolute rights, trespass, and the like, a person may be guilty of a tort though he act perfectly honestly and innocently, *bonâ fide* believing that he has a right to do what he is doing. Thus, if I walk over another man's land in the honest but mistaken belief that I have a right to do so by reason of there being a public way over the land, or acquire, by purchase from A., B.'s goods, honestly believing they are A.'s, in each case I am guilty of a tort. My good intentions or the fact that I have made a mistake are no defence.

So, too, in libel, a man who (except on a privileged occasion) publishes a false defamatory statement of another, is guilty of a tort, although he may do it from the most praiseworthy motives and in the honest belief that the statement is true and that it is for the good of the defendant that it should be published.

Even negligence involves no moral guilt. The state of mind of the defendant is immaterial. The only question is, What has he done or left undone? Has he acted as a reasonable and prudent man would do in the circumstances? Not, has he done what he thought was the best thing to do? The law pays no regard to the moral culpability of the defendant, but considers only whether his conduct has been reasonable and prudent as judged from the standpoint of the average man.

Fraud.

It is said, indeed, that in order to constitute fraud there must be some moral turpitude; and in a sense this is true. Actionable fraud consists in the making of an untrue statement with the intention of deceiving and with knowledge that it is untrue or absolutely recklessly without caring whether it is true or untrue. The man who does this is no doubt in most cases morally guilty; but it is conceivable that a man may, from the highest

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Art. 5.

over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in an action brought in respect of this damage, Bovill, C.J., said: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom"; but "where there is no reason to expect it, and no knowledge in the person doing the wrongful act, that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. Can it then be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage (for which the defendant is not responsible), no damage would have been done." And accordingly judgment was given in favour of the defendant (*Sharp* v. *Powell*, L. R. 7 C. P. 258).[21]

Canadian Cases.

[21] The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise

(2) But where water, which had trickled down from a waste-pipe at a railway station on to the platform, had

Art. 5.

Canadian Cases.

his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages. *Held*, that the damages were not too remote (*McKelvin* v. *City of London*, 22 O. R. 70).

"I am unable to adopt the view that *Lazarus* v. *The Corporation of Toronto*, 19 U. C. R. 9, precluded the Court in the present case from leaving the question of negligence to the jury. There is an element of negligence in this case that there was not in that, that is to say, the notification by the policeman to the defendant to have the snow removed from the roof. This notification under the bye-law was an intimation that the snow was then in a dangerous condition, and assuming the notification was in fact given, which was a question for the jury and not for the Court, the neglect to remove the snow entailed, in my opinion, as much liability on the defendant as there would have been if he had been told that there was a loose stone or brick in the cornice or wall that was likely to fall and endanger those passing below; and it is clear in such case the jury would have to decide whether the defendant had been negligent or not. The language of the judges in giving their opinions in *Lazarus* v. *Corporation of Toronto* does undoubtedly go the length contended for by the defendant, that a liability does not exist at common law for an accident happening by the falling of snow from the roof of a house, without evidence of some construction of the roof that would be likely to cause the precipitation of the snow more dangerously than an ordinary construction would do" (*Landreville* v. *Gouin*, 6 O. R. 459.—Cameron, C.J., and see *Atkinson* v. *Grand Trunk R. W. Co.*, 17 O. R.

Art. 5.

become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured, the court held the defendants liable, on the ground, probably, that the non-removal of a *dangerous nuisance*, like ice, from their premises, was the proximate cause of the injury (*Shepherd* v. *Midland Rail. Co., cited by plaintiff arguendo; Sharp* v. *Powell, supra*).[22]

Art. 6.—*Where Damage would have been suffered in the absence of unauthorised Act or Omission.*

Where the elements of a tort are present, the fact that similar damages would have been suffered by the plaintiff, even if the wrongful act or omission had not been done or made by the defendant, does not excuse the latter. It is, however, open to him to show, if he can, that there is a substantial *and ascertainable* portion of the damages fairly to be attributed *solely* to the other circumstances, and in that case he is entitled to a proper deduction in that respect (see *Nitro-Phosphate Co.* v. *London and St. Katharine Docks Co.*, 9 Ch. D. 503).

Illustrations.

Thus, where it was the duty of the defendants to keep a river wall at a height of four feet two inches above Trinity high-water mark, and they only kept it at a height of four feet, and an extraordinary tide rose four

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Canadian Cases.

220; *Gordon* v. *City of Victoria*, 5 B. C. Reps. 553, and *Skelton et ux.* v. *Thompson et al.*, 3 O. R. 11).

[22] *Durochie* v. *Town of Cornwall*, 23 O. R. 355, and *post*, p. 77.

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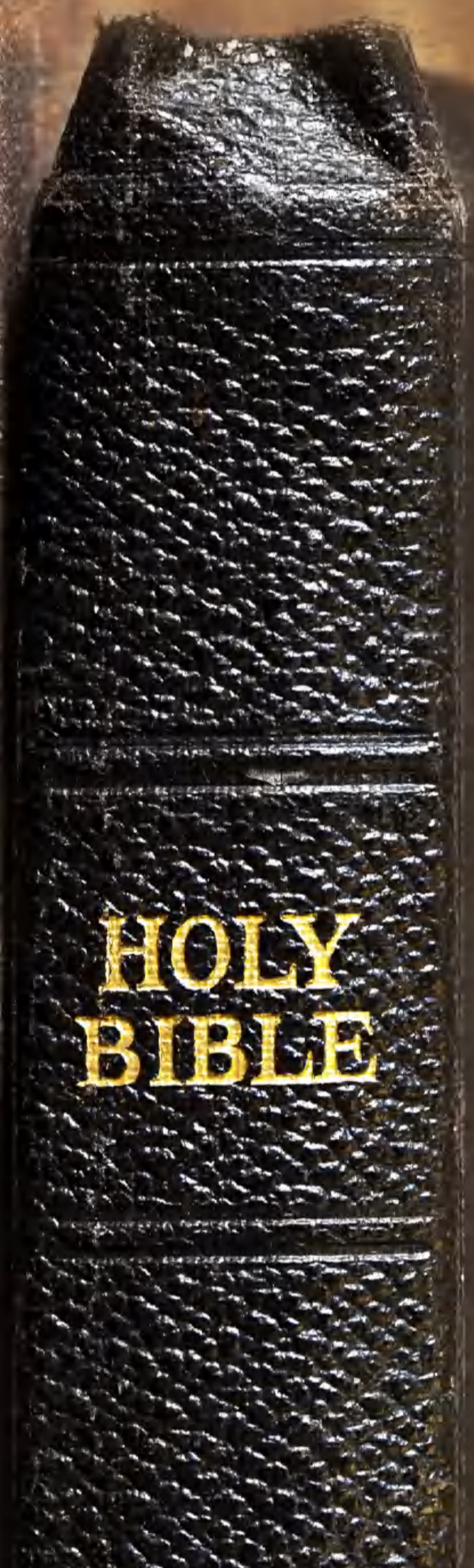

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Art. 7.

ART. 7.—*To what Extent Civil Remedy interfered with where the unauthorised Act or Omission constitutes a Felony.*[23]

(1) Where any unauthorised act or omission is, or gives rise to consequences which make it, a felony, and it also violates a private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2) But (*semble*) the policy of the law will not allow the person injured to seek civil redress, if *he* has failed in his duty of bringing, or endeavouring to bring, the felon to justice.

Canadian Cases.

[23] An action for seduction will not lie where the defendant had connection with the seduced against her will (*Vincent* v. *Sprague*, 3 U. C. R. 283).

"It is a clear principle of law that, whenever in a civil action for seduction, it turns out upon the trial that the act complained of was not merely a trespass but a felony, it is proper to direct an acquittal, for the civil injury merges in the higher offence, and the policy of the law is that the party wronged must first bring the offender to justice for the crime before he seeks compensation to himself by a civil action for damages" (*Brown* v. *Dalby*, 7 U. C. R. 170.—Robinson, C.J.).

A conviction for assault is no bar to a civil action (*Clarke* v. *Rutherford*, 2 O. L. R. 206).

Art. 7.

(3) Where the offender has been brought to justice at the instance of some third person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or (?) by reason of his escape from the jurisdiction before a prosecution could by reasonable diligence have been commenced, the right of action is not suspended (*Per* BAGGALLAY, L.J., *Ex parte Ball, Re Shepherd*, 10 Ch. D. 673; and see *per* COCKBURN, C.J., *Wells* v. *Abrahams*, L. R. 7 Q. B. 557).

How to enforce the rule.

But although this would seem to be the rule, it is extremely doubtful how it can be enforced. It is no ground for the judge to direct a nonsuit (*Wells* v. *Abrahams, supra*). It cannot be raised by a summons to strike out the statement of claim (*Roope* v. *D'Avigdor*, 10 Q. B. D. 412); nor by pleading the felony in the defence, because the effect of that would be to allow a party to set up his own criminality. But it has been suggested, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked to stay the proceedings, which would involve an undue use, probably an abuse, of the process of the court (*Wells* v. *Abrahams, supra*).[24]

Canadian Cases.

[24] To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with felony, that the defendant was com-

Art. 7.

Opinion of BRAMWELL, L.J.

In *Ex parte Ball, Re Shepherd* (10 Ch. D. 667), BRAMWELL, L.J., said: "There is the judgment in *Ex parte Elliott* (3 Mont. & A. 110), besides the expressed opinion for centuries, that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways: 1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of the claim by, or at the instance of the felon, but that the court of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories.[25] That the first is not true is shown by *Marsh* v. *Keating* (1 Bing. N. C. 198), where it was held, that prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till after both. Till then, the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be

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Canadian Cases.

mitted for trial, which trial had not yet taken place. *Held*, that the civil right of action was suspended until the criminal charge was disposed of (*Taylor* v. *M'Cullough*, 8 O. R. 309).

[25] Where in an action for seduction the evidence shows that a rape was committed it is the duty of the judge in the interests of public justice to stop the case (*Walsh* v. *Nattrass*, 19 U. C. C. P. 453; *Williams* v. *Robinson*, 20 U. C. C. P. 255).

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Art. 7.

Unfortunately the point was not necessary for the decision in *Ex parte Ball*, and consequently the law still remains in a very hazy and unsatisfactory state, with regard to which it is impossible to express any opinion with confidence. However, the rule, as above expressed, has received the sanction of nearly three centuries; and although the criticisms of BRAMWELL, L.J., throw some doubt upon its accuracy, it must, I think, be taken to be law until it is expressly overruled.

In a recent case in Ireland a Divisional Court declined to stay of its own motion, without any application by the defendant, an action of assault on the ground that the assault amounted to a felony, and had not been prosecuted (*A.* v. *B.*, 24 L. R. Ir. 234; *S. C.*, *sub nom.*, *S.* v. *S.*, 16 Cox C. C. 566).

It must be observed that the rule only applies as against a plaintiff who has failed in *his duty* of endeavouring to bring the felon to justice, and not to third parties. Where, therefore, in an action for seduction of the plaintiff's daughter, a paragraph of the claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion; it was held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute (*Appleby* v. *Franklin*, 17 Q. B. D. 93; and see also *Osborn* v. *Gillett*, L. R. 8 Ex. 88).

And the rule does not apply where the defendant is not the person guilty of the felony. So, where A. had stolen goods, and B. has innocently bought them from A., the owner may bring an action of trover against B., although no steps have been taken to bring A. to justice (*White* v. *Spettigue*, 13 M. & W. 603).

Art. 7.

It is expressly provided by Lord Campbell's Act (see *post*, Part II., Chap. VII.), that actions for damages brought in respect of the death of any person under that Act, shall be maintainable "although the death shall have been caused under such circumstances as amount in law to felony."

CHAPTER II.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORISED ACT OR OMISSION IS ONE FORBIDDEN BY STATUTE.

ART. 8.—*General Rule.*

(1) When a statute gives *a right*, or *creates a duty*, in favour of an individual or class, then, if no penalty is attached, any infringement of the right or breach of the duty will be a tort remediable in the ordinary way (*Mersey Docks Co.* v. *Gibbs*, L. R. 1 H. L. 93).[26]

Canadian Cases.

[26] "It is now well settled that the statutory obligation to fence imposed upon these defendants by that act can only be taken advantage of by the adjoining proprietor or by one who is in occupation of the lands of such proprietor with his licence or consent" (*Daniels* v. *Grand Trunk R. W. Co.*, 11 O. A. R. 473—Osler, J.A. See also *M'Lennan* v. *Grand Trunk R. W. Co.*, 8 U. C. C. P. 411; *McIntosh* v. *Grand Trunk R. W. Co.*, 30 U. C. R. 601; *Douglass* v. *Grand Trunk R. W. Co.*, 5 O. A. R. 585; *McAlpine* v. *Grand Trunk R. W. Co.*, 38 U. C. R. 446; *Conway* v. *Canadian Pacific R. W. Co.*, 12 O. A. R. 708, and *McFie* v. *Canadian Pacific R. W. Co.*, *post*, p. 380, and see note 92, *post*, p. 146).

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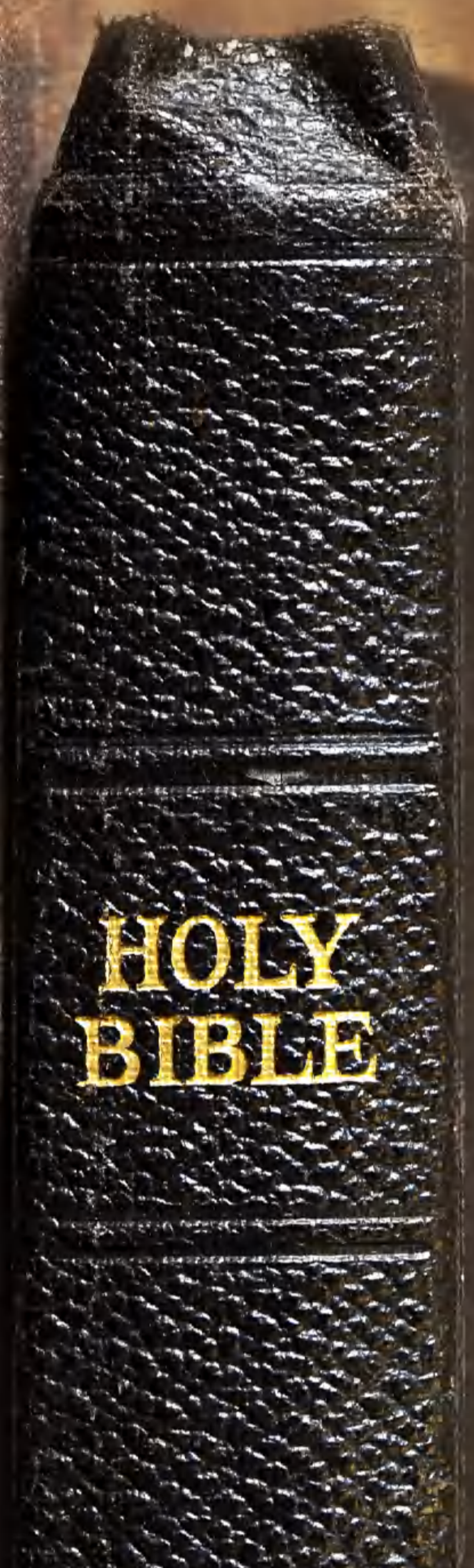

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Art. 8.

damages to the plaintiff (*Dormont* v. *Furness Rail. Co.*, 11 Q. B. D. 496).[27]

Rules in *Wolverhampton Waterworks Co.* v. *Hawkesford.*

(2) In *Wolverhampton Waterworks Co.* v. *Hawkesford* (28 L. J. C. P. 242) Willes, J., lays down the following rules for the construction of statutes giving remedies for statutory duties: "There are three classes of cases in which a liability may be created by statute. There is a class where there is a liability existing at common law, which is only re-enacted by the statute, with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . and with respect to that class it has been

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Canadian Cases.

[27] *Finlay* v. *Miscampble*, 20 O. R. 29; and *post*, 119.

The plaintiff, a conductor on the G. T. R., was injured while his train was crossing the track of the defendants' railway on a level by the defendants' train running into it. *Held*, defendants were liable (*Brown* v. *G. W. R.*, 2 Tuppers' Reps. in App. 64).

The statute [Consol. Stat. C. c. 66, now sec. 258 Railway Act, Canada, 1888] imposed an absolute duty on the defendants to stop for three minutes, their omission to do so rendered them liable to the plaintiff, unless it was shown to have been caused by the act of God or inevitable necessity, *idem*.

always held that the party must adopt the remedy given by the statute."[28] Art. 8.

Art. 9.—*Where the Act or Omission is forbidden to prevent a particular Mischief.*

Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person, who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action for damages in respect of such loss, *Gorris* v. *Scott*, L. R. 9 Ex. 125.[29]

(1) Thus, in the principal case, the defendant, a ship-owner, undertook to carry the plaintiff's sheep from a Illustrations.

Canadian Cases.

[28] Public corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere nonfeasance, unless the legislature has shown an intention to impose such liability upon them (*Pictou* v. *Geldert*, (1893) A. C. 524).

[29] "The provisions of the statute which require the railway company to blow the whistle or ring the bell when approaching a highway which it crosses apply only to persons travelling upon the highway so intersected upon the same level, and meeting with injury by actual collision, and not to persons passing over a bridge above the railway or upon the highway at a distance from the intersection, to whom the railway owes no duty" (*Lemay* v. *Canadian Pacific R. W. Co.*, 17 O. A. R. 300—Hagarty, C.J.O).

But the above provision does not release persons

Art. 9.

foreign port to England. On the voyage, some of the sheep were washed overboard. This would not have happened if the defendant had obeyed certain directions contained in an Order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869. It was, however, held that the object of the statute and order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiff could not recover (*Gorris* v. *Scott*, L. R. 9 Ex. 125).

(2) And so, where certain regulations were established by statute for the management of the pilchard fishery, and enforced by the imposition of penalties, it was held, that a fisherman who had lost his proper turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him for the loss of a valuable capture of fish, which the latter had taken, through being in such wrong place. For the object of the statute was to regulate the fishery, and not to give any individual fisherman a right to any particular place (*Stevens* v. *Jeacocke*, 11 Q. B. 741).[30]

Canadian Cases.

approaching and passing over level railway crossings from the exercise of ordinary care (*Miller* v. *Grand Trunk R. W. Co.*, 25 U. C. C. P. 389).

[30] *Fairbank* v. *Township of Yarmouth*, 24 O. A. R. 273; *Sibbald* v. *Grand Trunk R. W. Co.*, 20 S. C. R. 259, *post*, p. 155.

Defendant having been employed by a road company to furnish them with stones, by placing them on the road, accidentally caused the death of plaintiffs' servant and horse. On an application for a nonsuit, it was held that the defendant was personally liable for the damage done under

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Art. 10.

an action would have been maintainable at common law, and that the Locomotive Acts did not restrict

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Canadian Cases.

the defendants' servants in the management of the vessel or in the method of the construction of its boiler and smokestack. I confess myself unable to distinguish between a liability for an act of this kind between a highway on land and a highway on water; to exempt the parties using a dangerous article of this nature express legislative authority is required" (*Hilliard* v. *Thurston*, 9 O. A. R. pp. 523, 526—Burton, J.A.).

Under sect. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. As sect. 213 provides no punishment for the offence the common law punishment of a fine may be imposed on a corporation indicted under it (*Union Colliery Co.* v. *The Queen*, 7 B. C. Rep. 247, 31 S. C. R. 81).

The plaintiff and defendant, adjoining land owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height, which they were to build and keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on to the plaintiff's land, and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, from whence, by breaking down the plaintiff's fences, they got on to the plaintiff's land, and further damaged it. A township bye-law provided that no

the common law liability (*Powell* v. *Fall*, 5 Q. B. D. 597). **Art. 10.**

Canadian Cases.

fence should be less than five feet high, etc., and prohibited the running at large of all breachy cattle, *i.e.*, cattle known to throw down or leap over any fence four feet high, and provided for impounding them, etc.: *Held*, that the defendant was liable for the damages sustained by the plaintiff; and that such liability was not displaced by the bye-law (*Barber* v. *Cleave*, 1901, May 27, 2 O. L. R. 213).

CHAPTER III.

RELATION OF CONTRACT AND TORT.

ART. 11.—*Distinction Between Actions for Tort and for Breach of Contract.*

(1) If the cause of complaint is for breach of a contractual duty, (that is to say, is for an act or omission which would not give rise to any cause of action without proof of a contract), the action is one of contract.

(2) But if the relation of the plaintiff and the defendant be such that a duty arises from the relationship, irrespective of contract, for a breach of that duty the remedy is an action of tort. See *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944, *per* A. L. SMITH, L.J., at p. 947.[32]

ment. Formerly a plaintiff had to be careful to frame his action either in tort or in contract, and the rule then was

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Canadian Cases.

[32] When a defendant hiring a horse and waggon with seats for two persons places three therein, and the horse on the journey sickens and dies, he will be liable because of the misuser (*Casey* v. *Archibald*, 2 N. S. R. 4).

An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury

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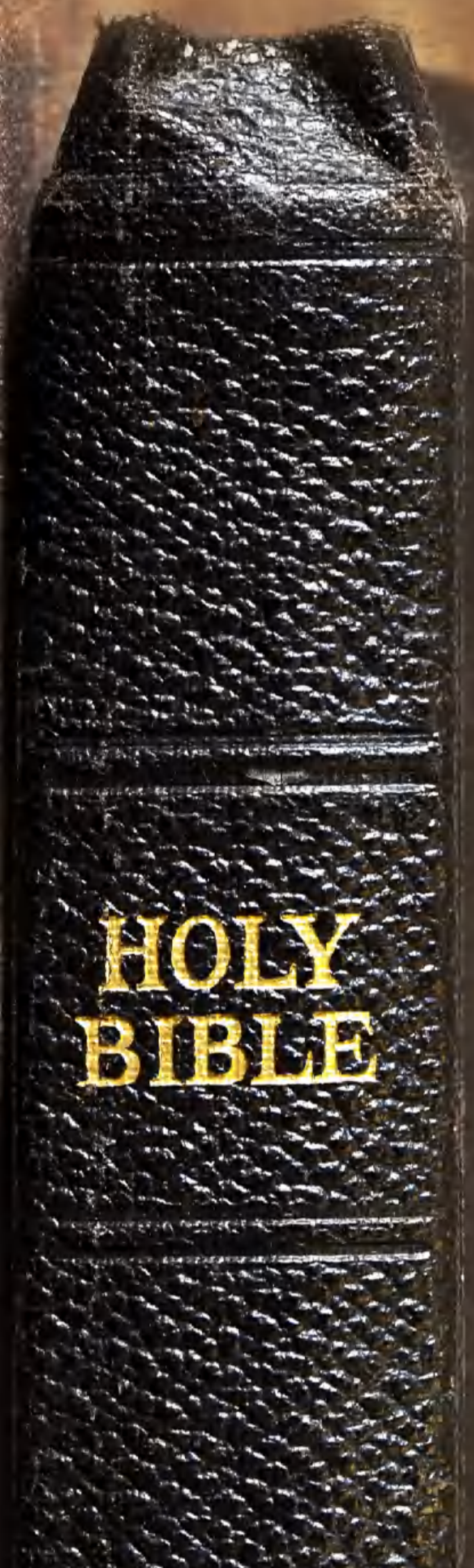

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Art. 11.

Illustrations.

(1) A railway company owes to a passenger, irrespective of any contract, a duty to take care. The taking of a ticket also constitutes a contract to carry. If the servants of the railway company are negligent, whether by acts of omission or by acts of commission, the cause of action is in substance a tort, being a breach of a duty arising irrespective of contract, although in form the action might be framed as a breach of contract (*Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134; *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q. B. 944).

(2) A person who takes in a horse under a contract of agistment, impliedly undertakes not to be negligent in respect of the horse. But as the agister is a bailee, the same duty to take care arises irrespective of the contract, and an action for not taking care is in substance an action of tort for negligence (*Turner* v. *Stallibrass*, [1898] 1 Q. B. 56). So in all cases of actions between bailor and bailee, if the duty arises out of the bailment at common law, a breach of that duty gives rise to an action for tort: but if the duty only arises out of a contract between the parties, and would not apart from such contract arise from the mere relationship of bailor and bailee, a breach of the duty is properly the subject of an action for breach of contract (*Ibid.*, at p. 60, *per* COLLINS, L.J.).

ART. 12.—*Privity not necessary where the Remedy is in Tort.*

When something done in pursuance of a contract between two persons gives rise to a relationship between one of them and a third person, such that the one owes a duty to the third person, irrespective of the contract, the

third person cannot sue on the contract because he is not privy to it, but he can sue in tort for breach of the duty arising, irrespective of the contract. Art. 12.

(1) A man employs a surgeon to attend his wife or his infant son. By reason of the surgeon's negligence, the patient is injured. There is a contract between the man who calls in the surgeon and the surgeon, but none between the surgeon and the patient. But irrespective of the contract, the surgeon owes a duty to take care by reason of the relationship of surgeon and patient. And for breach of this duty the patient can sue in tort (*Gladwell* v. *Steggall*, 5 Bing. N. C. 257; *Pippin* v. *Sheppard*, 11 Price, 400).[33] Illustrations.

Canadian Cases.

[33] An attorney is not liable to his client for omitting to take advantage of a dishonest defence (*Vail* v. *Duggan*, 7 U. C. R. 571). "I should be sorry to find it maintained in a court of justice, that an attorney was guilty of culpable negligence in not putting forward such a defence: he might well decline to do so, and as I think, safely, on the ground that it is not a part of his professional duty to take all dishonest advantages" (*Ibid.*—Robinson, C.J.).

An attorney is liable for negligence and plaintiff is entitled to nominal damages, even if grounds of special damages fail (*McLeod* v. *Boulton*, 3 U. C. R. 105).

"There can be no doubt that an attorney is liable for negligence in the discharge of his duty whereby his client has sustained damage, and I think an attorney is bound to bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the

Art. 12.

(2) A passenger by train lost his luggage by reason of the negligence of the company's servants. The passenger's fare had been paid by his master. There was accordingly no contract between the passenger and the railway company—nevertheless the company were as bailees bound to take care of the passenger's luggage, and for breach of that duty the passenger could sue in tort (*Marshall* v. *York and Newcastle Rail. Co.*, 11 C. B. 655).[34]

(3) A servant of the plaintiff took a ticket for a journey on the defendant's railway, and a portmanteau of his was accepted by the defendants as his personal luggage. The portmanteau contained his livery, which was the property of the plaintiff. By reason of the negligence of a porter in the employment of the defendants, the livery was destroyed. There was a contract between the servant and the railway company, but none between the plaintiff and the company. But the company owed the plaintiff a duty to take care by reason of their having accepted the portmanteau for carriage, and for breach of this duty the plaintiff could maintain an action of tort (*Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387).[35]

(4) A father bought a gun for the use of himself *and*

Canadian Cases.

business of his client" (*Hett* v. *Pun Pong*, 18 S. C. R. 292—Sir W. J. Ritchie, C.J.; *Carrigan* v. *Andrews*, N. B. R. 1 All. 485).

[34] The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall. It was *held* that the plaintiff might maintain an action therefor (*Walker* v. *Sharpe*, 31 U. C. R. 340).

[35] *McLean et al.* v. *The Buffalo and Lake Huron Railway Company*, 24 U. C. R. 270.

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Art. 12.

the builder's vendor. The certificates were inaccurate, and the mortgagees thereby suffered loss, for which they claimed compensation from the defendant:—*Held*, that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs, and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun or a poisonous hair-wash, and that on that ground the defendant was liable; but the court would not admit the analogy. Of course, however, if the certificate had been *fraudulent, i.e.*, issued with intent to deceive the plaintiff, then, independently of any contractual relation, the defendant would have been liable in an action of deceit.[38]

(7) So, too, when A. built a coach for the Postmaster-General, B. horsed it and hired C. to drive it, the coach broke down from a defect in its construction, and C. was consequently injured, it was held that A. *owed no duty to C. apart from contract*, therefore C. could not sue A. in tort. Nor, of course, could C. have sued A. in contract, as C. was no party to the contract between A. and B., and A. was no party to the contract between B. and C. (*Winterbottom* v. *Wright*, 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253).[39]

Canadian Cases.

[38] A husband is not entitled to damages for the personal injury and suffering of the wife as against a medical man who neglects to attend upon her according to contract (*Hunter* v. *Ogden*, 31 U. C. R. 132).

[39] The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N.B., entitled him to cross the St. John Harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John.

Art. 13.

Art. 13.—*Duties gratuitously undertaken.*

When a person gratuitously undertakes to perform any service for another, then although no action will lie for not performing the service (there being no consideration for the promise) yet an action will lie for negligence in the performance of it (*Coggs* v. *Bernard*, 1 Sm. L. C. 177).

A duty to take care may arise apart from any contract whatever, and for breach of that duty the remedy is an action of tort.

Illustrations.

(1) Thus, in *Coggs* v. *Bernard*, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got staved through his gross negligence. Upon these facts it was decided that the defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) Again, the defendants, the Metropolitan District Railway Company, had running powers over the South Western Railway between Hammersmith and the New Richmond Station of the South Western Company. Above the booking office at the Richmond Station were the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from

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Canadian Cases.

Held, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage (*Mayor of St. John* v. *MacDonald*, 14 S. C. R. 1).

Art. 13.

the clerk there employed by the South Western Company a return ticket to and from Hammersmith. The ticket was not headed with the name of either company, but bore on it the words "*viâ* District Railway." On his return journey from Hammersmith the plaintiff travelled with this ticket in a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond Station platform, the plaintiff, in alighting, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—*Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, *even assuming the ticket not to have been issued by or for them, but for the South Western Company* (*Foulkes* v. *Metropolitan District Rail. Co.*, 5 C. P. D. 157).

(3) In *Doorman* v. *Jenkins* (2 A. & E. 256), a keeper of a coffee house gratuitously undertook the custody of money for a customer. It was lost whilst in his care by his negligence. He was held liable in an action for breach of the duty to take care arising from his becoming bailee of the money.

(4) Where the plaintiff was invited by the defendants' servant to ride on an engine, and he did so for his own convenience, and was injured by the negligence of the defendants' servants, the defendants were held liable; as by gratuitously undertaking to carry the plaintiff, the defendants came under a duty to exercise care, and they were liable in an action of tort for breach of that duty (*Harris* v. *Perry & Co.*, [1903] 2 K. B. 219).

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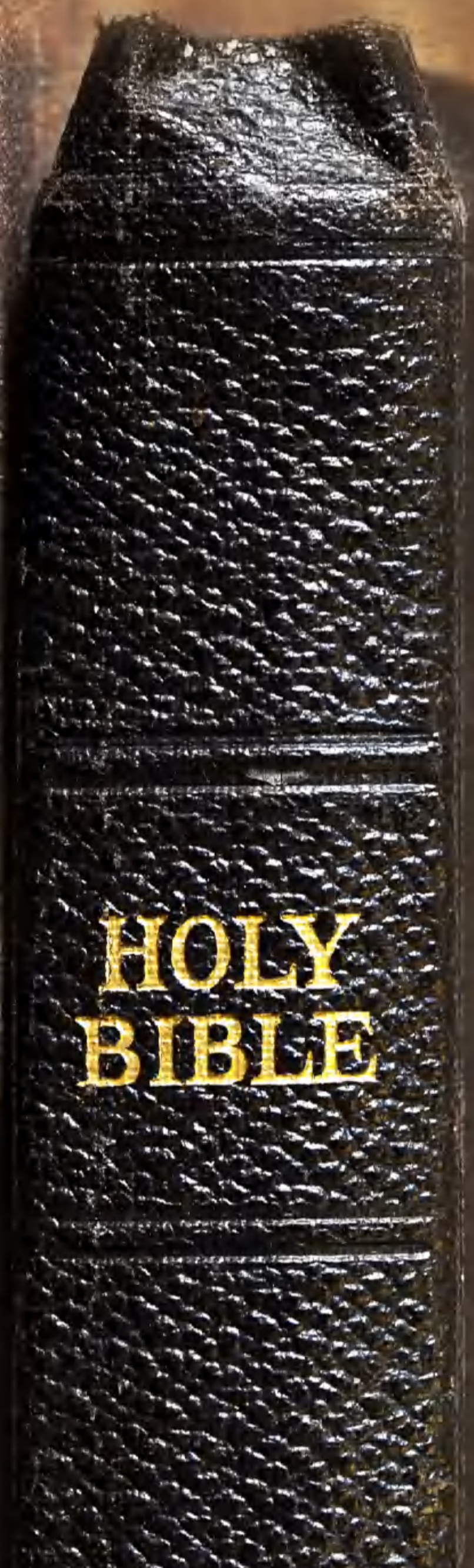

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Art. 14.

Illustrations.

(1) Thus, in the leading case of *Mostyn* v. *Fabrigas* (1 Sm. L. C. 628), it was held that an action lay in England against the governor of Minorca for a false imprisonment committed by him in Minorca, the plaintiff being a native Minorquin.

(2) So actions may be brought in this country against foreigners for injuries committed on the high seas (*Submarine Telegraph Co.* v. *Dickson*, 15 C. B. (N.S.) 759).

(3) On the other hand, where there was a collision between two ships in Belgian waters, and the owners of one of the ships were liable according to Belgian law, notwithstanding that the Belgian law imposed on them compulsory pilotage, it was held that no action could be maintained against them in our courts, which recognise the plea of compulsory pilotage as a good answer to an action for collision (*The Halley*, L. R. 2 P. C. 193, 204; and see also *The Guy Mannering*, 7 P. D. 52, 132; and *The Augusta*, 6 Asp. M. C. 58, 161).

(4) Conversely, where the governor of a colony had committed a tort according to our law, but was, by an act of the Colonial Legislature, discharged from responsibility in the colony, it was held that he could not be sued in England (*Phillips* v. *Eyre*, L. R. 4 Q. B. 225; 6 *ibid.*, 1).

(5) So an action will lie in this country for a libel contained in a pamphlet in the Portuguese language and published in Brazil, even though libel be not actionable in Brazil, provided it be not justifiable in Brazil, *i.e.*, it is enough if it be punishable in Brazil (*Machado* v. *Fontes*, [1897] 2 Q. B. 231).

(6) The English courts have no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad; injuries to proprietary rights in foreign real estate being outside their jurisdiction (see *British*

South African Co. v. *The Campanhia de Mocambique*, [1893] A. C. 602, where all the prior cases are examined).

(7) The case of *Morocco Bound, etc.* v. *Harris* ([1895] 1 Ch. 534), has given rise in some minds to the idea that torts committed abroad cannot be enforced in English courts. In that case, however, the alleged tort was infringement of copyright *in Germany*. The English law gave the plaintiffs no copyright in Germany, but only in England, and although the German law gave them copyright, the infringement of that was a tort according to German law but not according to English law. The case, therefore, does not comply with the conditions required by paragraph (a), *supra*.

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 15.—*Who may sue.*

(1) Every person may maintain an action for tort, except an alien enemy, and a convict during his incarceration (33 & 34 Vict. c. 23, ss. 8, 30).[40]

Canadian Cases.

[40] The executor of a deceased partner in trade is tenant in common with the surviving partners of the partnership property, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion against their will of the whole of the partnership property (*Strathy* v. *Crooks*, 2 U. C. R. 51).

Tenants in common cannot maintain trespass against each other (*Wemp* v. *Mormon et al.*, 2 U. C. R. 146).

"A man may become the absolute owner of a chattel by purchase without seeing the chattel, and without the performance of any visible act of receiving possession; and it is equally clear that such purchaser, without ever having had actual visible possession of the chattel, may bring trespass against anyone who wrongfully converts it or injures it. It is enough if he has the exclusive

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Art. 16.

coverture, or unsoundness of mind; except (1) the sovereign, (2) foreign sovereigns, and (3) ambassadors of foreign powers (see *Magdalena Co.* v. *Martin*, 28 L. J. Q. B. 310). But foreign sovereigns and ambassadors can waive their privilege (*Duke of Brunswick* v. *King of Hanover*, 6 Bea. 1).

(2) A corporation which commits a tort is as liable to be sued as a private individual would be, if the thing done or omitted is within the purpose for which the corporation exists; but otherwise the corporation is not liable, and its directors, servants, or other persons who authorise or commit the tort can alone be sued (*Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 93).

Illustrations.
Infants.

(1) Thus, if an infant hires a horse he is liable in an action of negligence for immoderately riding the horse, for, as bailee, he is bound to take care of the horse, and the breach of that duty is a tort (*Burnard* v. *Huggis*, 14

Canadian Cases.

slander; for in legal consideration it is an act which cannot be committed by several persons, and must be considered the separate *tort* of each person who spoke the words, and for which separate actions only can be brought. In the instance of written slander or libel, the law holds a different course, and permits the plaintiff to make all who participated, either openly or by secret instigation, in publishing the libel, joint defendants in the action" (*Brown* v. *Hirely*, 5 U. C. R. (O. S.) 734.—Sherwood, J.; and *post*, p. 228).

C. B. (N.S.) 45, followed in *Walley* v. *Holt*, 35 L. T. 631). But he would not be liable in an action of *contract* founded on the hiring (*Jennings* v. *Rundall*, 8 T. R. 335). Art. 16.

(2) But it may be that extreme youth may be a defence in an action of fraud; for as fraud depends, not upon acts or omissions simply, but upon acts done or omissions made with *intent to injure another*, it would seem to follow that extreme youth or lunacy *of such a character as would negative the existence of such intention* would probably be held a good defence (see *per* ESHER, M.R., in *Emmens* v. *Pottle*, 16 Q. B. D. at p. 356).

Lunatics.

(3) There is not much authority upon the liability of *lunatics* for their torts. Lord KENYON points out in *Haycroft* v. *Creasy* (2 East, p. 104),[42] the distinction between answering *civiliter et criminaliter* for acts injurious to others. "In the latter case the maxim applied *actus non facit reum nisi mens sit rea*, but it was otherwise in civil actions where the intent was immaterial if the act done were injurious to another." And no doubt a lunatic is generally liable in tort (see also *per* ESHER, M.R., in *Hanbury* v. *Hanbury*, 8 T. L. R. at p. 560).

Corporations.

(4) With regard to corporations, of course actions of tort can of necessity only arise for acts or omissions of their servants or directors, and the difficulty in such cases is the same as arises in other cases of the responsibility of a principal for the acts of his agent, viz., the

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Canadian Cases.

[42] A lunatic is civilly liable in damages to persons injured by his acts, unless utterly blameless. Where a lunatic defendant had set fire to a barn, and the evidence showed that, while not responsible to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong, *Held*, that he was liable for the damage done (*Stanley* v. *Hayes*, 8 O. L. R. 81).

Art. 16.

difficulty of determining whether or not the act or omission complained of was within the scope of the general authority or duty of such servant or director (see Chapter on Principal and Agent).

It was long doubtful whether a corporation aggregate could be sued in an action of malicious prosecution. It was thought that a corporation, having no mind, could not act maliciously (see Lord BRAMWELL's opinion in *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247). But it is now settled that a corporation may be made liable for malicious prosecution if in instituting the proceedings it is actuated by motives which in an individual would be malice (*Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392, following *Edwards* v. *Midland Rail. Co.*, 6 Q. B. D. 287).[43]

Canadian Cases.

[43] *Freeborn* v. *The Singer Sewing Machine Co.*, 2 Manitoba L. R. 253; *Wilson* v. *The City of Winnipeg*, 4 Manitoba L. R. 193; *Miller* v. *Manitoba Lumber and Fuel Co.*, 6 M. L. R. 487.

An action for slander will not lie against a corporation (*Marshall* v. *Central Ontario R. W. Co.*, 28 O. R. 241).

Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties (*Hesketh* v. *Toronto*, 25 O. A. R. 449).

In the absence of a statute imposing liability for negligence or nonfeasance, a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair (*The City of St.*

as to false imprisonment see p 99. 54.

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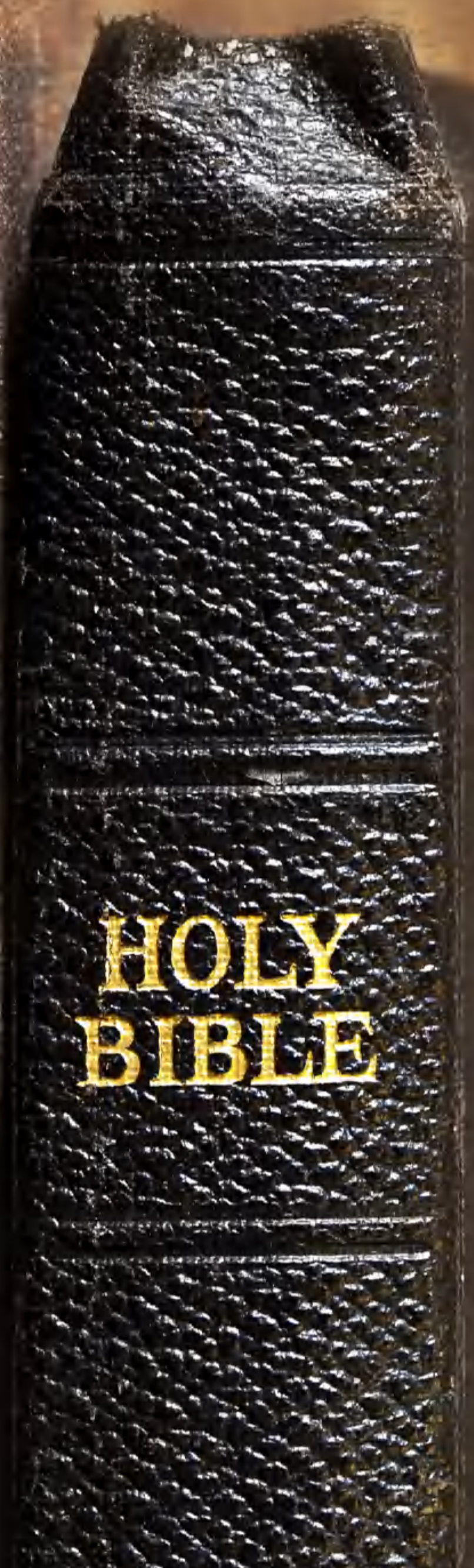

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Art. 16.

liable to a prosecution, or to a *mandamus*, but not to an action for damages (*Municipality of Pictou* v. *Geldert*, [1893] A. C. 524).

Trades unions.

(6) Trades unions are registered under the Trade Union Acts, 1871 and 1876, are associations of a special kind created by statute and empowered to hold property, and with limited powers of suing or being sued in contract. A trade union may nevertheless be sued in tort in its registered name (*Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426).

Married women.

As to the liability of married women for their torts, see *post*, Chap. VI., Art. 17.

CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

SECTION I.—LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 17.—*Wife's ante-nuptial and post-nuptial Torts.*

(1) A married woman may be sued alone in respect of her ante-nuptial torts; but her husband is also liable to the extent of the property which he received with her; and he may be sued either jointly with her or alone (45 & 46 Vict. c. 75, ss. 13—15).[44]

Canadian Cases.

[44] A married woman may bring an action of libel in her own name without joining her husband as plaintiff (*Spahr* v. *Bean*, 18 O. R. 70).

A bear belonging to one of the defendants escaped from premises, the separate property of Mary, wife of John McCreary, where it had been confined by the latter without objection from his wife, and attacked and injured the plaintiff on a public street. *Held*, that the wife having under R. S. O., 1887, c. 132, sects. 3, 14 [now R. S. O., 1897, c. 163], all the rights of a *feme sole* in respect of her separate property, might have had the bear

Art. 17.

(2) A married woman may also be sued alone in respect of her post-nuptial torts (45 & 46 Vict. c. 75, s. 1), but her husband is also liable, and may be joined with her as defendant (*Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 1 Ch. 203).

Prior to the Married Women's Property Act, 1882, a wife could not be sued alone for a tort. Her husband was necessarily joined as defendant in an action of tort brought against her, as all her property vested in him during coverture, and there was therefore no means of sátisfying a judgment obtained against her alone. Since the passing of the Married Women's Property Act, a

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Canadian Cases.

removed therefrom, and not having done so she was liable (*Shaw* v. *McCreary*, 19 O. R. 39).

Apart from any legislation a married woman may be liable for torts committed by her unless she has been acting under tbe coercion of her husband (*Ibid.*—Boyd, C.; *Stone* v. *Knapp*, 29 U. C. C. P. 609; *Wagner* v. *Jefferson*, 37 U. C. R. 551; *Consolidated Bank* v. *Henderson*, 29 U. C. C. P. 549).

In an action for a tort committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone (*Amer* v. *Rogers et ux.*, 31 U. C. C. P. 195).

"The position of a married woman, as regards liability for her separate contracts and for her torts during coverture, is essentially different. She is bound by her civil torts just as if she was discovert, and whether she has separate property or not. But her contracts, though valid as against her property, cannot be sued upon at law or in equity, either during or after her coverture, so as to bind her person" (*Ibid.*—Osler, J. See, however, R. S. O., 1897, c. 163).

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Art. 18. commit a tort the principal is clearly liable. If the agent is employed to do a thing not in itself wrongful,

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Canadian Cases.

erect a house on his land adjoining, employed an architect, who drew the plans, whereby trenches to lay the foundations in were to be dug adjoining the plaintiff's foundation wall, and the depth of the trenches was shown. This work was let out to a contractor, and through his negligence in digging the trenches, etc., the wall of the plaintiff's house fell. It was *held* that the defendant was liable, for the damage arose, not in a matter collateral to, but in the performance of the very act which the contractor was employed to perform (*Wheelhouse* v. *Darch*, 28 U. C. C. P. 269; and see R. S. O., 1897, c. 160, sect. 4; *Kerr* v. *The Atlantic & N. W. R. Co.*, 25 S. C. R. 197).

The plaintiff, travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and after he had walked some distance along it, and was moving towards the railway track, the car by which he had travelled, backing up, struck him. There was a light at both ends of the car, which was travelling at the rate of three or four miles an hour, but the current was very weak and the light slight, and the motor-man came within four or five feet of the plaintiff before seeing him, and he did not sound the gong or give any other warning of his approach. *Held*, that there was evidence of negligence on the part of the defendants, and the appeal from the trial judgment was dismissed and a new trial refused, on the plaintiff consenting to reduce his damages (*Ford* v. *The Metropolitan R. W. Co.*, 1902, 4 O. L. R. 29).

While a teamster was delivering a load of coke

and in the course of doing the thing for which he is employed he commits a tort, the principal's liability depends partly on whether the agent is a servant or an agent who is not a servant, *i.e.*, an independent contractor. Art. 18.

ART. 19.—*Ratification of Tort committed by an Agent.*

A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, and, whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*Wilson* v. *Tumman*, 6 Man. & Gr. 242).

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur,*"

Canadian Cases.

on the premises of the defendants, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard, or, in the absence of such device, by the workman stopping work during the delivery of the coke. *Held*, that the defendants were liable for the injury sustained (*Fallis* v. *The Gartshore, Thompson Pipe and Foundry Company*, 1902, 4 O. L. R 176).

Art. 19. and is equally applicable to torts and to contracts. It should be observed that the act cannot be ratified when the person doing it does not profess at the time of doing it to be acting on behalf of a principal (4 Inst. 317; *Wilson* v. *Barker*, 4 B. & Ad. 614; and judgment of DALLAS, C.J., in *Hull* v. *Pickersgill*, 1 B. & B. 286; *Wilson* v. *Tumman*, 6 M. & G. 242; and *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240).

Illustration

The plaintiff's goods were illegally seized under a warrant of distress handed to a bailiff by the defendants. The plaintiff wrote to the defendants seeking reparation. The defendants replied that their solicitors would accept process of service. The vestry had given no special instructions to the brokers. It was held in the Court of Appeal that there was ample evidence of ratification by the defendants, and that they were liable for the wrongful seizure made by the bailiff on their behalf (*Carter* v. *Vestry of St. Mary Abbotts, Kensington*, 64 J. P. 548).

ART. 20.—*Unauthorised Delegation by Agent.*

A master is not liable for the tortious acts of persons to whom his agent has, without authority, delegated his duties. An agent may have express authority, and in some cases may have implied authority, to delegate his duties to another, but if without such authority he delegates his duties to another, that other does not become the agent of the master.

Illustrations.

(1) Thus, where the driver and conductor of an omnibus authorised a bystander to drive the omnibus (the driver having been ordered to discontinue driving by a policeman who thought he was drunk), and the

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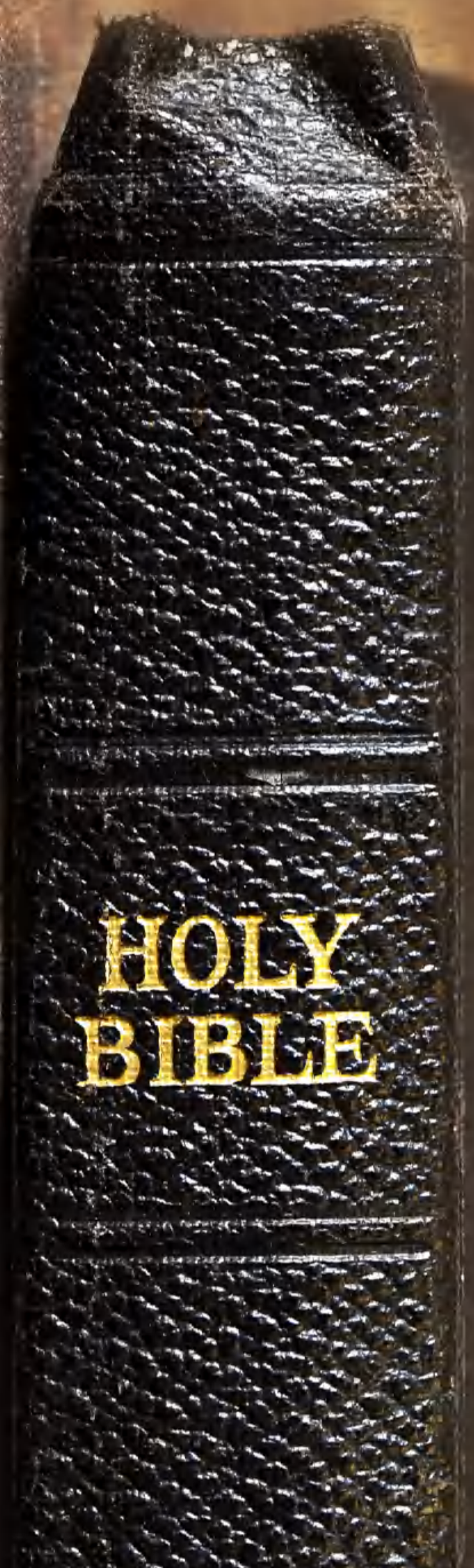

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Art. 21.

ART. 21.—*Liability for Contractors and other Agents.*[49]

(1) A principal is liable for the acts of his agent

Canadian Cases.

[49] L. was walking along the sidewalk of a street in Halifax at night when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city for damage it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant, and accustomed to walk on this street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted, but authorise them to enter into contracts for that purpose. At the time of the accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the city was not liable; that the corporation being under no statutory duty to light the streets the relation between it and the contractor was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation, and that L. could have avoided the accident by the exercise of reasonable care (*The City of Halifax* v. *Lordly*, 20 S. C. R. 505; *McMillan* v. *Walker*, 5 N. B. R. 31.

An action for malicious arrest cannot be maintained against a principal on an arrest made on

either (a) expressly authorised by him, *or* (b) done **Art. 21.**

Canadian Cases.

his agent's apprehension that the debtor would leave the province, the affidavit and arrest being both made without the principal's knowledge, privity or procurement (*Smith* v. *Thompson*, 6 U. C. R. (O. S.) 327).

"I take it to be clear on general principles that where malice begins the agency ends, for there to serve a wrongful end of his own, the agent is going out of the scope of his authority, and cannot make his principal liable for an act flowing wholly from his own bad motives" (*Ibid.*—Robinson, C.J.); but see *Lyden* v. *McGee*, 16 O. R., *post*, 104.

The Kingston and Bath Road Co. v. *Campbell*, 20 S. C. R. 605; *Wishart* v. *City of Brandon*, 4 Manitoba L. R. 453.

A man dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not in itself negligence in law (*Imperial Bank of Canada* v. *Bank of Hamilton*, A. C., 1903, 49).

The act incorporating the town of St. Louis, Que., gives power to the council to regulate the connection of private drains with the sewers, "owners and occupiers being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation." It was *held* that the municipality could not be made liable for damages caused through the acts of a person permitted by the council to make such connections as he is neither an employee of the corporation nor under its control (*Dallas* v. *Town of St. Louis*, 32 S. C. R. 120).

A municipal corporation having placed a barrier round a portion of the sidewalk which they were

Art. 21. within the scope of his authority, and for the general benefit of his principal.[50]

Canadian Cases.

repairing, the plaintiff at night going round, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No lights were put up by either defendant. The plaintiff brought this action against both for injuries sustained. *Held*, that both the defendants were liable to the plaintiff, the corporation for non-repair, and not warning the public, and the gas company under their special contract with the corporation and under R. S. O., 1897, c. 199, sect. 26, but that the corporation should have judgment over against the company (*McIntyre* v. *The Corporation of the Town of Lindsay et al.*, 1902, 4 O. L. R. 448).

[50] *Matthews* v. *Hamilton Powder Co.*, 14 O. A. R. 261; *Cram* v. *Ryan*, 25 O. R. 524.

The medical health officer of a municipal corporation appointed under R. S. O. c. 205, sect. 47 [now R. S. O., 1897, c. 248, sect. 31], is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duty (*Forsythe* v. *Canniff*, *Corporation of Toronto*, 20 O. R. 478).

A constable in charge of a patrol waggon is not a servant of a board of commissioners of police constituted under sect. 481 of the Municipal Act, R. S. O., 1897, c. 223, as amended by 62 Vict. c. 26, sect. 28 (O.), so as to make them liable for his negligence in the performance of his duties.

Hesketh v. *The City of Toronto* (1898), 25 A. R. 449, *ante*, p. 76, distinguished (*Winterbottom* v. *Board of Commissioners of Police of the City of London*, 1901, 1 O. L. R. 549).

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Art. 21.

for a negligent act or omission of the agent which arises incidentally in the course of the performance of the work; because he never authorised that act or omission.

(3) But to this rule there are three exceptions:

(a) Where the agent is employed to do an act unlawful in itself the principal is liable for the direct consequences of such act, and is also liable for the consequences of the agent's negligence in the course of doing the act (*Ellis* v. *Sheffield Gas Co.*, 2 *E.* & B. 767).

(b) If the principal is under an obligation by contract or statute to do a particular thing, and he employs an agent to do it, he is liable if the agent neglects to do the thing, or does it improperly. He cannot get rid of his duty by employing an agent (*Hole* v. *Sittingbourne, etc., Rail. Co.*, 6 H. & N. 488).

(c) Where the thing which the agent is employed to do will be a nuisance, or is likely in the ordinary course of events to cause damage, unless proper precautions are taken, the principal is liable for the neglect of the agent to take those precautions.

Comment on above rule.

It will be noticed that the liability of one who employs another to do work for the torts of that other is not so extensive where the person employed is a contractor as it

Art. 21.

is where that other is a servant. A master has control of the servant as to the way he does his work, and it is his duty to see that the work is so done as not to cause damage to others—so he is liable for the collateral negligence of the servant. When an independent contractor is employed the principal is only liable for acts which (a) he has expressly authorised, or which (b) are done for the master's benefit and are within the scope of the agent's authority, and so are impliedly authorised. He cannot (except in the cases stated) be held liable for acts done by the contractor or agent for his own benefit or outside the scope of his agency. But a person who is under a duty to do something cannot evade that duty by deputing its performance to another. So if a person is under an obligation to do something and he employs an agent to do it, he is responsible for any neglect of the agent to properly perform that duty.

So, too, if a person chooses to do something which he does at his peril, or something which will be dangerous if not properly done, he must see that the person he employs to do the work does it properly. Having authorised the work, he cannot escape responsibility for its being carried out in such a manner as not to be dangerous.

Illustrations, Contractors.

(1) A railway company was empowered by Act of Parliament to construct a railway bridge over a highway. The company employed a contractor to do the work. A servant of the contractor negligently caused the death of a person passing underneath on the highway by allowing a stone to fall on him. The contractor would no doubt have been liable for the negligence of his servant, but in an action brought by the administratrix of the deceased against the railway company the defendants were held not liable for the negligence of the workman, being that of an agent who was not their servant, and merely collateral to the work which he was employed to do

Art. 21. (*Reedie* v. *London and North Western Rail. Co.*, 4 Ex. 244).

(2) So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C.; a passenger injured by the negligent construction of the scaffold could only sue C., and not A., B., or the company (*Knight* v. *Fox*, 5 Ex. 721).

Illustrations of exceptions.

(3) A company, not authorised to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself an unlawful act (*Ellis* v. *Sheffield Gas Consumers Co.*, 23 L. J. Q. B. 42).

(4) So where the defendants were authorised, by an Act of Parliament, to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable under exception (b), and could not excuse themselves by throwing the blame on their contractor (See *Hole* v. *Sittingbourne, etc. Rail. Co.*, 6 H. & N. 488).

(5) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support

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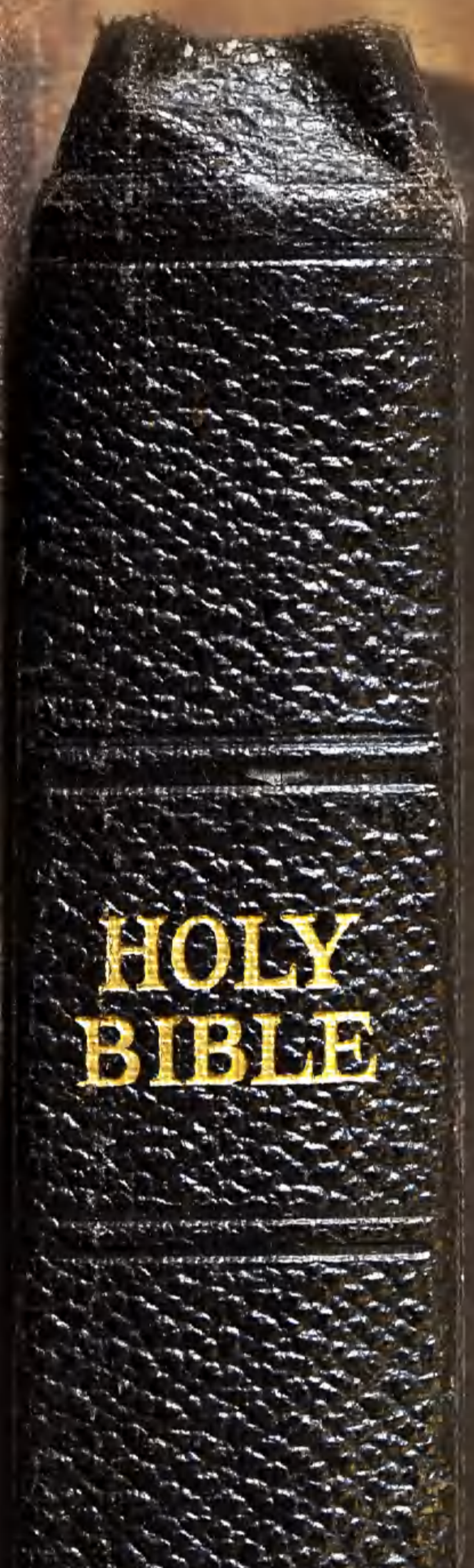

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Art. 22.

ART. 22.—*Increased Liability where the Agent is a Servant.*[51]

(1) A servant is a person employed by another, and subject to the commands of that other as to the way he shall do his work.

(2) A master is liable for the negligence of his servant committed in the course of his employment (*a*).[52]

(*a*) As to the exceptional case of injury done by one servant to another servant working in a common employment under a common master, see Art. 23, *post*.

Canadian Cases.

[51] A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work, and in doing so he ran over and injured a child. It was *held*, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start (*Merritt* v. *Hepenstal*, 25 S. C. R. 150; *Milner* v. *Manitoba Lumber Co.*, 6 M. L. R. 487).

[52] "The plaintiff was in the employment of Church, a contractor under the defendants. Church was permitted by the defendants, as a matter of convenience to him, to carry the tools used by his workmen on the defendants' trains, so as to enable him to drop them on the line of railway where his workmen might be employed. According to Church's testimony, it was his duty to place the bars in question on the train, to take charge of them while there, and his business to put them off

(3) A master is liable for the wilful torts of his Art. 22.

Canadian Cases.

where he wanted them, and the person (assuming him to be a baggage master, which is anything but clear) who threw the bar off had nothing to do with him, Church, nor any right to meddle with his tools, nor did he ask him to put them out, or his permission to place them on the car. Now in this case, assuming that it was a servant of the defendants who pitched off the bar, it does not appear from the evidence to have been done in pursuance of his duty or employment. The evidence rather shows that in the act done he was acting as a volunteer, and assisting Church in putting off his tools for the use of his workmen, and he was in effect, although unasked, employed at the time doing Church's work. And supposing that we might infer from the evidence that the defendants lent the services of their baggage master to Church to help him in putting off his tools, he, Church, having, as he swore, the sole superintendence of them, and as to when and where they were to be put off, still it seems to us, in that case, the act would be within the principle laid down by Brett, J., in *Murray* v. *Currie*, in which he says, 'But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing not my work, but the work of the independent contractor.' On the whole, it appears to us that the defendants incurred no liability by the act complained of" (*Cunningham* v. *The Grand Trunk Railway Co.*, 31 U. C. R. 353 *et seq.*—Morrison, J.; *Saunders* v. *City of Toronto*, 29 O. R. 273).

Art. 22. servants committed within the scope of his

Canadian Cases.

The plaintiff was injured by a waggon in which he was being driven, being struck by an electric car of the defendant, which was running backwards in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendant, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour, for the damages assessed. *Held*, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded and was not merely a specific finding in answer to a question.

Per Armour, C.J.O.: Questions to the jury must be in writing.

Per Osler, J.A.: While it is more convenient that questions to the jury should be in writing, the judge is not bound to adopt that course.

Judgment of Falconbridge, J., affirmed (*Balfour* v. *Toronto Railway Co.*, 1901, 5 O. L. R. 735).

Plaintiff came to a platform station of the defendant and signalled an approaching car to stop. The car slowed down but did not stop, and as it was passing the conductor seized plaintiff's

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Art. 22. master, even though in fact the master derives no

Canadian Cases.

evidence was rightly rejected of improper relations between the plaintiff and the wife of his assailant, alleged as provocation for the assaults. *Pounder* v. *North Eastern R. W. Co.* [1892] 1 Q. B. 385, discussed (*Blain* v. *Canadian Pacific R. W. Co.* (1903), 5 O. L. R. 334).

Two servants of one of the defendants were engaged in their master's business in unloading and storing a cask of beer in the cellar of his house by means of opening a trap-door in the sidewalk in front of the house. This was at night, and the trap-door being left open, and no light or guard being provided, the plaintiff fell into the opening and was injured. *Held*, that this negligence of the servants was attributable to the master, who was liable for the injury. No act of negligence was proved against the other defendants, the village corporation, nor was there evidence upon which notice to the corporation might be attributed; the construction of an opening in the sidewalk is authorised by the Municipal Act, s. 639, and no fault was alleged in its construction or maintenance; the corporation had no knowledge of the opening being left after dark without protection, and it was not shown that they had means of guarding against it. *Semble*, that, under these circumstances, the corporation were not liable. *Homewood* v. *City of Hamilton* (1901), 1 O. L. R. 266, considered. But, supposing the corporation liable, it could only be for nonfeasance, and not for misfeasance, and the action failed because not brought within the proper time (*Mims et ux.* v. *Village of Omemee et al.* (1901), 2 O. L. R. 579).

benefit therefrom, and though the tort amounts also to a crime.[53] [54] Art. 22.

Servant or contractor.

The test to be applied to ascertain whether an agent is or is not a servant is to consider whether the master has complete control of the acts of the agent as to the way he should do them. If he has, the agent is a servant, and the master is liable for the consequences, because he has made himself responsible not only for the act itself but for the manner of doing it. Thus, the relationship of master and servant is in each a question of fact, depending not on the mode of payment for services, or the time for which the services are engaged, or the nature of those services, or on the power of dismissal (though each of those matters may be taken into consideration), but on the extent of the principal's control over the agent as to the way in which the work is done. And a person who is in the general employment of one man may be the servant of another for a particular purpose, that other having control of him as to the manner in which he carries out his duties in connection with that particular purpose.

Illustrations. As to who are servants.

(1) Thus where an owner of a carriage was supplied by a livery stable keeper with a driver, and the owner of the carriage was also *owner of the horse and harness*, it was held by RUSSELL, C.J., that in all the circumstances of the case the owner of the carriage had control of the

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Canadian Cases.

[53] *Down* v. *Lee*, 4 Manitoba L. R. 177.

[54] "From these cases it is clear that a corporation may be liable for false imprisonment under an order by its agent acting within the scope of his authority" (*Lyden* v. *McGee*, 16 O. R. 108—Rose, J.; and see *Hesketh* v. *Toronto*, 25 O. A. R. 449, *ante*, p. 88; and *Smith* v. *Thompson*, *ante*, p. 87).

Art. 22.

driver as to the manner of driving, and the driver was his servant (*Jones* v. *Scullard*, [1898] 2 Q. B. 565).

(2) But where two ladies, owners of a carriage, *hired horses* from a livery stable, and with the horses a driver, whom they put into their livery, but to whom they did not pay wages, it was held that the driver was not their servant (*Quarman* v. *Burnett*, 6 M. & W. 499).

(3) So, too, in *Rourke* v. *The White Moss Colliery Co.* (2 C. P. D. 205), the defendants were sinking a shaft in their colliery and agreed with one Whittle to do the sinking at so much per yard. The defendants agreed to supply an engine and engineer at the mouth of the shaft. The engineer was employed and paid by the defendants, and was their general servant, but was at the time under the orders and control of Whittle, and it was held that he was, for the particular purpose, the servant not of the defendants but of Whittle, and consequently the defendants were not liable for his negligence.

(4) And so, when a person who is the general servant of one person is lent to another for a time, and is, during such time, under the control of that other, the person whose general servant he is is not liable for his negligence whilst so employed (*Donovan* v. *Laing, etc. Limited*, [1893] 1 Q. B. 629).

Cabdrivers.

(5) It is held that upon the construction of the Metropolitan Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), so far as the public is concerned, the proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire as if the relationship of master and servant existed between them, although, in fact, no such relationship exists, the relationship apart from statute being that of bailor and bailee and not that of master and servant (*Venables* v. *Smith*, 2 Q. B. D. 279; and *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281). But if the driver is in fact the servant of some person other than

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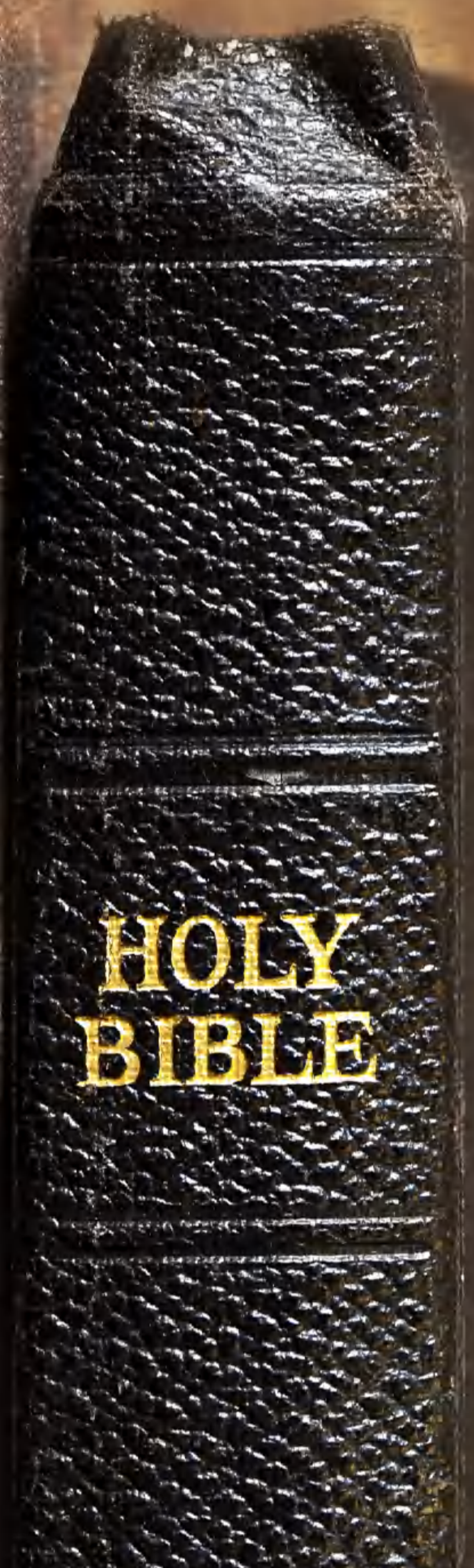

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Art. 22.

if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*Mitchell* v. *Crasweller*, 22 L. J. C. P. 100).

(8) And where a servant does a kind of work for which he is not engaged, he is not acting within the course of his employment so as to make the master liable for his

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Canadian Cases.

powers vested in the company, and the reason is that such an act cannot be considered as done within the scope of his employment; but if the illegal act is in furtherance of his employer's orders, or in the course of his employment, the employer is responsible, and in the latter case, even if the act was unknown or actually forbidden by the employer" (*Harris* v. *Brunette*, 3 B. C. Reps. 174—Drake, J.; *Turner* v. *Isnor*, 25 N. S. R. 428).

While defendants' servants were employed in the attempt to replace on the track one of defendants' engines which had run off it, near a highway crossing, but within defendants' grounds, the female plaintiff, with another woman, approached the crossing with a horse and waggon and asked defendants' servants if they might cross, when one of them said "Yes," and then winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the waggon and holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened, knocked down the female plaintiff and injured her. It was *held*, that there was an actionable wrong for which the defendants were liable (*Stott et ux.* v. *Grand Trunk R. W. Co.*, 24 U. C. C. P. 347; *Bell* v. *The W. & A. R. W. Co.*, 24 N. S. R. 521).

negligence. Thus, when an omnibus conductor drove the omnibus, and whilst so doing negligently ran into the plaintiff, it was held that, in the absence of evidence that the conductor was authorised to drive the omnibus, the defendants were entitled to judgment (*Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530).

Wilful acts of servant.

(9) In *Barwick* v. *English Joint Stock Bank* (L. R. 2 Ex. 259), the defendants were held liable for the fraudulent statements of their manager made for the benefit of the defendants, and in the course of his business, the statements being made in answer to inquiries by the plaintiff and being to the effect that a customer of the bank was a person of financial stability. These statements were untrue to the knowledge of the manager, and were made with intent to deceive—but not for the benefit of the manager.

(10) Where an omnibus driver, contrary to the express instructions of his employers, so drove as to obstruct a rival omnibus with a view to increasing the takings of his own, it was held that his employers were liable, as he was acting at the time in the course of his employment, and, as he thought, for their benefit (*Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526). But where a driver to gratify his own spite struck the horses of a rival with his whip, his employers were held not liable (*Croft* v. *Alison*, 4 B. & A. 590). In the one case the driver was acting for his employers' benefit; in the other solely for his own.

(11) In another case the plaintiffs occupied offices beneath those of the defendant, and in the defendant's offices was a lavatory for his own use exclusively, the use of which was expressly forbidden to the clerks. One of the clerks, nevertheless, used it, and left the water running, whereby the plaintiffs' offices were flooded:—*Held*, that the act of the clerk was not within the scope of his authority, and that the defendant was not liable

Art. 22.

(*Stevens* v. *Woodward*, 6 Q. B. D. 318). But where the clerk was allowed the use of the lavatory, the decision was *contra* (*Ruddiman* v. *Smith*, 60 L. T. 708).

Wrongful arrest by servants.

(12) In *Poulton* v. *London and South Western Rail. Co.* (L. R. 2 Q. B. 534),[56] a station master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff, and detained him in custody until it was ascertained by telegraph that all was right. *The railway company had no power whatever to arrest a person for non-payment of carriage*, and therefore the station master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station master; and BLACKBURN, J., said: "In *Limpus* v. *London General Omnibus Co.*, the act done by the driver was within the scope of his authority, though no doubt it was a wrongful and improper act, and, therefore, his masters were responsible for it. In the present case, an act was done by the station master completely out of the scope of his authority, which there can be no possible ground for

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Canadian Cases.

[56] *Lyden* v. *McGee*, 16 O. R. 105, *ante*, p. 87, The plaintiff while travelling between St. M. and L. mislaid his ticket, and, having been ejected by the conductor, it was *held*, that the defendants were responsible for the acts of the officer duly authorised and styled under the statute "conductor," when not committed in excess of his authority derived from them, and the court refused to disturb a verdict for plaintiff (*Curtis* v. *Grand Trunk Rail. Co.*, 12 U. C. C. P. 89; *Thomas* v. *Gildert*, 4 N. B. R. 95; and see *Walker* v. *Sharpe*, *ante*, p. 64; and *Beaver* v. *G. T. R. W. Co.*, 22 S. C. R. 498).

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Art. 22. (*Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; and see *Hanson* v. *Waller*, [1901] 1 Q. B. 390).[58]

Canadian Cases.

[58] The defendants were *held* not liable where the motor-man of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the cars, pushed off the car, as the jury found, a newsboy who was getting on to sell papers to a passenger (*Coll* v. *Toronto Rail. Co.*, 25 O. A. R. 55; and see *Williamson* v. *G. T. Rail. Co.*, 17 U. C. C. P. 615, *post*, p. 347; *Adams* v. *The National Electric Tramway Co.*, 3 B. C. 199; and *Hall* v. *McFadden*, 5 N. B. R. 586).

The motor-man of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All that can be expected is that the motor-man shall proceed carefully, and it is in each case a question whether that has been done. Upon the facts of this case the majority of the court *held* that there was no evidence to justify a finding of negligence, and set aside a judgment in the plaintiff's favour. Judgment of Falconbridge, C.J., reversed (*Robinson* v. *Toronto Rail. Co.*, C. A. (1901), 2 O. L. R. 18).

The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Budgeburg he drank heavily, and when near Budgeburg he began to annoy passengers, and the conductor compelled him to leave the train at that station, which was 700 feet from the end of the International Railway bridge over the Niagara river, and the deceased, who was not given into the charge of anybody, being intoxicated, strayed after the train on which his luggage remained, and fell over the bridge and was drowned. It would

Art. 22.

(15) In *Goff* v. *Great Northern Rail. Co.* (3 E. & E. 672), on the other hand, the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger for non-payment of his fare; and the court accordingly held, that the policemen who were employed, and the station master, must be assumed to be authorised to take people into custody whom they believed to be committing the act, and that if there was a mistake, it was a mistake within the scope of their authority.

Assaults by servants.

(16) So, again, in *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (L. R. 7 C. P. 415),[57] the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' byelaws did not expressly authorise the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but, nevertheless, the court considered that the act of

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Canadian Cases.

have been easy to have taken care of deceased and to have prevented him interfering with passengers. At Budgeburg the train was only five minutes' run from the city of Black Rock and only twenty minutes' from Buffalo, its destination. It was *held* that the defendants were liable, inasmuch as the act of the deceased was what might reasonably be expected that a man in his condition would do upon being put off the train when and where he was put off (*Delehanty* v. *Michigan Central Rail. Co.*, 7 O. L. R. 690).

[57] *Ferguson* v. *Roblin*, 17 O. R. 167; *Murphy* v. *Corporation of Ottawa*, 13 O. R. 334.

Art. 22.

the porter in pulling the plaintiff out of the carriage was an act done in the course of his employment as the defendants' servant.

In that case WILLES, J., says: "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise, when an act of that class is to be done and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

(17) The defendants employed a manager to manage a branch of their business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person living in the plaintiff's house, and on one of the instalments being in arrear he went to the plaintiff's house and removed the furniture. Whilst so doing he assaulted the plaintiff. The jury found that the manager committed the assault in the course of his employment, and it was held that the defendants were liable, the mere fact that the assault was a criminal offence, and not merely a tortious act, not affecting the liability of the defendants for the act of their servant (*Dyer* v. *Munday*, [1895] 1 Q. B. 742).

(18) But where the plaintiff, a wholesale silversmith, hired a brougham and coachman from the defendant to drive the plaintiff's traveller about London with samples, and the coachman in pursuance of an arrangement made with confederates drove the brougham to a place where the confederates stole the samples, it was held that the defendant was not liable for the criminal act of the coachman, as it was not done within the scope of his employment (*Cheshire* v. *Bailey*, [1905] 1 K. B. 237).

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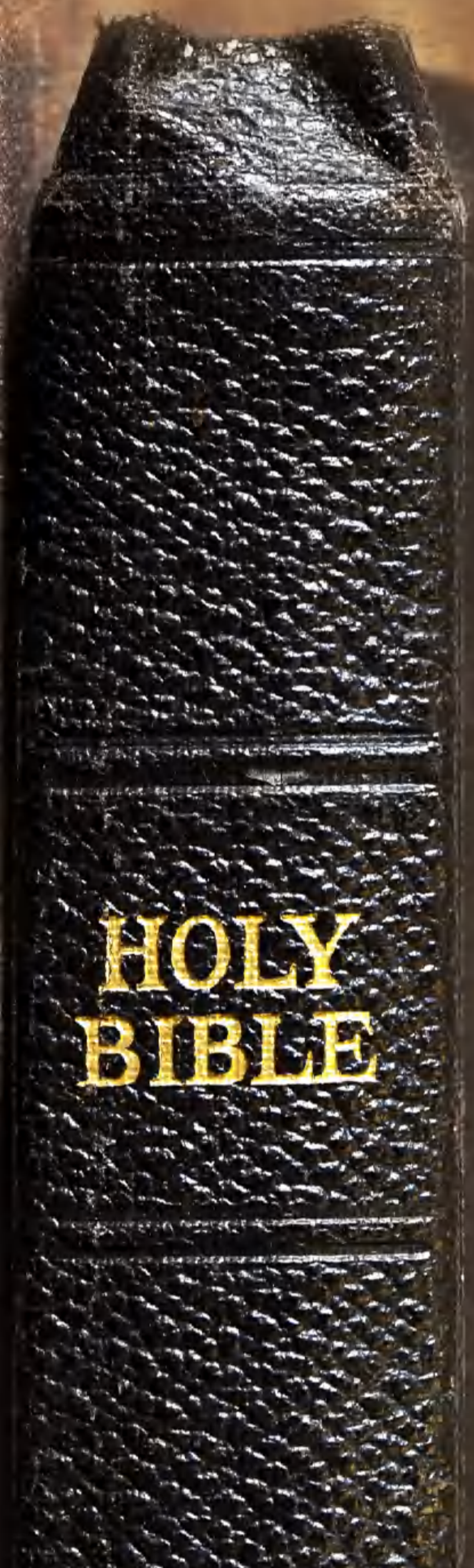

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Art. 23.

(1) Common Law Liability.

ART. 23.—*General Immunity.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment.

But a master who is personally negligent is liable to his servant for damage resulting from such negligence; and such negligence may consist in—[60]

(a) employing another servant knowing him to be incompetent or without making proper enquiries as to his competence (*Tarrant* v. *Webb*, 18 C. B. 797);

(b) retaining in his employment whom he knows to be habitually negligent (see *Senior* v. *Ward*, 28 L. J. Q. B. 139);

(c) allowing the premises, plant or machinery to be in a dangerous condition, when he knew or might have known they were dangerous (*Williams* v. *Birmingham Battery, etc. Co.*, [1899] 2 Q. B. 338).

(2) Common employment does not necessarily imply that both servants should be engaged in the

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Canadian Cases.

[60] *Clegg* v. *Grand Trunk R. W. Co.*, 10 O. R. 717; *Ryan* v. *Canada Southern R. W. Co.*, 10 O. R. 745.

Art. 23.

same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages (*Morgan* v. *Vale of Neath Rail. Co.*, L. R. 1 Q. B. 149; *Allen* v. *New Gas Co.*, 1 Ex. D. 251).[59]

Explanation of rule.

The rule was first established in *Priestley* v. *Fowler* ((1837), 3 M. & W. 1). In that case a butcher's man was ordered to deliver meat from a van. The van was overloaded by the negligence of a fellow-servant, in consequence of which it broke down and the butcher's man was hurt. The master was held not liable.[61]

Canadian Cases.

[59] The master is not responsible for an accident due to the negligence of a fellow-servant (*Matthews* v. *Hamilton Powder Co.*, 14 O. A. R. 261).

The question of whether or not there was common employment is one of fact, and is for the jury to decide (*St. John's Gas Light Co.* v. *Hatfield*, 23 S. C. R. 164).

[61] "The defendants could not be liable unless there was reasonable proof that they had intrusted a duty to Ryan (the deceased's fellow-servant), knowing that he did not possess competent skill for the purpose" (*Deverill* v. *Grand Trunk Rail. Co.*, 25 U. C. R. 521—Hagarty, J.).

"Servants must be supposed to have the risk of the service in their contemplation where they voluntarily undertake it and agree to accept the stipulated remuneration. If, therefore, one of them suffers from the wrongful act of carelessness of another, the master will not be responsible. This, however, supposes that the master has

Art. 23.

It was further established in *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* ((1850), 5 Ex. 343), in which it was held that where a servant of a railway company in discharge of his duty as such was proceeding in a train under the guidance of others of their servants through whose negligence a collision took place and he was killed, his personal representatives had no cause of action.[62]

Illustrations. Common employment.

(1) The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves: all these are fellow-labourers within the meaning of the doctrine (*Bartons-hill Coal Co.* v. *Reid*, 4 Jur. (N.S.) 767); and so are the captain of a ship and the sailors employed under him (*Hedley* v. *Pinkney Co.*, [1892] 1 Q. B. 58). The real test seems to be, whether they are engaged in the same pursuit.

(2) In *Morgan* v. *Vale of Neath Rail. Co.* (L. R. 1 Q. B. 149), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the

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Canadian Cases.

secured proper servants and proper machinery for the conduct of the works" (*Plant* v. *Grand Trunk Rail. Co.*, 27 U. C. R. 82—Draper, C.J.; *Campbell* v. *General Mining Association*, 1 N.S.R. 415).

[62] "In 1866 the case of *Dexerill* v. *Grand Trunk R. W. Co.* (25 U. C. R. 517) was decided in this court, and the authorities reviewed. An engineer was killed by a collision caused by the negligence of a switchman. It was *held*, that there could be no recovery, the deceased and the switchman being fellow-servants in a common employment" (*O'Sullivan* v. *Victoria R. W. Co.*, 44 U. C. R. 130—Hagarty, C.J.).

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Art. 23.

(3) And again, in *Tunney* v. *Midland Rail. Co.* (L. R. 1 C. P. 291),[64] the plaintiff was employed by a railway company as a labourer, to assist in loading what is called a "pick-up train," with materials left by platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train by which he was travelling came into collision with another train, through the negligence of the guard who had charge of it, and the plaintiff was injured. The plaintiff accordingly sued the company; but the court held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an

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Canadian Cases.

for their negligence, as his agents, because they, although in other respects fellow-servants, cannot be so in relation to such duty, which is not one performed in the course of the common employment, and negligence in the performance of which is not one of the ordinary risks contemplated and undertaken by the servant when entering into the employment. In the present case it is not suggested that the captain was not entirely competent to perform the duty of selecting the crew, and any personal negligence on the part of the defendants is out of the question. This being so, the authorities to which we have referred show, in our opinion, that the defendants are not liable" (*Ibid.*, Osler, J., at pp. 546, 550).

[64] *McFarlane* v. *Gilmour et al.*, 5 O. R. 310.

Art. 23.

injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment.

(4) So, again, in *Feltham* v. *England* (L. R. 2 Q. B. 33)[65], the defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood, supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present. His foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on to the engine, the piers gave way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff.

(5) But when a collision occurred between two steamships belonging to the same owners, it was held that the crew of ship A. were not in common employment

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Canadian Cases.

[65] *Macdonald* v. *Dick*, 34 U. C. R. 623.

"It seems clearly established that the superior rank or position of a foreman or manager does not affect his position of a fellow-servant in a common employment with one of far inferior grade" (*Drew* v. *Corporation of East Whitby*, 46 U. C. R. 111—Hagarty, C.J.).

Art. 23.

with the crew of ship B. (although employed by the same masters), so as to protect the owners from liability to the crew of ship A. for the negligence of their servants, the crew of ship B. (*The Petrel*, [1893] P. 320).

Common master.

(6) Where one of two railway companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply, for the men though in common employment are not in the employment of a common master (*Warburton* v. *Great Western Rail. Co.*, L. R. 2 Ex. 30). And it may be laid down broadly, that the defence of common employment is not available unless the plaintiff was, at the time of the injury, in the defendant's actual employment, and the relationship of master and servant subsisted between them (*Cameron* v. *Nystrom*, [1893] A. C. 308).[66]

(7) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor; for the servant of the contractor is not the servant of the contractor's employer, or where the person injured is a servant of one contractor, and the person by whose negligence he is injured is the servant of another contractor (*Johnson* v. *Lindsay*, [1891] A. C. 371). It must, however, be borne in mind, that it is sometimes a question of difficulty whether a person holds the position of a contractor, or of a foreman in charge of a gang of workmen; and that in the latter case the rule as to fellow-servants applies (*Charles* v. *Taylor*, 3 C. P. D. 492).

Canadian Cases.

[66] *Hurdman* v. *Canada Atlantic R. W. Co.*, 25 O. R. 209.

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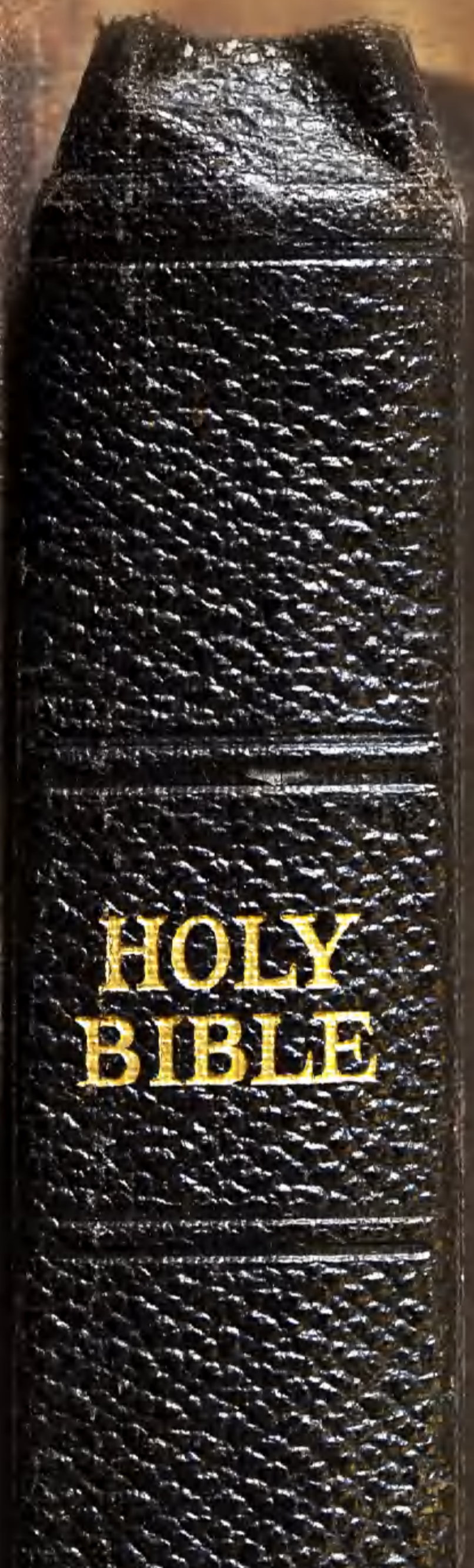

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Art. 23.

either expressly or impliedly, he cannot recover; for *volenti non fit injuriâ*.[68]

But the defence of *volenti non fit injuriâ* is somewhat difficult of application. Lord ESHER, M.R., in the case of *Yarmouth* v. *France* (19 Q. B. D. 647), stated the rule in the following words: "It seems to me to amount to this, that mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *volenti non fit injuriâ*. If so, that is a question of fact." And LINDLEY, L.J., added: "A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before, in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."[69]

Canadian Cases.

[68] *O'Brien* v. *Sanford*, 22 O. R. 136.

The maxim *volenti non fit injuriâ* does not apply where an accident is caused by the breach of a statutory duty (*Rodgers* v. *The Hamilton Cotton Co.*, 23 O. R. 425).

[69] *Held*, in an action by a servant against his master for an injury he had sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to show that the master knew the saw was not guarded, but it must also appear that

(11) So where a workman in the course of his employment slipped descending from an elevated tramway, and the jury found that the employers had not exercised due care to have the tramway in a safe condition, and that the deceased had the same means as the defendants of knowing, and did know, that it was dangerous to descend without a ladder, but *did not find that the deceased had undertaken the risk* of descending from the tramway without a ladder, it was held that the plaintiff (widow of the deceased) was entitled to judgment (*Williams* v. *Birmingham, etc. Co.*, [1899] 2 Q. B. 338).[70]

(12) So, too, when a workman, engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily accepted the risk (*Smith* v. *Baker & Sons*, [1891] 1 A. C. 325).[71]

Canadian Cases.

the servant was ignorant of that fact; and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off as it was his duty to have done, he could not, therefore, make his master responsible to him for the consequences of his own neglect of duty (*Miller* v. *Reid*, 10 O. R. 419; see *Webster* v. *Foley*, 21 S. C. R. 580, *post*, p. 120).

[70] *Miller* v. *Grand Trunk R. W. Co.*, 25 U. C. C. P. 389.

[71] *Headford* v. *M'Clary Mfg. Co.*, 23 O. R. 335. This case is like in principle to *Finlay* v. *Miscample*, 20 O. R. 29, *ante*, 54. *Poll* v. *Hewitt*, 23 O. R. 619. *Thompson* v. *Wright*, 22 O. R. 127. *Haight* v. *Wortman and Ward Mfg. Co.*, 24 O. R. 618.

Art. 24.

Art. 24.—*Volunteer Servants.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by

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Canadian Cases.

The defendants, an ironworks company, used in their business a pair of shears for cutting up boiler plate and scrap iron, prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty, was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against the defendants under the Workmen's Compensation for Injuries Act it was *held* that defendants were liable (*Madden* v. *Hamilton Iron Forging Company*, 18 O. R. 55 *Foley* v. *Webster*, 2 B. C. Reps. 137, and *post* p. 121, and *ante*, p. 119; and *Scott* v. *B. C. Milling Co.*, 3 B. C. 221).

"The law is that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable apart from the provisions of the Employers' Liability Act. The employer may be made liable who is blameworthy in respect of not having provided proper machinery and appliances for the work, or, as put in *Bartonshill Coal Co.* v. *Reid*, where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper

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Art. 24.

therefore be fairly called upon to recompense him for the result of his officiousness.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed, the volunteer, and the servants of the company were of competent skill, and the company did not authorise the negligence, it was held that the company was not liable (*Degg* v. *Midland Rail. Co.*, 1 H. & N. 773; *Potter* v. *Faulkner*, 1 B. & S. 800).

Exception.

Where a person aids the servants of another, with such other's consent or acquiescence, and not as a mere volunteer, but for the purpose of expediting some business of his own, he is not considered to be in a position of a servant *pro tempore* (*Wright* v. *London and North Western Rail. Co.*, 1 Q. B. D. 252).

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(2) Under Employers' Liability Act, 1880 (*a*).

Art. 25.—*Epitome of Act.*[76]

(1) In the case of railway servants, labourers, husbandmen, journeymen, artificers, handicraftsmen, miners, and other persons engaged in

(*a*) A temporary Act renewed from year to year by the Expiring Laws Continuance Acts.

Canadian Cases.

[76] R. S. O., 1897, c. 160.—An Act to secure compensation to workmen in certain cases.

By section 3 it is provided that: "Where personal injury is caused to a workman—

(1) By reason of any defect in the condition or

manual labour and *not being domestic or menial servants*, an employer cannot set up the defence of common employment in any case where the

Art. 25.

Canadian Cases.

arrangement of the ways, works, machinery, plant, buildings, or premises, connected with, intended for, or used in the business of the employer ; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or

(4) By reason of the act, or omission, of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by the employer, or by any person delegated with the authority of the employer in that behalf ; or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway, or street railway ;

the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work "

Art. 25.

injury complained of is due to any of the following causes, viz. :

(a) A defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, caused, undiscovered, or unremedied by the negligence of the employer, or of some person entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

Canadian Cases.

[The Manitoba Statute, 56 Vict. c. 39, sect. 3, and R. S. B. C., 1897, c. 69, sect. 3, are both identical with the above, and see "An Act to make provision for the safety of railway employees and the public" (R. S. O., 1897, c. 266)].

The following cases may be consulted as bearing upon the Act:—*M'Cloherty* v. *The Gale Mfg. Co.*, 19 O. A. R. 117; *Garland* v. *City of Toronto*, 23 O. A. R. 238; *Washington* v. *Grand Trunk R. W. Co.*, 24 O. A. R. 183; *Toronto Ry. Co.* v. *Bond*, 24 S. C. R. 715 (judgment Court of Appeal, Ontario, affirmed); *Hamilton Street Ry. Co.* v. *Moran*, 24 S. C. R. 717 (judgment Court of Appeal, Ontario, affirmed); *Hamilton Bridge Co.* v. *O'Connor*, 24 S. C. R. 598; *Grand Trunk Ry. Co.* v. *Weegar*, 23 S. C. R. 422; *Canada Southern Ry. Co.* v. *Jackson*, 17 S. C. R. 316; *Headford* v. *M'Clary*, 21 O. A. R. 164; *O'Connor* v. *Hamilton Bridge Co.*, 21 O. A. R. 596; *Bond* v. *Toronto R. W. Co.*, 22 O. A. R. 78; *Truman* v. *Rudolph*, 22 O. A. R. 250; *British Columbia Mills Co.* v. *Scott*, 24 S. C. R. 702; *Scott* v. *British Columbia Milling Co.*, 3 B. C. Reps. 221.

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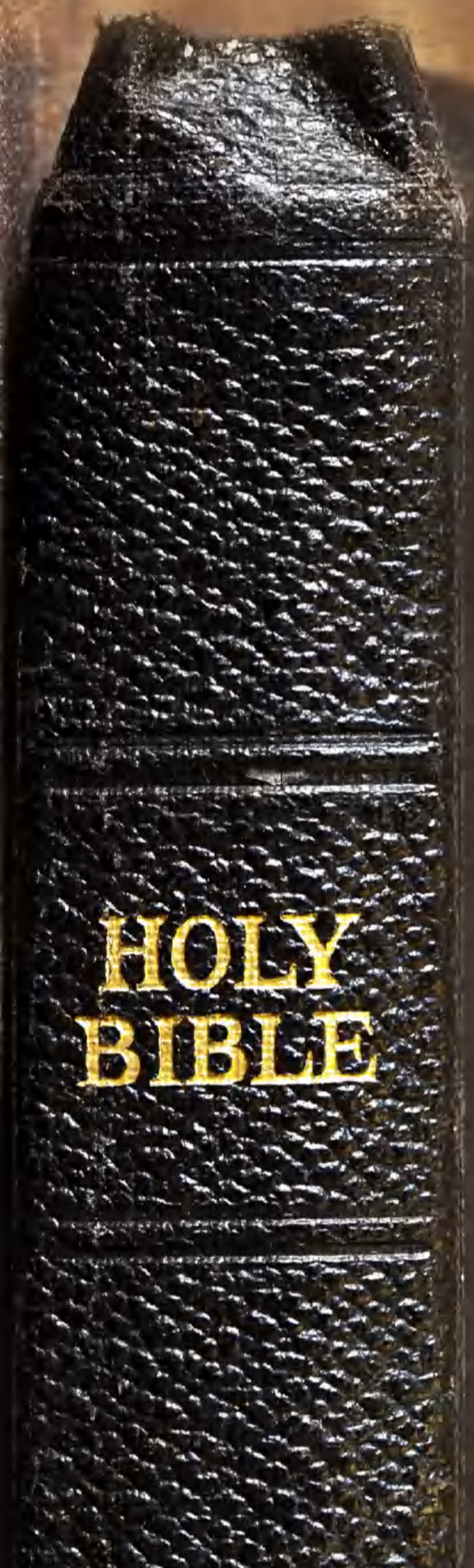

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Art. 25.

(4) The master may rely, by way of defence, on contributory negligence, and on the maxim *volenti non fit injuriâ* (*Thomas* v. *Quartermaine*,[78] 18 Q. B. D. 685); and also on any contract by which the workman has contracted himself out of the Act (*Griffiths* v. *Earl of Dudley*,[79] 9 Q. B. D. 357).

Canadian Cases.

14, an action for the recovery, under this Act, of compensation for an injury shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing injury, or in case of death, within twelve months from the time of death, provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

[78] *Lemay* v. *Canadian Pacific R. W. Co.*, 18 O. R. 314; *Stride* v. *Diamond Glass Co.*, 26 O. R. 270.

[79] Section 10.—No contract or agreement made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this Act of compensation for any injury—

(1) Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor

(2) Unless such other consideration was in the opinion of the court or judge before whom such action is tried, ample and adequate; nor

(3) Unless in the opinion of the court or judge, such contract or agreement, in view of such

(5) The action must be brought in the County Court, but is removable, under very exceptional

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Canadian Cases.

other consideration, was not, on the part of the workman, improvident, but was just and reasonable;

and the burden of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that the contract was just and reasonable and was not improvident as aforesaid, shall in all cases rest upon the defendant. And Manitoba Act, sect. 5, and British Columbia Act, sect. 10.

Section 6 provides that "a workman or his legal representative, or any person entitled in case of his death, shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say—

"Sub-section 1.—Under clause 1 of section 3, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person intrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, buildings, or premises are proper." And Manitoba Act, sect. 5, and R. S. B. C., 1897, c. 69, sect. 7.

(2).—Under clause 4 of section 3, unless the injury resulted from some impropriety, or defect in the rules, bye-laws or instructions therein mentioned; provided that where a rule or bye-law has been approved, or has been accepted as a proper rule or bye-law, either by the Lieutenant-Governor in Council or under and in pursuance to any provision in that behalf of any act of the legislature

Art. 25.

circumstances, to the High Court (see *Munday* v. *Thames, etc. Co.*, 10 Q. B. D. 59).

(6) The damages are limited to three years' average earnings (see *Borlick* v. *Head*, 34 W. R. 102).

Class of servants to which the Act applies.

It will be perceived that this Act applies only to a limited class of employees.[80] Thus, a grocer's assistant, injured while lifting a heavy weight, is not a person engaged in manual labour within the meaning of the Act (*Bound* v. *Lawrence*, [1892] 1 Q. B. 226); nor is the driver of a tramcar (*Cook* v. *North Metropolitan Tramways Co.*, 18 Q. B. D. 683); nor an omnibus conductor (*Morgan* v. *London General Omnibus Co.*, 13 Q. B. D. 832).

Canadian Cases.

of Ontario, or of the Parliament of Canada, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law.

(3).—In any case where the workman knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give or cause to be given within a reasonable time, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. Provided, however, that such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury.

[80] Sub-section 3 of section 2, R. S. O., 1897, c. 160, specifies the class of servants to which the Act applies.

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Art. 25.

his giving directions when to start or stop machinery (*Shaffers* v. *General Steam Navigation Co.*,[84] 10 Q. B. D. 356; and *Kellard* v. *Rooke*, 21 *ibid.* 367); nor one who is a mere mouthpiece to carry the orders of the master himself to the other workers (*Snowden* v. *Baynes*, 25 Q. B. D. 193). But, on the other hand, where a genuine superintendent voluntarily assists in manual labour, that fact renders the master none the less liable for his negligence (*Osborne* v. *Jackson*, 11 Q. B. D. 619). A boy going about as mate to a carman may sue in respect of the latter's carelessness, as, *primâ facie*, he is under his orders (*Millward* v. *Midland Rail. Co.*, 14 Q. B. D. 68). To succeed under the latter part of this sub-section, the plaintiff must prove that there was negligence of a person in the employ of the defendant, to whose orders the plaintiff was bound to conform; and that his injuries resulted from his having in fact conformed to those orders (see *Wild* v. *Waygood*, [1892] 1 Q. B. 783).[85]

Negligence of railway servants having management of points, signals, locomotives, and trains.

A person employed to shunt trucks by means of an hydraulic capstan, of which he had the management, may be a person having control of a train on a railway within the meaning of the Act, so as to render the railway company liable for his negligence (*Cox* v. *Great Western Rail. Co.*, 9 Q. B. D. 106); so may a fireman whose duty it was to uncouple some trucks from a train, and scotch them to prevent them from running down an

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Canadian Cases.

[84] Sect. 2, sub-sect. (1). "Superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour [identical with (*a*) sect. 2, Manitoba Act, and (1) sect. 2, R. S. B. C., 1897, c. 69].

[85] Sect. 5, R. S. O., 1897, c. 160.

Art. 25.

incline (*McCord* v. *Cammell*, [1896] A. C. 57). But, on the other hand, a person whose duty it is to oil, clean, and adjust points, and signal wires, and apparatus, is not a person who has the *charge or control* of points or signals within the meaning of the Act (*Gibbs* v. *Great Western Rail. Co.*, 12 Q. B. D. 208). The word "railway" is not confined to the railways of regular railway companies, but extends to temporary railways laid down by a contractor for the purpose of constructing works (*Doughty* v. *Firbank*, 10 Q. B. D. 358).

Notice of claim.

The contents and form of this notice are matters rather of procedure than of law; but for the convenience of the practitioner, it may be stated, that it should be in writing (*Moyle* v. *Jenkins*, 8 Q. B. D. 116), and should state on the face of it the name and address of the injured servant, and the date and cause of the injury (*Keen* v. *Millwall Docks*, 8 Q. B. D. 482). It should be served by delivering it at, or sending it in a registered letter to, the place of business or residence of the employer. It need not, however, be technically accurate (*Stone* v. *Hyde*,[86] 9 Q. B. D. 76; and see also *Previdi* v. *Gatti*,[87] 36 W. R. 670).

SECTION IV.—LIABILITY OF PARTNERS FOR EACH OTHER'S TORTS.[88]

The liability of partners for each other's torts rests on precisely the same principles as the liability of a principal

Canadian Cases.

[86] *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300.

[87] See also Factories Act, R. S. O., 1897, c. 256; and *Hamilton* v. *Groesbeck*, 18 O. A. R. 437; and Railway Act, Canada, 1888, c. 29.

[88] While promoters of a company, as such, are not agents for each other, it may be shown that

Art. 25.

for the act of his agent, inasmuch as each partner is the agent of his co-partners in relation to the conduct of the partnership business. With regard to partnership, however, the law has now been codified by ss. 10, 11 of the Partnership Act, 1890, in the following words:

ART. 26.—*Statutory Rule.*

Partnership Act, 1890, s. 10.

(1) "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

Section 11.

(2) "In the following cases, viz.:

"(a) Where one partner acting within the scope of his apparent authority receives

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Canadian Cases.

one or more of them has or have been authorised to act as agent or agents for the others, and the ordinary responsibility of principals then attaches. Therefore, where promoters who were to receive for their services paid-up stock in a company to be formed, authorised two of their number to solicit subscriptions for shares, and these two, by means of false representations, induced the plaintiff to subscribe and pay for shares, the money being received and used by the promoters before the incorporation of the company, the plaintiff was held entitled to repayment by the promoters of the amount paid. Judgment of Armour, C.J., affirmed (*Wilson* v. *Hotchkiss*, C. A. (1901), 2 O. L. R. 261).

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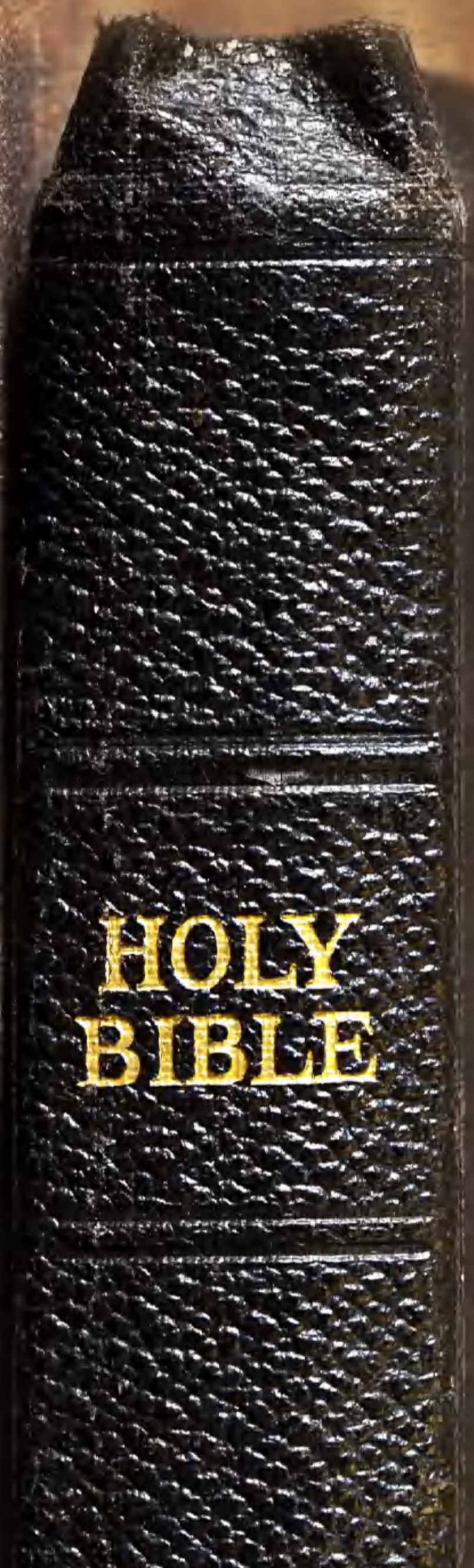

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Art. 26.

of the partnership property, another partner will not be liable unless he expressly authorises the tort; for such a prosecution is outside the ostensible authority of a partner; as it has nothing to do with the carrying on the business of the firm in the ordinary way (*Arbuckle* v. *Taylor*, 2 D. P. C. 160). Indeed, it is difficult to imagine a case in which (without express authority, or, what is the same thing, subsequent ratification) a firm would be liable for the violent acts of a member against the person or liberty of a third party.

Defamation.

(3) Partners in certain firms may, however, be liable for torts to the reputation committed by a partner who has no actual authority. Thus, a firm of newspaper proprietors would be liable for a libel inserted by an editor partner. So, a firm of company promoters would be liable for a fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside it.

Fraudulent guarantees.

(4) There is one tort from which the firm is specially exempted from liability by statute (viz. 9 Geo. 4, c. 14, s. 6, by which it is enacted that the firm is not to be liable for false and fraudulent representation as to the character or solvency of any person, unless the representation is in writing signed by all the partners. The signature of the firm's name is insufficient even although all the partners are privy to the misrepresentation (*Swift* v. *Jewsbury*, L. R. 9 Q. B. 301).

Liability for fraudulent misappropriations, where one partner receives the money.

(5) With regard to the special torts referred to in s. 11 of the Partnership Act, viz., the misapplication of money or property by a member of the firm, the liability arises in two cases, viz., (1) where a partner acting within the scope of his apparent authority receives the money and misapplies it; and (2) where the firm receives the

Art. 26.

money in the course of its business and one or more of the partners misapplies it. Questions under the first part of s. 11 mostly occur in the case of solicitors and bankers, and the question almost always resolves itself into this: Was the acceptance of the money or property by the defaulting partner within the scope of his apparent authority or not? It is obviously impossible to give any general rule by which such a question can be solved, and most of the reported cases really turn on evidence of partnership usage tending to prove actual as distinguished from ostensible authority, and therefore decide no general principle of law at all (*Cf. Cleather* v. *Twisden*, 28 Ch. D. 340, and *Rhodes* v. *Moules*, [1895] 1 Ch. 236). It has, however, been held that the receipt of money by one member of a firm of solicitors, professedly on behalf of the firm for the general purpose of investing it as soon as a good security can be found, is not an act within the scope of the ordinary business of a solicitor, and that therefore, in the absence of actual authority, the other partners are not liable for its misappropriation (*Harman* v. *Johnson*, 2 El. & Bl. 61). But, on the other hand, the receipt of money by a solicitor to be invested on a specified mortgage, or to be applied in the settlement of the affairs of the client, is within the scope of his ostensible authority so as to render his partners liable if he misapplies it (*Earl of Dundonald* v. *Masterman*, 7 Eq. 504).

Liability where the firm receives and one partner misappropriates.

(6) With regard to the second part of s. 11, viz., the case where a firm (and not merely an individual partner) receives money or property, and it is afterwards misapplied by one or more of the partners, no question of partnership authority to *receive* the property can arise. In such cases the only question is whether it has been misapplied by a partner *while it remains in the custody of the firm*. Thus, where a firm of solicitors accepts money from a client to be invested on a specific mortgage,

Art. 26.

and it is so invested, the subsequent fraud of one of the partners, who induces the mortgagor to repay the money to him and then absconds with it, will not render the firm liable; for the misapplication is not made while the money is in the custody of the firm (*Sims* v. *Brutton*, 5 Ex. 802).

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Art. 27. if the cause of action is the infringement of a right, the action must be brought within the

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Canadian Cases.

the collectors' roll is not limited to two years under R. S. O., 1877, c. 61, sect. 1 [now R. S. O., 1897, c. 72, sect. 1] (*Town of Peterborough* v. *Edwards*, 31 U. C. C. P. 231).

(a) An action against a commissioner of Indian affairs for seizing and selling timber cut on Indian lands must be brought within six months from the seizure, not from the sale (*Jones* v. *Bain*, 12 U. C. R. 550).

An action for malpractice against a registered member of the "College of Physicians and Surgeons of Ontario," was brought within one year from the time when the alleged ill-effects of the treatment developed, but more than a year from the date when the professional services terminated. *Held*, that the action was barred under "The Ontario Medical Act," R. S. O., 1887, c. 148, sect. 40 [now R. S. O., 1897, c. 176, sect. 41]. *Held*, also, that infancy does not prevent the running of the statute (*Miller* v. *Ryerson*, 22 O. R. 369).

The defendants, a road company, incorporated under the General Road Companies Act, R. S. O., 1887, c. 159, sect. 99 (now R. S. O., 1897, c. 193, sect. 139), and which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post he was thrown out of it into the open ditch at the end of the culvert and injured. *Held*, that the construction of the culvert and the guard was a thing "done in pursuance of the Act" within the meaning of

prescribed period after the actual doing of the thing complained of. Art. 27.

Canadian Cases.

section 145: and that therefore the time for bringing the action was limited to within six months after the date of the accident (*Webb* v. *The Barton Stoney Creek Consolidated Road Co.*, 26 O. R. 343).

The Municipal Act, sect. 337 [now R. S. O., 1897, c. 223, sect. 606], provides that actions against a municipal corporation for not repairing highways must be brought "within three months after the damages have been sustained." The plaintiff's mare fell through a bridge and died four months after from the injuries received. *Held*, that the statute began to run from the occurrence of the accident, not from the death (*Miller* v. *The Corporation of the Township of North Fredericksburgh*, 25 U. C. R. 31).

In case of fraudulent misrepresentation, the statute begins to run from the time of misrepresentation, not from its discovery by the plaintiff, nor from the time that damage accrued (*Dickson* v. *Jarvis*, 5 U. C. R. (O. S.) 694; *Irwin* v. *Freeman*, 13 Grant's Chy. Reps. 465).

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months. *Held* bad, as sect. 491 of the Municipal Act, R. S. O., 1877, c. 174 [now R. S. O., 1897, c. 223, sect. 606], did not apply (*Sullivan* v. *Town of Barrie*, 45 U. C. R. 12).

"The only section of the Municipal Act, R. S. O., 1877, c. 174 [now R. S. O., 1897,

Art. 27.

(2) But if the cause of action is not the infringement of a right, but merely damage

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Canadian Cases.

c. 223, sect. 606], which imposes any limitation as to the time of commencement of an action against a municipal corporation is the 491st," which enacts that "every public road, street, bridge, and highway shall be kept in repair by the corporation, and in default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained." This section is not applicable to all actions against a corporation, but only to those arising out o non-repair of, or by reason of neglect to repair public streets, highways, &c. (*Ibid.*—Osler, J.).

Municipal Corporations—Opening in Sidewalk by Permission of Corporation—Negligence of Licensee—Liability of Corporation—Three Months' Limitation—R. S. O., 1897, c. 223, *sects.* 606, 639.

Sect. 606 of the Municipal Act, R. S. O., 1897, c. 223, which requires an action against a municipal corporation for its default in keeping its streets in repair to be brought within three months, applies to an action against a corporation for an accident occasioned by the failure to properly guard an opening made, with the corporation's permission, in the sidewalk adjoining certain premises for access to the cellar thereof; at all events it was never intended that the

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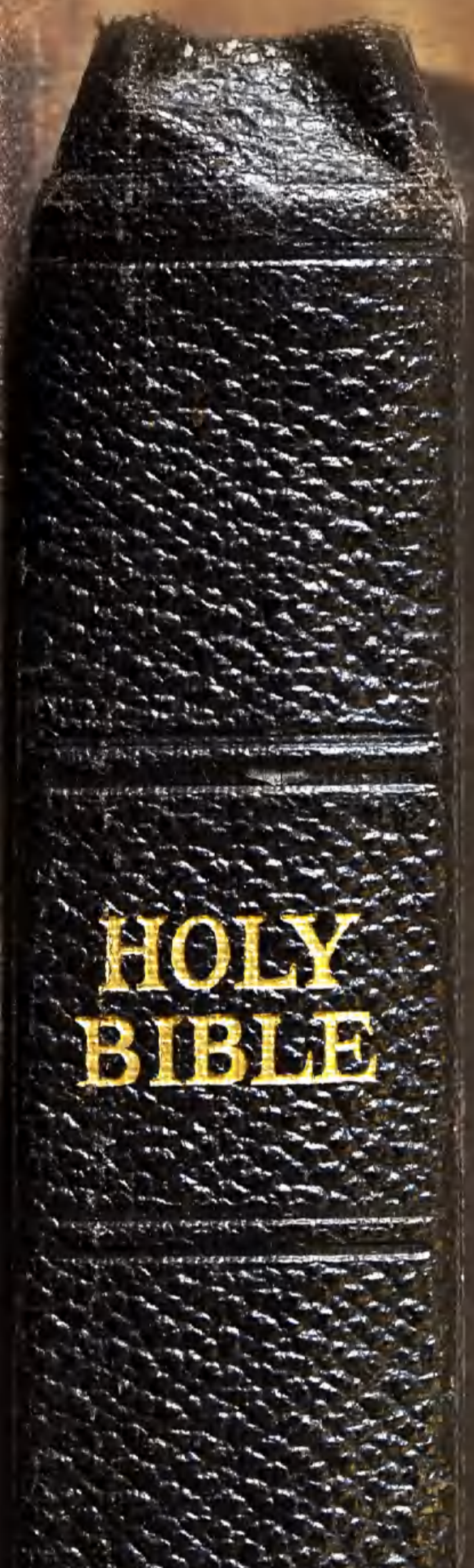

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Art. 27.

more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses:—*Held*, that A.'s right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself (*Backhouse* v. *Bonomi, supra*; *Darley Main Colliery Co.* v. *Mitchell, supra*).

Abstracting coal.

(2) But where a trespasser wrongfully worked *the plaintiff's coal*, in consequence of which the surface of the plaintiff's land subsided, it was held that the statute commenced to run from the working and taking away of the plaintiff's coal, and not from the subsidence; on the ground that the working of the coal was a complete tort, and that the subsidence was only a consequence of it (*Spoor* v. *Green*, L. R. 9 Ex. 99).

Actions for recovery of chattels.

(3) In an action for wrongful conversion of goods (which is an injury to a right), the facts were as follows: A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years, and died. Upon A.'s death it was claimed by these friends, and adversely by the widow, on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the widow had refused to give up the furniture to the friends, for the tort was the wrongful conversion of the goods, and there was no conversion until there had been a demand and refusal (*Edwards* v. *Clay*, 28 Beav. 145).

Concealed fraud.

(4) A lease, belonging to the plaintiff, was fraudulently taken from him by his son, and deposited with B. to secure a loan made by B. to the plaintiff's son. The plaintiff was ignorant of this transaction. Subsequently B. became bankrupt, and his trustee in bankruptcy assigned the leasehold premises for good consideration to

Art. 27.

the defendant. B. and the defendant were both ignorant of the fraud. The plaintiff then commenced an action against the defendant for conversion of the lease; to which the defendant pleaded that the fraudulent deposit with B. was made more than six years before action brought, and that, consequently, the action was barred by the Statute of Limitations. The Court of Appeal, however, held that the statute only began to run when the plaintiff had a complete cause of action against the defendant, *i.e.*, when he demanded the deed and was refused it, and not from the receipt of the deed by B. In giving judgment, Lord ESHER, M.R., said: "I am of opinion that, in the present case, the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done *by the defendant* himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations, though more than six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them" (*Miller* v. *Dell*, [1891] 1 Q. B. 468; and see also *Spackman* v. *Foster*,[90] 11 Q. B. D. 99).

see over.

Canadian Cases.

[90] *McClure* v. *Black*, 20. O. R. 70; *Kent* v. *Kent*, 19 O. A. R. 352; *Hill* v. *Ashbridge*, 20. O. A. R. 44; *Grant* v. *O'Hare*, 46 U. C. R. 277; *Adamson* v. *Adamson*, 12 S. C. R. 563; *Hopkins* v. *Hopkins*, 3 O. R. 223; *Smith* v. *Midland R. W. Co.*, 4. O. R. 494; *Cameron* v. *Walker*, 19. O. R. 212; and see *Dickson* v. *Jarvis*, *post*, p. 314, and *ante*, p. 139.

In an action against O. to recover possession of land it was shown that O. had been in possession for over twenty years; that he was originally in as caretaker for one of the owners; that afterwards the property was severed by judicial decree, and such owner was ordered to convey certain portions

Art. 27.

Actions for recovery of land.

(5) There is a great distinction between actions for the recovery of chattels and actions for the recovery of land. For the Statutes of Limitation *do not bar the right* to chattels after the prescribed period, but only *bar the*

Canadian Cases.

to the others; that after the severance O. performed acts showing that he was still acting for the owners, and that he also exercised acts of ownership by inclosing the land with a fence and in other ways. *Held*, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker, and he had acquired no title by possession (*Ryan* v. *Ryan*, 5 S. C. R. 387, followed; *Heward* v. *O'Donohoe*, 19 S. C. R. 341; and see *Harris* v. *Mudie*, 7. O. A. R. 414).

"The Supreme Court in *McConaghy* v. *Denmark*, 4 S. C. R. at p. 632, points out that 'by a long unbroken chain of decisions extending over a period of upwards of forty years, it has been held by the courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons . . . to the exclusion of the true owner for the full period of twenty years.' The period is now reduced, but the tendency since *McConaghy* v. *Denmark* has been more than ever in the direction of requiring satisfactory proof of a possession, answering in all respects the conditions above indicated" (*Coffin* v. *N. A. Land Co. et al.*, 21 O. R. 87—Street, J.; and see *Harris* v. *Mudie*, 7 O. A. R. 414; and *Griffith* v. *Brown*, 5 O. A. R. 303).

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Art. 28.

Art. 28.—*Continuing Torts.*

Where the tort is continuing, or recurs, a fresh right of action arises on each occasion (*Whitehouse* v. *Fellowes*, 30 L. J. C. P. 305).[92]

Illustrations.

False imprisonment.

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the imprisonment *de die in diem* is a new imprisonment; and

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Canadian Cases.

the action could not be maintained (*Chaudiere Machine and Foundry Co.* v. *Canada Atlantic Railway Co.*, 33 S. C. R. 11).

"His right of action would, therefore, now be barred, or was barred when the present action was instituted by the lapse of six years. And the appellants cannot recover damages upon that very same cause of action. The proposition that every conveyance of the title would revive a right of action arising out of the same tort, for the additional damages suffered by the new owner is untenable"—Taschereau, C.J., *ib.*

The Towns Incorporation Act of 1895 (Nova Scotia) c. 4, s. 295, provides that "no action shall be brought against any town incorporated under the Act . . . unless within twelve months next after the cause of action shall have accrued." In an action against the town of Truro for cutting a drain through plaintiff's land the Supreme Court *held*, affirming the decision of the court below, that the trespass being a continuing one was not barred except as to damage suffered more than one year before action brought (*The Town of Truro* v. *Archibald*, 33 N. S. Rep. 401; 31 S. C. R. 380).

[92] An action on the case will not lie for the continuance of trespass, as every continuance of the

therefore the period of limitation commences to run from the last, and not the first day of the imprisonment (*Hardy* v. *Ryle*, 9 B. & C. 608). Art. 28.

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*Kansas Pacific Railway* v. *Mihlman*, 17 Kansas Rep. 224). Trespass.

(3) But where the defendants worked their mines too close to the plaintiff's land, and, in consequence, some cottages of the plaintiff were injured in 1868, and by Nuisance.

Canadian Cases.

injury is a new trespass (*Wallace* v. *Milliken* (N. B. Reps.), Trin., T., 1833).

Where the Statute of Limitations has once begun to run against a person no subsequent disability in any one claiming under him will stop it, thus where A. discontinued possession in 1820, and died in 1826, leaving a son under age. It was *held*, that if the statute began to run against A., his son had not ten years after coming of age in which to bring ejectment (*Doe* dem. *Thompson* v. *Marks*, N. B. R., 3 Kerr, 659).

The Statute of Limitations is not a bar to an action for criminal conversation when the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought (*King* v. *Bailey*, 31 S. C. R. 338).

Art. 28.

reason of the *same excavation* some more cottages were injured in 1882, it was held that the plaintiff was entitled to sue for the injuries suffered in 1882. For the tort did not consist in making the excavation, but in causing the plaintiff's land to subside; and as often as it subsided a new cause of action arose. The *causa causans* was, no doubt, the excavation, but the cause of action was the damage (*Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127).

Art. 29.—*Disability.*[93]

Where a person is under disability, the statute only runs from the cesser of the disability (21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*Rhodes* v. *Smethurst*, 4 M. & W. 42;

Canadian Cases.

[93] "During the summer months and during the months when he was sowing the land and reaping his crop, his possession was clearly sufficient beyond question, but during the rest of the year his possession was not actual, nor constant, nor visible . . . The right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff" (*Coffin* v. *N. A. Land Co. et al.*, 21 O. R. 87, 88—Street, J.).

The payment of taxes is not a payment of rent within the meaning of the Real Property Limitation Act (*Ibid.*; and *Finch* v. *Gilray*, 16 O. A. R. 484).

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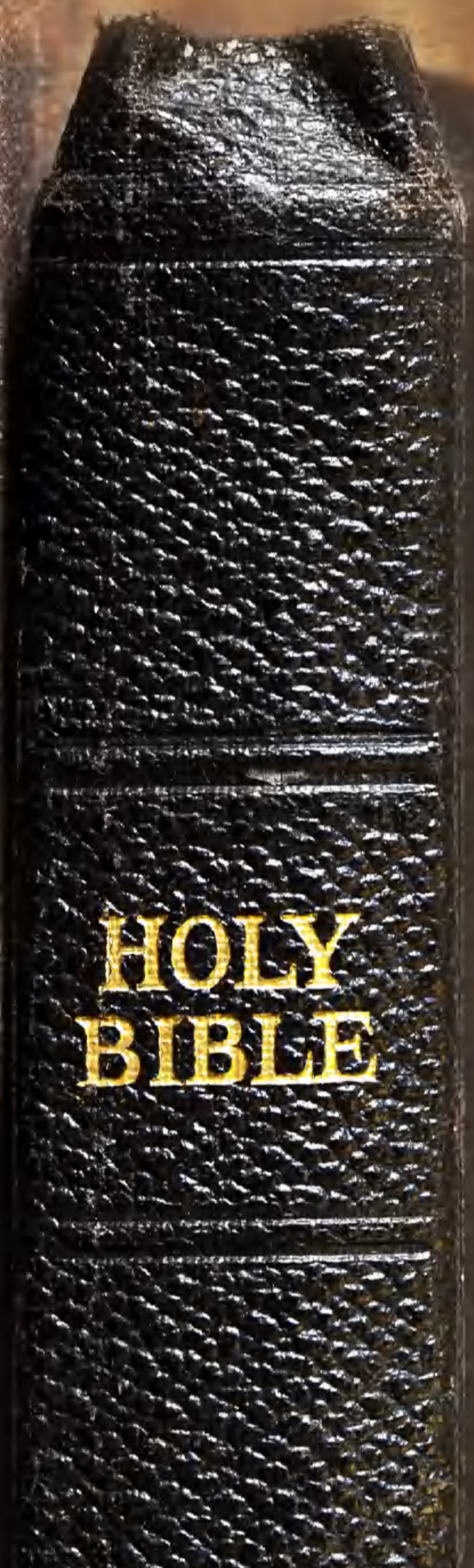

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Art. 30. commenced within *six months* next after the act, neglect or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof (56 & 57 Vict. c. 61).

Illustrations.

(1) A magistrate having convicted and fined the plaintiff for an offence under the Vaccination Acts, issued a distress warrant in default of payment of the fine, and a distress warrant was put in on the plaintiff's premises. Subsequently the conviction was quashed for want of jurisdiction. The plaintiff has six months *from the date of the wrongful entry* on his premises within which to bring his action for the illegal distress (*Polley* v. *Fordham*, [1904] 2 K. B. 345).

(2) A county council acquired and worked tramways under their statutory powers. An action for damages for injuries sustained by a passenger on one of their tramcars in consequence of the negligence of their servants must be begun within six months of the negligence complained of (*Parker* v. *London County Council*, [1904] 2 K. B. 501).

Contractor under public authority.

(3) But though the protection of the Act extends to the officers of a public body and to persons acting under their direct mandate, it does not extend to an independent contractor doing work under contract with a public authority for his own profit. So a contractor laying down tram lines under contract with the London County Council (though the county council would be protected) cannot claim the protection of the Act (*Tilling* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562.

see 138(a)

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.[95]

THE principles which govern the measure of damages in actions of tort are very loose; and, indeed, as Mr. Mayne, in his excellent treatise, has pointed out, there are many cases of tort in which no measure can be given. It will

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Canadian Cases.

[95] *Fraser* v. *London St. R. W. Co.*, 29 O. R. 411; *Steadman* v. *Venning*, 6 N. B. S. C. R. 639; *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 O. A. R. 263; *Laughlin* v. *Harvey*, 24 O. A. R. 438.

In actions for torts the court will not set aside a verdict for excessive damages except upon very clear and manifestly strong grounds.

"As regards the amount of damages and the merits generally, it is never without reluctance and hesitation that the court sets aside a verdict in any action of this nature (wrongful imprisonment) on the ground of excessive damages, because there is no rule approaching to certainty by which they can be estimated, and it is peculiarly within the province of a jury to assess them. In doing this, juries are supposed to give due consideration, not merely to the facts of the case, but to the feelings and motives of the parties, weighing also, as they cannot fail to do in some degree, their characters and stations of life" (*McDonald* v. *Cameron*, 4 U. C. R. 1—Robinson, C.J.; and see *post*, p. 155; *Dobbyn* v. *Dicow*, 25 U. C. C. P. 18; *Ford* v. *Gourlay*, 42 U. C. R. 552.

The evidence being insufficient to enable the trial

Art. 31. be at once apparent, however, that, putting aside circumstances of aggravation or mitigation, the compensation to be awarded in respect of an injury to property is

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Canadian Cases.

judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded. The Supreme Court allowed an appeal, and discussed the action, *Williams* v. *Stephenson*, 33 S. C. R. 323. "With all due deference, I am of opinion that it was not competent for the learned trial judge to guess the amount of damages in an action such as this, which was an action to recover damages for the breach by the defendant of an agreement. The plaintiff should have given such evidence as would have enabled the learned trial judge to have ascertained the damages with reasonable certainty, and not to have contented himself with also guessing as to his damages, as he apparently did" —Armour, J., *ib.*

Where, in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or *bonâ fide* (*Union Bank of Canada* v. *Rideau Lumber Co.*, 1901, 3. O. L. R. 269).

Notwithstanding the privileges conferred by its act of incorporation upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of the city, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery, and the diminution of rentals and value thereby occasioned. *Drysdale* v. *Dugas*, 26 S. C. R. 20, followed (*Gareau* v. *Montreal Street Railway Co.*, 31 S. C. R. 463).

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Art. 31.

measurement save the discretion of the jury upon the evidence before them, courts will not disturb a verdict upon the ground of excessive damages unless it be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it" (*Miss. Cent. R. R.* v. *Caruth*, 51 Miss. Rep. 77).

Illustrations.

False imprisonment.

(1) Thus, where some working men were unlawfully imprisoned for six hours only, being in the meantime well fed and cared for, and the jury nevertheless awarded £300 to each of them, the court refused to set the verdict aside; on the ground that it seemed to them probable that the jury considered the importance of the right of personal liberty rather than the position of the plaintiffs (*Huckle* v. *Money*, 2 Wils. 587).

Seduction.

(2) And so in actions for seduction, "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (*per* Lord ELDON, *Bedford* v. *M'Kowl*, 3 Esp. 120).

Assault.

(3) So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly, is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge* v. *Wade*, 3 Wils. 18).

Art. 31.

Defamation.

(4) So, for defamation, the damages are almost wholly in the discretion of the jury (*Kelly* v. *Sherlock*, L. R. 1 Q. B. 686), and the court will not interfere with their verdict, unless, having regard to all the circumstances, the damages awarded are so large that no twelve reasonable men could have given them (*Praed* v. *Graham*,[96] *supra*).

ART. 32.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses incurred by reason of such act (see *Rust* v. *Victoria Dock Co.*, 56 L. T. 216; and *Pneumatic Tyre, etc. Co.* v. *Puncture Proof, etc. Co.*,[97] 15 R. P. C. 405).

Canadian Cases.

[96] *Sibbald* v. *Grand Trunk R. W. Co.*, 19 O. R. 164; and *ante*, p. 56.

[97] "It is not an inflexible rule that the jury can give no more in damages than the value of the goods at the time of the conversion, though that is the estimate by which they should be governed as a general principle where there is nothing special or unusual in the case" (*Morton and McGhee* v. *McDowell*, 7 U. C. R. 339—Robinson, C.J.).

"It is true that in actions of trespass the courts are reluctant to interfere on account of excessive damages, but this applies rather to trespasses to the person, or such as involve injury to the feelings or character, and in which there can be

Art. 32.

(2) In actions for trespass to real property the measure of damages is the loss the plaintiff has sustained in consequence of the wrongful acts of the defendant, and not the benefit which accrues to the latter.

(3) When the wrong consists in depriving the plaintiff of his personal property the measure of damages is the market value of the property at the time of the commission of the wrong.

(4) Where the wrong results in the plaintiff's being temporarily deprived of the use of personal property the measure of damages is the value of the use of which he is deprived.

Injury to horse.

(1) Thus, in the case of injury to a horse through the defendant's negligence, it has been held that the measure of damages is the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the prior and subsequent value of the horse (*Jones* v. *Boyce*, 1 Stark. 493).

Canadian Cases.

scarcely said to be any rule for computation. But here the injury was to a right of possession, certainly not wanton or insulting—the damages, if any, might have been estimated, and the jury should not have disregarded all computation" (*per* Robinson, C.J.; *Jeffers* v. *Markland*, 5 U. C. R. (O. S.) 677. *Godard* v. *Fredericton Boom Co.*, N. B. R., 1 Han. 536; *Rankin* v. *Mitchell*, N. B. R., 1 Han. 495; *Rose* v. *Belyea*, N. B. R., 1 Han. 109; *Allenach* v. *Desbrisay*, N. B. R., East. T. 1865).

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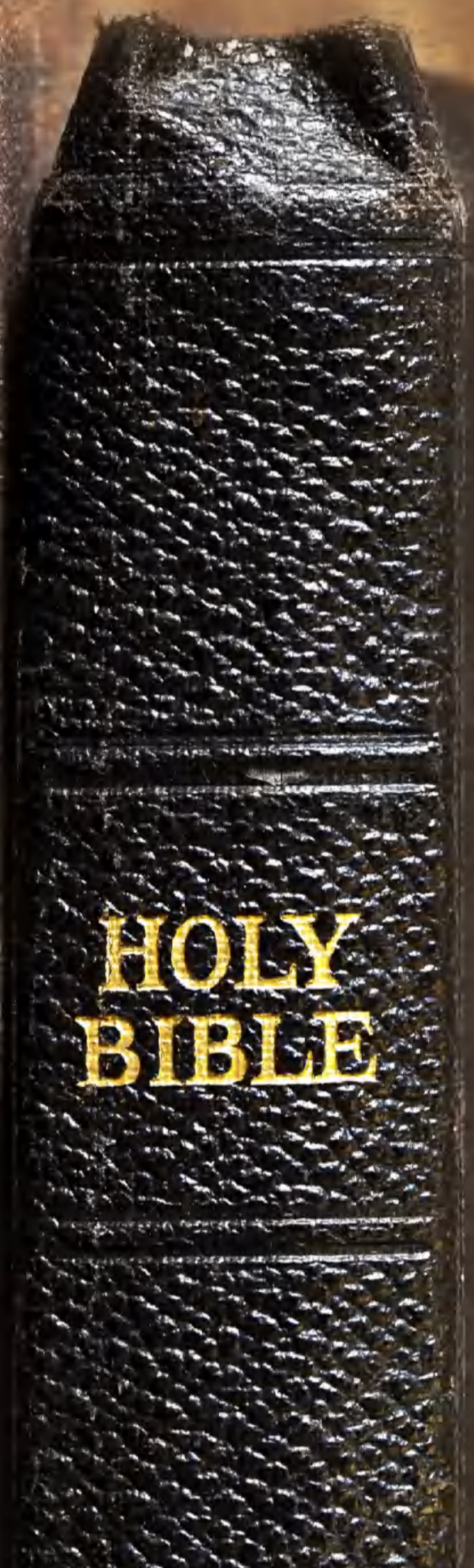

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Art. 32.

where the plaintiff purchased champagne, lying at the defendant's wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave England, and the defendants wrongfully refused to deliver up the wine, and converted it to their own use, it was held, in an action of trover, that although the defendants had no knowledge of the sale, or of the purposes for which the plaintiff required delivery of the champagne, yet the plaintiff was entitled as damages to the price at which he had sold it (*France* v. *Gaudet*, L. R. 6 Q. B. 199).

Trespass to land.

(3) Where the defendant cut a ditch across the plaintiff's land, the measure of damages was the diminution in value of the land, and not the cost of restoring it (*Jones* v. *Gooday*, 8 M. & W. 146). In *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* ([1896] 2 Ch. 538), another principle was applied in peculiar circumstances. The defendants had wrongfully tipped on the plaintiff's land spoil from a colliery, and it was held that in the special circumstances the value of the land to *the defendants* for tipping purposes was the proper measure, as the defendants had had the use of the plaintiff's land for years, and they ought not to do this without paying for it.[99]

Canadian Cases.

trespass or trover. But that, if correct, does not introduce any other element than a valuation of the goods themselves as forming the true measure of damages" (*Maxwell* v. *Cramm*, 13 U. C. R. 254 *et seq.* Draper, J.; and *post*, p. 165).

[99] In trespass the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed?

Where the defendants had wrongfully and wilfully entered upon and cut and carried away

Art. 32.

Taking coal.

(4) So, where coal had been taken. by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*In re United Merthyr Collieries Co.*, L. R. 15 Eq. 46).

Loss of use of a chattel.

(5) Where, owing to a collision, the plaintiffs lost the use of a dredger for some weeks, they were entitled to recover damages for the loss of the use of the dredger (*The Greta Holme*, [1897] A. C. 596), and he is entitled to the same damages even though he has a spare article of the same kind which he keeps for use in such circumstances (*The Mediana*, [1900] A. C. 113).

Canadian Cases.

timber from the plaintiffs' limits, and the plaintiffs sued for trespass only: *Held*, that the damages should be measured by: (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damages as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc. *Martin* v. *Porter* (1839), 5 M. & W. 351; and *Bulli Coal Co.* v. *Osborne* (1899), A. C. 351, applied and followed.

Judgment of Lount, J., 3. O. L. R. 269, affirmed (*Union Bank of Canada* v. *Rideau Lumber Co.*, 1902, 4. O. L. R. 721).

Art. 32.

Cost of repairs.

(6) So, in case of collisions between ships, the actual cost of repairs must be recouped, no allowance being made in respect of new materials replacing old ones (*The Munster*, 12 T. L. R. 264).

Art. 33.—*Presumption of Damage against a Wrong-doer.*

If a person who has wrongfully converted property, refuses to produce it, it will be presumed as against him to be of the best description (*Armory* v. *Delamirie*, 1 Str. 504; 1 Sm. L. Ca. 343).

Illustrations.

(1) Thus, in the leading case (*Armory* v. *Delamirie*, 1 Str. 504; 1 Sm. L. Ca. 343), where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem*.

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer* v. *Cradock*, 12 L. J. C. P. 166).

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Art. 34.

was long doubted whether mental shock caused by fright without any bodily injury was a subject for damages, but it has now been decided that damages are recoverable in respect thereof (*Dulieu* v. *White & Sons*, [1901] 2 K. B. 669 (*a*), and *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57 (*b*)).

Medical expenses.

(3) So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon* v. *Bell*, 1 Stark. 289; and see *Spark* v. *Heslop*, 28 L. J. Q. B. 197).

Loss of property.

(4) The plaintiff was travelling with other passengers in the carriage of a railway company, and, on the tickets being collected, there was found to be a ticket short. The plaintiff was wrongly charged by the collector with being the defaulter, and, on his refusing to pay, was removed by the officers of the company, but without unnecessary violence. In an action for assault, it was held, that the loss of a pair of race-glasses, which the plaintiff had left behind him in the carriage when he was removed, and which were not proved to have come into the possession of any of the company's servants, was not such a natural consequence of the assault as to be recoverable (*Glover* v. *London and South Western Rail. Co.*,[101] L. R. 3 Q. B. 25).

(*a*) An action for negligence.

(*b*) An action for damages for shock caused by the defendant, as a practical joke, falsely telling the plaintiff that her husband had had his legs broken in an accident.

Canadian Cases.

[101] Where the conductor of a railway company forcibly, and without excuse for so doing, removes from a train a passenger who has paid his fare, he is liable for the assault, and the doctrine of *respondeat superior* applies to the company. But where, in the course of such removal, and while in the act of leaving the car, plaintiff slipped and was injured,

Art. 34.

Lord Campbell's Act.

(5) The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant, should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased (*Franklin* v. *South Eastern Rail. Co.*,[102] 3 H. & N. 211). But the jury cannot, in such cases, take into consideration the grief, mourning, and funeral expenses to which the survivors were put. And this seems reasonable; for, in the ordinary course of nature, the deceased would have died sooner or later, and the grief, mourning, and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake* v. *Midland Rail. Co.*, 18 Q. B. 93; *Dalton* v. *South Eastern Rail. Co.*, 4 C. B. (N.S.) 296).

And, on the same principle, where a deceased had made provision for his wife, by insuring his life in her favour, then, inasmuch as she is benefited by *the accelerated receipt* of the amount of the policy, the jury ought, in estimating the widow's loss, to deduct from the future earnings of the deceased, not the amount of the policy moneys, but the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy (*Grand Trunk Rail. Co.* v. *Jennings*,[103] 13 App. Cas. 800).

Canadian Cases.

the defendants were *held* not liable for such injury, as the removal was not the proximate, but the remote cause of the accident (*Williamson* v. *Grand Trunk Railway Co.*, 17 U. C. C. P. 615).

[102] *Lett* v. *The St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545, and R. S. O., 1897, c. 166.

[103] *Beckett* v. *Grand Trunk R. W. Co.*, 13 O. A. R. 174; *Grand Trunk* v. *Beckett*, 16 S. C. R. 713; *Stephens* v. *Township of Moore*, 25 O. A. R. 42.

Art. 34.

Injury to trade.

(6) So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory* v. *Williams*, 1 C. & K. 568).

Infection.

(7) A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not; and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*Mullet* v. *Mason*, L. R. 1 C. P. 559).

Earnings of ship.

(8) In collision cases,[104] the loss of earnings from a second voyage for which the ship was let, is not too remote (*The Argentino*, 14 App. Cas. 519).

Loss of ship.

(9) So, where a steamer (wholly to blame) collided with a sailing vessel, and destroyed its instruments of navigation, and in consequence of that loss, the sailing ship ran ashore, and was lost while making for port, it was held that the loss of the ship was the natural result of the collision, and that the steamer was liable (*The City of Lincoln*, 15 P. D. 15).

Canadian Cases.

[104] In an action for injury to plaintiff's vessel, caused by collision with defendant's steamboat, it was *held* that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs, but not for the sum expended in the hire of another vessel, to take her place, or for the profits which he would have earned by her employment (*Brown* v. *Beatty et al.*, 35 U. C. R. 328).

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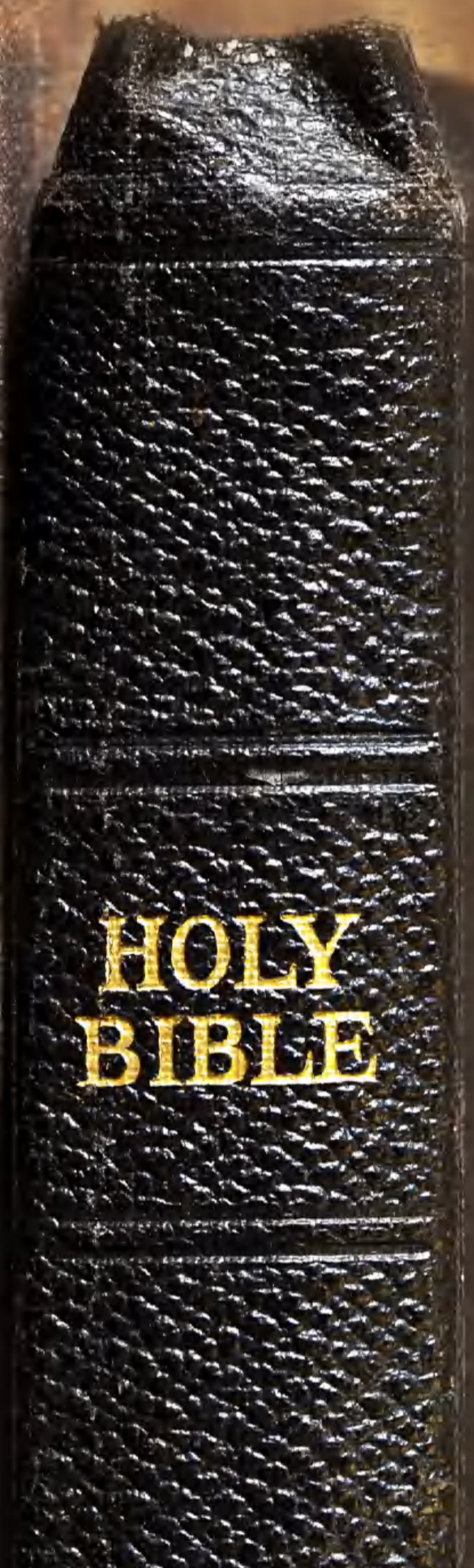

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Art. 35.

(2) But where an act of the defendant is merely the *causa causans*, and the actual cause of action (*i.e.*, the tort) is injury to the plaintiff's property, then each such injury constitutes a fresh cause of action.

Illustrations.

Bodily injuries.

(1) In *Richardson* v. *Mellish* (2 Bing. 240), Best, C.J., said: "When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—'You shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.'" A corollary to this rule is, that several actions cannot be brought in respect of the same injury. Therefore, where a bodily injury at first appeared slight, and small damages were awarded, but subsequently it became a very serious injury, it was held that another action would not lie; for the action having been once brought, all damages arising out of the wrong were satisfied by the award in the action (*Fetter* v. *Beal*,[107] 1 Ld. Raym. 339—692).

Canadian Cases.

[now R. S. O., 1897, c. 51, sect. 115], supports this opinion in authorising the jury, if they think fit, to give interest in the nature of damages over and above the value of the goods at the time of the conversion or of seizure in all actions of trover or trespass *de bonis asportatis*" (*Benson* v. *Connor*, 6 U. C. C. P. 359—Draper, C.J.; *Scott* v. *McAlpine*, 6 U. C. C. P. 302; and *ante*, p. 159).

[107] In an action for trespass to land, the defendant, who was a contractor, having driven over the plaintiff's fields where crops were growing, and thereby injured the grass, grain, etc., it was *held* that the plaintiff might recover to the extent of

Art. 35.

Continuing torts.

(2) But if the tort be a continuing tort, the principle does not apply; for in that case a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there *is* a continuing *tort*, or merely a continuing *damage*, is often a matter of difficulty to determine.

Successive subsidences caused by one act of defendant.

(3) In the recent case of *Darley Main Colliery Co.* v. *Mitchell* (11 App. Cas. 127), the defendant worked his

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Canadian Cases.

the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest (*Throop* v. *Fowler*, 15 U. C. R. 365).

The owner of a house of which he is not in the actual occupation, may recover from a person who has placed an offensive nuisance on adjoining premises, damages for the injury sustained in not being able to let the house advantageously in consequence of the nuisance. An owner is liable if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occurs from the want of such care on the part of the tenant (*Smith* v. *Humbert*, N. B. R., 2 Kerr, 602).

The law protects a defendant from being twice sued for the same cause (*Anctil* v. *City of Quebec*, 33 S. C. R. 347; and see *Gareau* v. *Montreal Street Railway Co.*, 31 S. C. R. 463).

Where in an action for bodily injuries there is but one cause of action, damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards rendered from the unforeseen effects of the original injury (*City of Montreal* v. *McGee*, 30 S. C. R. 582).

Art. 35.

mines too close to the plaintiff's property, and in consequence some cottages of the plaintiff were injured in 1868, and were repaired by the defendant. In 1882, in consequence *of the same workings which caused the damage of* 1868, a further subsidence took place, and the plaintiff's cottages were again injured. The case turned on the question of whether the plaintiff was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the plaintiff's land to subside. The excavation was no doubt the proximate cause of the subsidence (the *causa causans*), but the tort itself was the infringement of the plaintiff's right of support, and consequently each separate subsidence was a distinct and separate cause of action.

Damage to property and person distinct torts.

(4) So, also, where the same wrongful act caused damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*Brunsden* v. *Humphrey*, 14 Q. B. D. 141, Coleridge, C.J., *dissentiente*).

Art. 36.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis* v. *London and North Western Rail. Co.*,[108] 7 W. R. 105).

Illustrations. Seduction under guise of courtship.

(1) In seduction, if the defendant had committed the offence under the guise of honourable courtship, that is

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Canadian Cases.

[108] The action was brought for libels published in the defendant's paper. The first publication

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Art. 36.

giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (WILMOT, C.J., in *Tullidge* v. *Wade*, 3 Wils. 18).

Character of girl seduced.

(2) On the other hand, the previous loose or immoral character of the party seduced is ground for mitigation, the using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

Plea of truth in defamation.

(3) In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick* v. *Foulkes*,[109] 12 M. & W. 507).

Plaintiff's bad character in defamation.

(4) Evidence of the plaintiff's *general bad character*[110] is allowed in mitigation of damages in cases of defamation; for, as is observed in Mr. Starkie's book on Evidence,

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Canadian Cases.

with the libel complained of, but not of a publication subsequent to the libel, at any rate, where it makes no reference to the defendant.

Stirton v. *Gummer*, 31. O. R. 277, and *Downey* v. *Stirton*, *ante*, referred to and followed (*Downey* v. *Armstrong*, 1901, 1. O. L. R. 237).

[109] Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice, entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion (*Corridan* v. *Wilkinson*, 20. O. A. R. 184).

[110] In an action of slander a defendant may give facts and circumstances in evidence in mitigation

Art. 36.

"To deny this, would be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant; a virtuous woman with the most abandoned prostitute." But although evidence of general reputation of bad character is admissible, evidence of rumours and suspicions before the publication of the libel that the plaintiff had done what was charged in it, or of facts showing the misconduct of the plaintiff, is not admissible. (See *Scott* v. *Sampson*,[111] 8 Q. B. D. 491, and *Wood* v. *Durham*, 21

Canadian Cases.

of damages (*Johnson* v. *Eastman*, Taylor's K. B. Reps. 243).

"The case of *Bracegirdle* v. *Bailey* (1 F. & F. 536) lays down the rule that evidence of the plaintiff's bad character is inadmissible. . . . We have consulted the judges of the other court, and find that their practice has been in accordance with the case of *Bracegirdle* v. *Bailey*" (*Myers* v. *Currie*, 22 U. C. R. 470—Hagarty, J.).

"Clearly evidence of general bad character is inadmissible, though as to whether a reputation for the particular offence charged may be proved there have been different opinions expressed, more especially in text-writers" (*Ibid.*—Adam Wilson, J.; and see *Edgar* v. *Newell*, 24. U. C. R. 215, where it was *held* that evidence of general bad character was properly rejected).

In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plaintiff is not admissible in mitigation of damages (*Williston* v. *Smith*, N. B. R., 3 Kerr, 443).

[111] It is not permissible to a defendant to plead justification to a libel, and under that defence to

Art. 36.

Q. B. D. 501; and as to giving particulars, see Order XXXVI., r. 37.)

Plaintiff's irritating conduct in defamation.

(5) In *Kelly* v. *Sherlock* (L. R. 1 Q. B. 686), the action was brought in respect of a series of gross and offensive libels contained in the defendant's newspaper. It appeared, however, that the first libel was written because the plaintiff preached, and published in the local papers, two sermons reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew as their mayor. The plaintiff had, also, soon after the libels had commenced, alluded to the defendant's paper, in a letter to another paper, as "the dregs of provincial

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Canadian Cases.

offer evidence of the plaintiff's bad character in mitigation of damages. A plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such a plea, based upon the plaintiff's bad character, must either show that the plaintiff is a man of bad *general reputation or character*, or that the plaintiff has a bad character with regard to some specific act which relates to the charge in the libel complained of (*Wilson* v. *Woods*, 9 O. R. 687, disapproved of, and *post*, p. 202; *Moore* v. *Mitchell*, 11 O. R. 21; and see *Livingston* v. *Trout*, 9 O. R. 488).

In an action for damages for indecent assault evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not (*Gross* v. *Brodrecht*, 24. O. A. R. 687).

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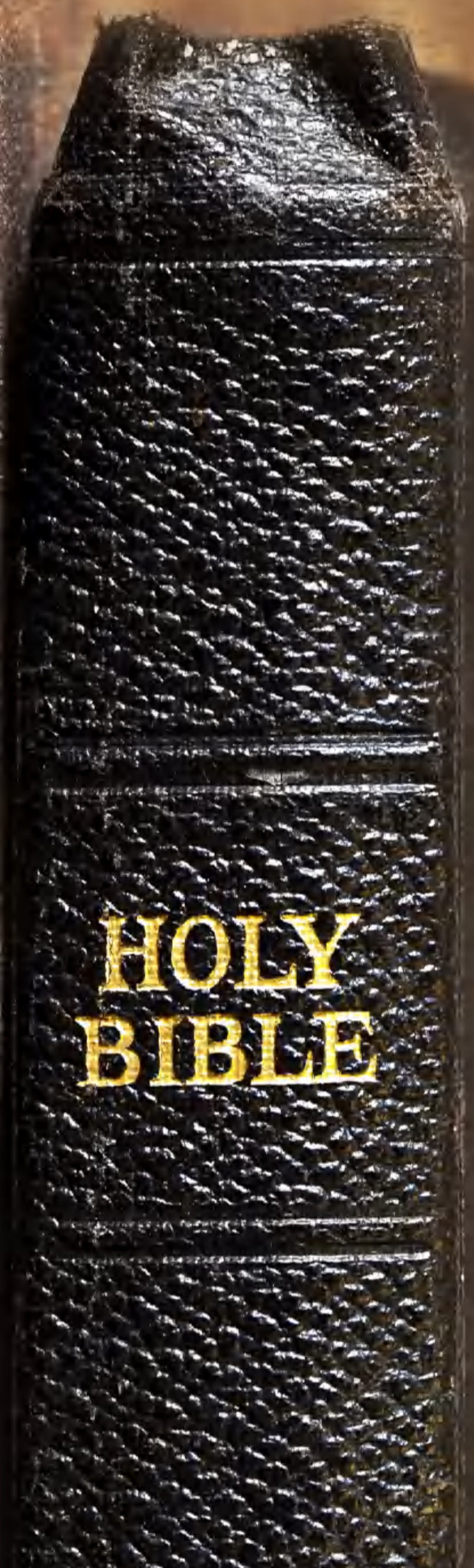

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Art. 36.

substantial damages will be awarded for the invasion of the right of ownership (*Bayliss* v. *Fisher*, 7 Bing. 153).

Causing suspicion of insolvency.

(10) And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an execution, it was held that exemplary damages might be given (*Brewer* v. *Dew*, 11 M. & W. 629).

Art. 37.—*Joint Tort-feasors.*[112]

(1) Persons who jointly commit a tort may be sued jointly or severally; and if jointly, the damages may be levied from both or either

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Canadian Cases.

[112] In joint trespasses the question is not which trespasser of several has acted best or worst, which is most, which least guilty, but what is the damage occasioned by the joint trespass to the plaintiff. Each defendant is liable with his fellow-trespassers for that sum" (*Grantham* v. *Sevens*, 25 U. C. R. 468).

"There is no doubt the general rule is, that in actions of trespass against two or more persons for a joint trespass, where a joint trespass is proven, the damages should be assessed against all the defendants; but when there appears to be a different course of conduct pursued by each defendant, and their motives seem different, an assessment of damages might do great injustice to one and be perfectly right as to the other" (*Clissold* v. *Machell and Mosley*, 26 U. C. R. 423—Richards, C.J.).

Where a debt is due to A. and B., and A. makes an affidavit to arrest the debtor, B. is not liable to

(*Hume* v. *Oldacre*, 1 Stra. 252; *Blair* v. *Deakin*, 57 L. T. 522). Art. 87.

(2) A judgment against one of several joint tort-feasors is a bar to an action against the others, even although the judgment remains unsatisfied (*Brinsmead* v. *Harrison*,[113] L. R. 7 C. P. 547).

Canadian Cases.

an action for a malicious arrest, unless it can be shown that he participated in the malicious act either by instructing or authorising A. to do it, or by having some knowledge that it was done, or intended, or by having afterwards adopted it by giving his assent thereto. If a writ of *capias* be set aside for irregularity, an action on the case will lie against the parties *suing out the same* maliciously. Trespass will be the proper form of action against the party *making the arrest* (*Cameron* v. *Playter*, 3 U. C. R. 138).

In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant *P.* had nothing to do with the original taking, but that it had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. A new trial was ordered without costs, the court refusing to allow the verdict to stand against *P.* (*Menton* v. *Lee et al.*, 30 U. C. R. 281).

[113] A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and

Art. 37.

(3) A release of one of several joint tort-feasors is a bar to an action against the others (*Cocke* v. *Jennor*, Hob. 66); but a mere covenant not to sue one of them is not (*Duck* v. *Mayeu*, [1892] 2 Q. B. 511).

(4) If damages are levied upon one only, then (a) where the tort consists of an act or omission, the illegality of which he must be presumed to have known, he will have no right to call upon the others to contribute (*Merryweather* v. *Nixon*, 8 T. R. 186). But (b) where the tort consists of an act not obviously unlawful in itself (*e.g.*, trover by a person from whom the same goods are claimed by adverse claimants), he may claim contribution or indemnity against the party really responsible for the tort; and this right is not confined to cases where he is the agent or servant of the other tort-feasor (*Adamson* v. *Jervis*, 4 Bing. 72; *Betts* v. *Gibbins*, 2 A. & E. 57).

Canadian Cases.

all costs without judgment being entered, is a bar to an action against others for the same libel (*Willcocks* v. *Howell*, 8. O. R. 576; *McMillan* v. *Fairly*, N. B. R., Han. 325).

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Art. 38. will be prohibited in all cases where the injury is such as is not susceptible of being adequately

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Canadian Cases.

(Ontario) 1897. "In this case the plaintiffs, a municipal corporation, claim an injunction restraining the defendant from continuing to obstruct an alleged public highway. There does not appear to be any objection to their maintaining a civil action for this purpose instead of proceeding by indictment, though the latter is the more usual course (*St. Vincent* v. *Greenfield*, 15. O. A. R. 568—Osler, J.; and see *Fenelon Falls* v. *Victoria*, 29 Grant, Chy. Reps. 4, and *Wray* v. *Morrison*, 9 O. R. 180).

An electric light company, incorporated under the Ontario Companies Act, R. S. O., 1897, c. 200, purchased a piece of land adjoining plaintiff's residence, and erected a transforming and distributing power house thereon. By the working of the engines so much vibration was caused in the adjoining land as to render the plaintiff's house at times almost uninhabitable, and to create a nuisance, though doing no actual structural injury. The company had no compulsory powers to take lands, and no opportunity had been afforded the plaintiff of objecting to the location of its works. Moreover, the company was under no compulsion to exercise its powers, nor was any statutory compensation provided for any injury of the character in question done by such exercise, nor was there any evidence that the company's powers might not have been exercised so as not to create a nuisance: *Held*, that the plaintiff was entitled to an injunction and a reference as to damages (*Hopkin* v. *Hamilton Electric Light and Cataract Power Co.*, 1901, 2. O. L. R. 240).

compensated by damages, or at least not without the necessity of a multiplicity of actions for that purpose (*Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600).

(2) The court has jurisdiction to give damages instead of granting an injunction, and will generally do so in cases where there are found in combination the four following requirements, viz., where the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*per* BAGGALLAY, L.J., in *Sayers* v. *Collyer*, 28 Ch. D. 108; *Serrao* v. *Noel*, 15 Q. B. D. 549; and *per* A. L. SMITH, L.J., in *Shelfer* v. *City of London Electric Lighting Co.*,[115] [1895] 1 Ch. 287, at p. 322).

(3) To entitle a plaintiff to an interlocutory injunction, the court must be satisfied that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to relief.

Canadian Cases.

[115] In *Wright* v. *Turner*, 10 Grant, 67, it was *held* that the small amount of damage occasioned was not a sufficient reason for withholding the aid of the court, and that the plaintiff, having established a clear right, was entitled to a perpetual injunction to stay further trespass.

Art. 38.

Per COTTON, L.J., *Preston* v. *Luck*,[116] 27 Ch. D. p. 506).

(4) An interlocutory injunction will be granted to restrain the publication of a libel, even though such libel affects the plaintiff in his character only, and not in his business. But an injunction to restrain the publication of a libel will only be granted in the clearest cases (*Bonnard* v. *Perryman*,[117] [1891] 2 Ch. 269; *Monson* v. *Tussaud*,[118] [1894] 1 Q. B. 671).

Illustrations. Nuisances.

(1) Thus, where substantial damages would be, or have been, recovered for injury done to land, or the

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Canadian Cases.

[116] There are many cases in which the court will interfere by injunction to maintain things in *statu quo pendente lite*, not only where plaintiff's title to relief is unquestioned, but even where it is doubtful, provided there is a substantial question to be settled (*Atty.-Gen.* v. *M'Laughlin*, 1 Grant, 34).

[117] *Wolfenden* v. *Giles*, 2 B. C. Reps. 279.

[118] Defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse, using no means to consume or prevent the smoke. He was ordered to desist from using his steam engine so as to occasion annoyance to the plaintiff from the smoke (*Cartwright* v. *Gray*, 12 Grant, 399; *Arnold* v. *White*, 5 Grant, 371; *Radenhurst* v. *Coate*, 6 Grant, 139; *Heenan* v. *Dewar*, 18 Grant, 438; *Swan* v. *Adams*, 23 Grant, 220; *Hathaway* v. *Doig*, 6. O. A. R. 264).

Where the defendant raised the height of a party wall beyond that of the building of plaintiff, the

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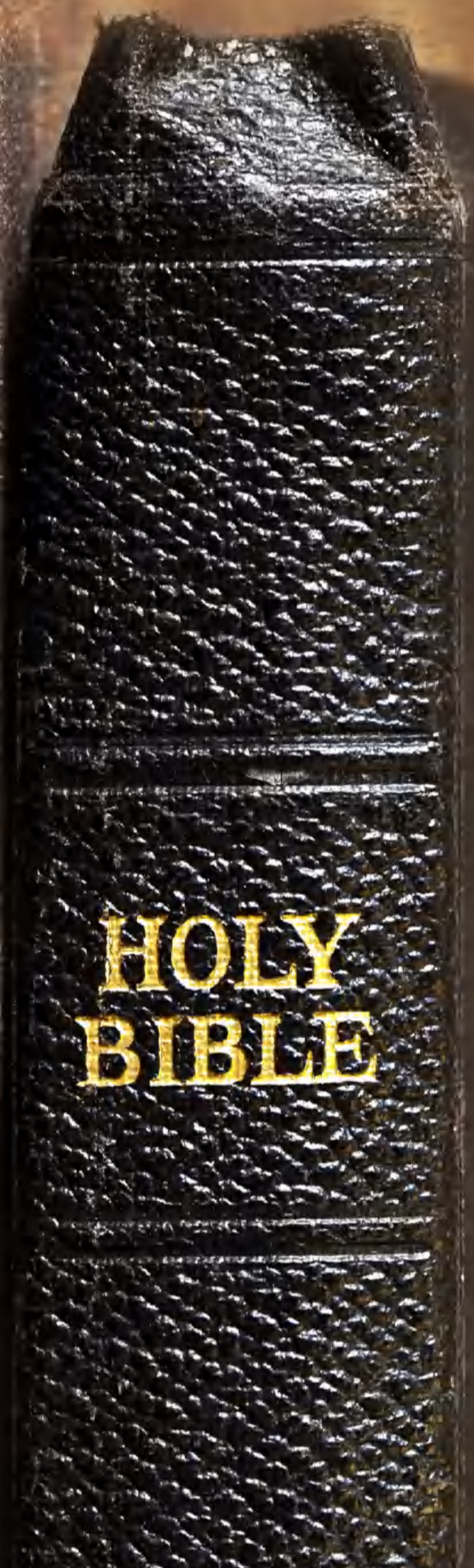

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Art. 38.

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*Fenwick* v. *East London Rail. Co.*, 20 Eq. 544; but see *Harrison* v. *Southwark, etc. Water Co.*, [1891] 2 Ch. 409, in which the former case was distinguished).

(3) As the atmosphere cannot rightly be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be restrained (*Soltau* v. *De Held*, 2 Sim. (N.S.) 133).

Interference with light.

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, according to the ordinary notions of mankind, and to prevent the plaintiff from carrying on his business on the premises as beneficially as before, an injunction will be granted in cases in which damages do not afford an adequate remedy. In *Colls* v. *Home and Colonial Stores* ([1904] A. C. 179), Lord MACNAGHTEN said: "Then, with regard to giving damages in addition to or in substitution for an injunction, that, no doubt, is a delicate matter. It is a matter for the discretion of the court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1*s.* damages as a notice to the defendant

Art. 38.

to remove the obstruction complained of: and then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded, to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the jury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him even to greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the court to protect some ancient lights, which they have never before considered of any great value, as there

Art. 38.

is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises."[119]

Trespass on land.

(5) Formerly (1) if the plaintiff was out of possession, an injunction against a trespasser was refused, except in cases of fraud, collusion, or destruction of the estate; and it was necessary that an action to try the right should be pending. (2) If the plaintiff was in possession, the right to an injunction depended upon the fact of the trespass being by a stranger, or under a claim of title (*Stanford* v. *Hurlstone*, 9 Ch. App. 116). All such distinctions are, however, abolished by s. 25 (8) of the Judicature Act, 1873 [120a] (*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275; *Hickman* v. *Maisey*,[120] [1900] 1 Q. B. 752).

Canadian Cases.

[119] The plaintiff, who claimed the exclusive user of certain streams flowing through his land, which right the defendants denied, had obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damage sustained thereby. *Held*, that the plaintiff was not entitled to an interlocutory injunction, as it was not shown that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour (*McLaren* v. *Caldwell*, 5. O. A. R. 363; *Wright* v. *Turner*, 10 Grant, 67; *Beamish* v. *Barrett*, 16 Grant, 318).

[120a] R. S. O., 1897, c. 51, sect. 58, sub-sect. 9.

[120] An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an electric light company, from running their lines in such a way as to interfere with the safe and efficient

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Art. 38.

Libel.

(9) It was formerly held that an injunction could not be granted to restrain the publication of a personal libel, even where it injuriously affected property (*Gee* v. *Pritchard*, 2 Swan. 402; *Clark* v. *Freeman*, 11 Beav. 112; *Prudential Assurance Co.* v. *Knott*, 10 Ch. App. 142). However, since the Judicature Act, 1873, the court has power to grant an injunction whenever it may appear to be just or convenient (s. 25 (8)). For some time the court was inclined to restrict this power to cases where a libel prejudicially affected property (*Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763); but it may now be considered settled that the court *has jurisdiction* to grant injunctions to restrain the publication of all libels (see *per* COLERIDGE, L.C.J., in *Bonnard* v. *Perryman*, [1891] 2 Ch. at p. 283); or even oral slanders (*Hermann Loog* v. *Bean*, 26 Ch. D. 306). Thus, injunctions have been granted to restrain libels denying the validity of an alderman's election (*Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 148), or imputing "sweating" to a manufacturer (*Collard* v. *Marshall*, [1892] 1 Ch. 571),[121] and to

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Canadian Cases.

[121] Where there are conflicting claimants to the position of president of a company and one takes forcible possession of the company's premises, the other claimant, at all events, when he is at the time the acting president, can bring an action to restrain him in the name of the company, although it be uncertain who is the rightful president (*Toronto Brewing and Malting Co.* v. *Blake*, 2, O. R. 175).

The plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. Some of the defendants by threats, intimidation and violence, prevented one man who had contracted to work for one of

Art. 38.

restrain the placing of a portrait model of the plaintiff in the "chamber of horrors" at an exhibition of wax works. However, the court is extremely chary of granting *interlocutory* injunctions in cases of libel. As Lord COLERIDGE said in *Bonnard* v. *Perryman* (*supra*): "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. . . . We entirely approve of, and desire to adopt as our own, the language of Lord ESHER, M.R., in *Coulson* v. *Coulson* (3 T. L. R. 846): 'To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. *It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable.*'"

Canadian Cases.

the plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business. *Held*, that this entitled the master to an injunction restraining these defendants from so interfering with his servants (*Hynes* v. *Fisher*, 4 O. R. 60).

"Any publication false in fact, injurious to property or trade, will be restrained; and any act done, or threatened to be done, injurious to trade or property, will be restrained" (*Ibid.*—Wilson, C.J., 73).

Art. 39.

Art. 39.—*Threatened Injury.*

The court will not in general interfere until an actual tort has been committed; but it may, by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual tort has been committed, if it is satisfied that the act complained of will inevitably result in a nuisance or trespass (Kerr on Injunctions, p. 339).

Illustrations.

Thus, where a man threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere before any actual damage or infringement of any right has actually taken place, if the circumstances are such as to enable it to form an opinion as to the legality of the acts complained of and the irreparable injury which will ensue (*Palmer* v. *Paul*,[122] 2 L. J. Ch. 154;

Canadian Cases.

[122] "I think the plaintiff was entitled to bring his action as he did, and there having been the threats made he was not obliged to wait to see how much mischief the defendants might do before bringing his suit. It might then be quite too late for the purpose of an injunction. I also think that the injury reasonably apprehended would be an injury to the plaintiff's reversion, and that he is in a position to sustain this suit notwithstanding the fact of the house being at present let to a tenant who is in occupation of it" (*Wray* v. *Morrison*, 9. O. R. 184—Ferguson, J.; and see *Donnelly* v. *Donnelly*, 9. O. R. 673).

An injunction will be granted to restrain the corporation of one municipality from establishing a smallpox hospital within the limits of another

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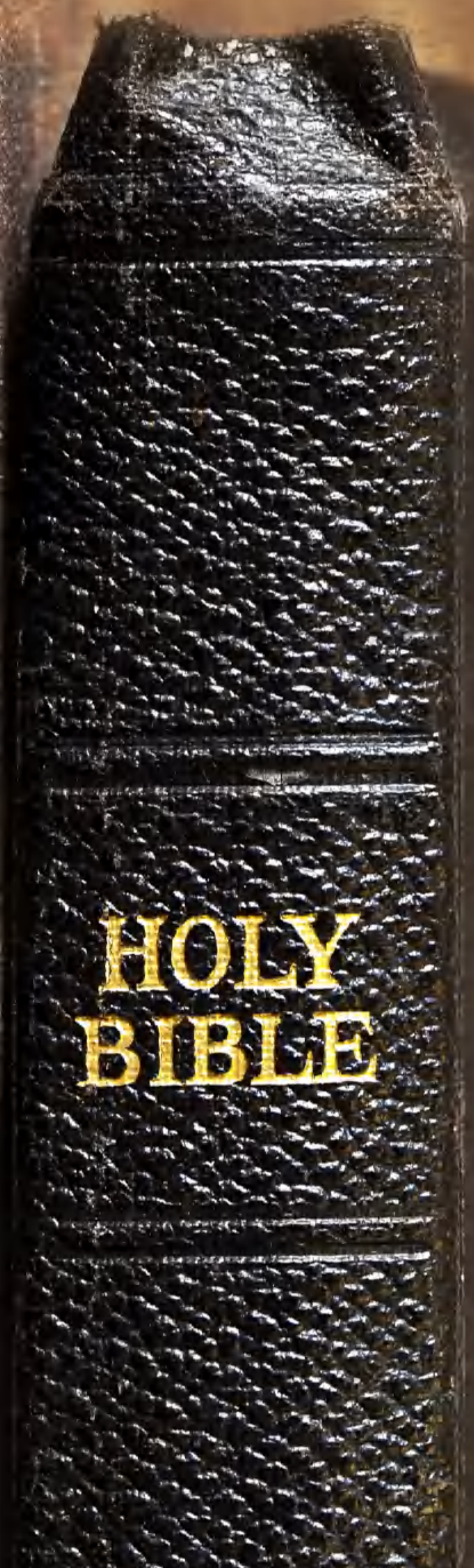

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Art. 40. *otherwise* (see *London, Brighton and South Coast Rail. Co.* v. *Truman*, 11 App. Cas. 45).

Illustrations. (1) Thus, in the case of *Attorney-General* v. *Birmingham Corporation* (4 K. & J. 528. But *cf.* Illust. (6), p. 185, *supra*), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable.

(2) But where Parliament has authorised works which cannot be carried out without the creation of a nuisance, the parliamentary authority is a good answer to an action (see *London, Brighton and South Coast Rail. Co.* v. *Truman*, *ubi supra*). On the other hand, where Parliament authorised a public body to erect a small pox hospital, but did not authorise them to erect it in any particular place, it was held that there was no justification for erecting it in a place where it would be a nuisance (*Hill* v. *Metropolitan Asylums Board*, 6 App. Cas. 193).

(3) And where a railway company were forbidden by statute to run trains across a level crossing at a greater speed than four miles an hour, it was held that they had no right to infringe this statutory provision, although it was for the public benefit that they should do so; and an injunction was granted to restrain the continuance of the infringement (*Att.-Gen.* v. *London and North Western Rail. Co.*, [1900] 1 Q. B. 78).

ART. 41.—*Mandatory Injunctions.*[123] Art. 41.

Where an injunction is asked, not merely prohibiting an act, but ordering some act to be done, it in general requires a stronger case to be made out than when a mere prohibition is asked for (*Durell* v. *Pritchard*, L. R. 1 Ch. 244). The Court has power to grant it on an interlocutory application, but will not do so unless the matter is very urgent (*Bonner* v. *Great Western Rail. Co.*, 24 Ch. D. 1), or unless the defendant has wilfully ignored the rights which the plaintiff claims (*Krehl* v. *Burrell*, 11 Ch. D. 146), or has evaded service of the writ (*Von Joel* v. *Hornsey*, [1895] 2 Ch. 774; *Daniel* v. *Ferguson*, [1891] 2 Ch. 27).

Illustrations

(1) Thus, where a man has actually built a house which interferes with his neighbour's ancient lights, the court will not order him to take it down, except in cases in which extreme, or at all events, very serious, damage would ensue if its interference were withheld. For, in such case, the injury to the defendant by the removal of his building would generally be out of all proportion to the injury to the plaintiff, and that is a consideration which ought to have great weight (see *Nat. Prov. Plate Glass Co.* v. *Prudential Ass. Co.*, 6 Ch. D. 761).

Canadian Cases.

[123] "I think there is no doubt of the general proposition that the court has the right to interfere by mandatory injunction on an interlocutory application. But where that is done the right must be very clear indeed" (*Toronto Brewing and Malting Co.* v. *Blake*, 2. O. R. 183—Proudfoot, J.).

Art. 41.

(2) And so where an injunction was asked, ordering the defendants to pull down some new buildings, on two grounds, namely, first, that a right of way was obstructed by the new buildings, and, secondly, that the new buildings obstructed the light and air, it was held that no injunction ought to be granted; because, as was said by TURNER, L.J., "as to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, I think that the diminution of light and air to the plaintiff's houses is not such as would warrant us in granting the relief which is asked" (*Durell* v. *Pritchard*, L. R. 1 Ch. 244).

(3) But where, in a light and air case, the defendant, after receiving notice of motion for an injunction, put on a number of men who worked night and day, and ran up his building to a height of nearly forty feet before he received notice that the injunction had been granted, it was held by the Court of Appeal that he ought to be ordered to restore the *status quo ante* by pulling down the building at once, without reference to the questions to be decided at the trial (*Daniel* v. *Ferguson*, *supra;* and see *Lawrence* v. *Horton*, 38 W. R. 555; and *Von Joel* v. *Hornsey*, *supra*).

As to the modern *form* of a mandatory injunction, see *Jackson* v. *Normandy Brick Co.*, ([1899] 1 Ch. 438).

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CHAPTER X.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

ART. 43.—*Death generally destroys the Right of Action.*[125]

(1) As a general rule, the right to sue, and the liability to be sued, for torts, ceases with the life of either party.

(2) This rule does not apply where the tort consists of:

(a) The appropriation by the defendant of property, or the proceeds or value of property, belonging to the plaintiff (*Phillips* v. *Homfray*, 24 Ch. D. 439); or

(b) An injury to *real* or personal property

Canadian Cases.

[125] The right of action for seduction does not survive to the administrator of the original plaintiff (*Ball* v. *Goodman*, 10 U. C. C. P. 174); nor does it survive to the mother where the action has been commenced in the father's lifetime (*Healey* v. *Crummer*, 11 U. C. C. P. 527).

This is no longer law in Ontario, the legislature having passed the following statute:—

The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal

committed *by the deceased* within six calendar months of his death (3 & 4 Will. IV. c. 42, s. 2; see *Kirk* v. *Todd*, 21 Ch. D. 484) (*a*); or

Art. 43.

(c) An injury to *real* property *of the deceased*, committed within six calendar months of his death (*Ibid.* (*b*)); or

(*a*) The action must be brought within six months of constitution of a personal representative.

(*b*) The action must be brought within twelve months of death.

Canadian Cases.

estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease (R. S. O., 1897, c. 129, sect. 10).

In case any deceased person committed a wrong to another in respect to his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought, at latest, within one year after the decease. This section shall not apply to libel or slander (R. S. O., 1897, c. 129, sect. 11; and see R. S. M., 1891, c. 146, sect. 48).

In case a tort is committed by a person who subsequently dies, an action can be brought against his executors (R. S. O., 1897, c. 129, sect. 11).

An administrator is the proper person to bring an action for tort (*Mummery et ux.* v. *Grand Trunk Railway Co.*, 1. O. L. R. 622).

Art. 43.

(d) An injury to goods and chattels (including choses in action *of the deceased*) (4 Edw. III. c. 7; 25 Edw. III. c. 5); or

(e) An injury causing the death of the deceased, if he or she leaves a wife, husband, parent, or child (9 & 10 Vict. c. 93, s. 1) (*c*).

Illustrations.

(1) The rule is usually expressed in the form of a Latin maxim, "*actio personalis moritur cum personâ.*" Thus, if one is assaulted or libelled, or assaults or libels another, and dies; in the one case the assaulter or libeller is acquitted, and in the other, the assaulted or libelled party is left without any remedy, however severely he may have been injured.

(2) The case of *Hatchard* v. *Megé* (18 Q. B. D. 771) is an excellent example of the rule under consideration. There it was held that a claim for falsely and maliciously publishing a statement, calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action *only so far as it was a claim for libel;* but so far as the alleged tort was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

It may be observed that, under paragraph (*b*), where an action is actually pending, if the defendant dies *pendente lite*, the action dies with him, unless the tort

(*c*) As to this Act, commonly called Lord Campbell's Act, *vide infra*, Art. 77. Strictly, such actions are not survivals of a cause of action belonging to the deceased, but are remedies for a statutory tort of a very special nature. This Act is incorporated in the Employers' Liability Act (see Art. 25, and p. 128), and the same principle is applied to claims under the Workmen's Compensation Acts, 1897 and 1900. See above, p. 109.

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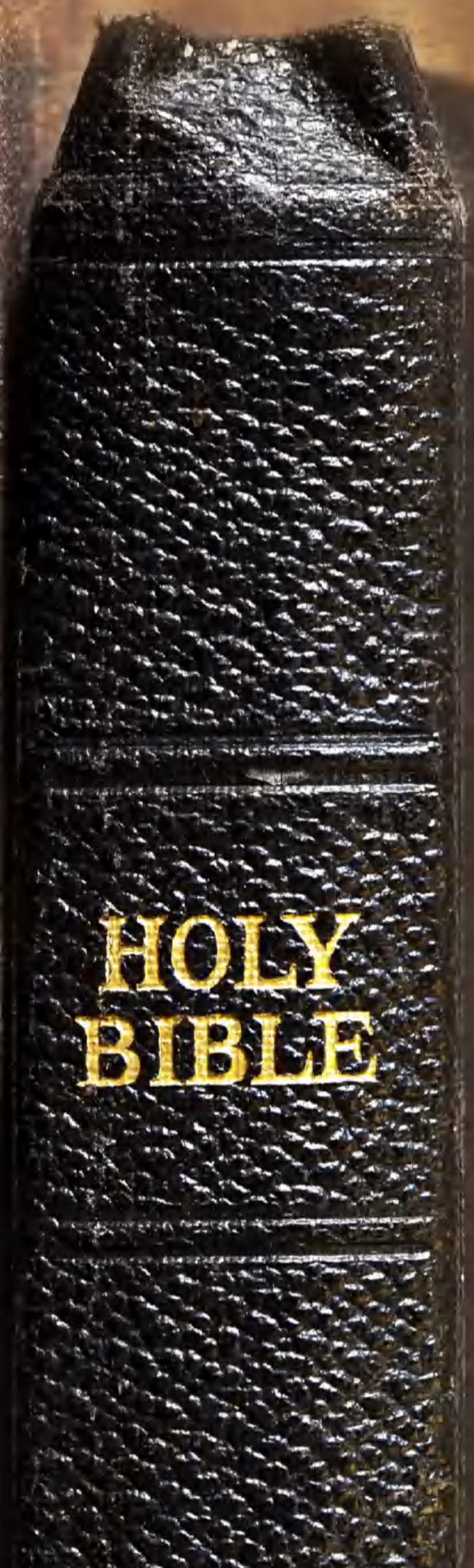

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Art. 44.

to the trustee in bankruptcy (*Rose* v. *Buckett*, [1901] 2 K. B. 449).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustee, and the bankrupt loses the right of suing for the abstract tort to his right (*Brewer* v. *Dew*, *supra*; and *Hodgson* v. *Sidney*, *supra*), unless there were two distinct causes of action (*Ibid.*).

PART II.

RULES RELATING TO PARTICULAR TORTS.

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Art. 45.

(2) Slander is a false, defamatory and malicious oral statement tending to injure the reputation of another.

(3) A libel is actionable without proof of *special* damage. General damage, such as any one suffers by loss of reputation, is enough to support the action. Slander, on the other hand, is not of itself actionable without proof of special damage, except in the cases enumerated in Art. 47.

(4) A corporation or a firm is as much entitled as an individual to protection against defamation calculated to affect its property or business, but not against personal defamation (*South Hetton Coal Co.* v. *N. E. News Association*,[1a] [1894] 1 Q. B.

Canadian Cases.

given no evidence that they conveyed the meaning attributed to them by him, he had failed to establish any cause of action (*Major* v. *McGregor*, 6 O. L. R. 528).

[1a] Although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage (*Journal Printing Co. of Ottawa* v. *Maclean*, 25 O. R. 509; *Journal Printing Co.* v. *MacLean*, 23 O. A. R. 324; and see cases on Slander of Title, *ante*, p. 24; *Acme Silver Co.* v. *Stacey*, *post*, p. 222; and *Hamilton* v. *Walters*, *post*, p. 223).

133; *Manchester (Mayor, etc.)* v. *Williams*, [1891] 1 Q. B. 94).[2]

Art. 45.

Analysis of libel and slander.

It will be perceived that in order to found an action, whether for libel or slander, ~~four~~ distinct factors must be present. (1) The imputation conveyed by the writing, picture or words must be false, for truth is a good defence to an action, or, in technical language, is a justification (*Watkin* v. *Hall*, L. R. 3 Q. B. 396; *Gourley* v. *Plimsoll*, L. R. 8 C. P. 362; *Leyman* v. *Latimer*, 3 Ex. D. 352). (2) The imputation must be defamatory (*Hubbock* v. *Wilkinson*, [1899] 1 Q. B. 87). (3) The imputation must have been published. (4) And in the case of *slander*, except in certain cases (see Art. 47), but not of libel, a fifth factor must exist, viz., special damage must be proved. In the succeeding articles, questions which occur as to the nature of defamatory imputations, publication, and, in the case of slander, the nature of special damage, will be more fully elucidated. It suffices, at this point, to say that if any one of the first three factors above enumerated in case of libel, or any one of the four in case of slander, is absent, no tort has been committed. It is sometimes said that to be actionable the libel or slander must have been published "maliciously." As to this, see above, p. 38 and *post*, Art. 50; and as to injunctions to restrain libels, see Art. 38, *supra*.

Canadian Cases.

[2] "In the present case the plea of justification was persisted in, and was not abandoned until after the defendant and witnesses called by him were examined and failed to prove it. We therefore think, on the authority of the cases referred to, that the plaintiff was entitled to have had the jury told that they might consider the defendant's conduct in putting the plea of justification on the record and endeavouring to prove it, as some

Art. 46.

ART. 46.—*What is defamatory.*

(1) Defamatory words or pictures or effigies are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*Digby* v. *Thompson*, 4 B. & Ad. 821); or to expose him to contempt, ridicule, or public hatred; or to prejudice his private character or credit (*Fray* v. *Fray*, 34 L. J. C. P. 45); or to cause him to be feared or

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Canadian Cases.

evidence of malice and aggravation of the injury" (*Faucitt* v. *Booth*, 31 U. C. R. 267—Morrison, J.; and see *ante*, p. 172).

Where in case for slander, the words laid in the declaration were "He (meaning the plaintiff) burnt my barn," and the words proved were "There is the man that burnt my barn, if he was not guilty of it he would not carry pistol," it was *held* that the words proved did not support the declaration (*Vankeuren* v. *Griffis*, 2 U. C. R. 423; *McNaught* v. *Allen*, 8 U. C. R. 304; *Smiley* v. *McDougall*, 10 U. C. R. 113; *Miller* v. *Houghton*, 10 U. C. R. 348; *Manley* v. *Corry*, 3 U. C. R. 380).

The editor of a public newspaper must respect the sacredness of a man's home, and if he resorts to such means of attack, he cannot complain if he is accused of having a bad depraved heart, and that his course is one of deliberate determined wickedness (*Stewart* v. *Rowlands*, 14 U. C. C. P. 485).

Where an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains

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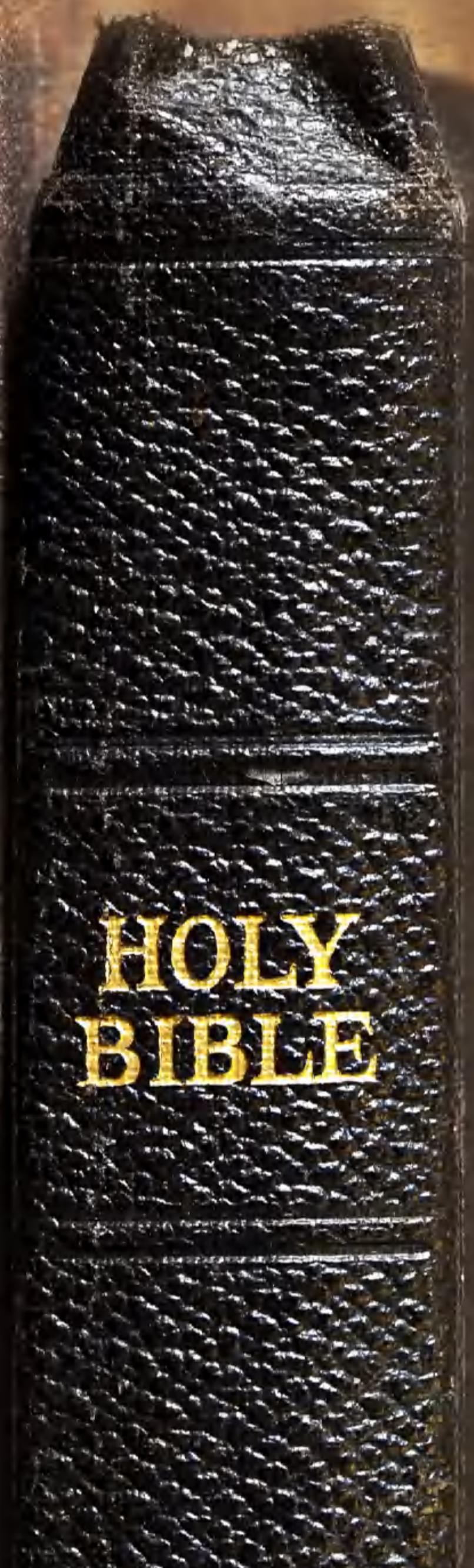

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Art. 46. it was published, is none the less actionable because, if taken literally, it would not be

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Canadian Cases.

and could not apply to, the other member, otherwise she could not recover (*Albrecht* v. *Burkholder*, 18 O. R. 287; *Silver et al.* v. *Dominion Telegraph Co.*, 2 N. S. (Russell & Geldert), 17; and see the Criminal Code, 1892, s. 285, sub-section 2).

The very words complained of in an action of defamation must be set out by the plaintiff, in order that the court may judge whether they constitute a cause of action—it is not sufficient to give the substance or purport with innuendoes—it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense, and as the libel itself must be produced at the trial, and the defendant is entitled to have the whole of it read: *Held*, that the plaintiff was entitled in this action to set out in the statement of claim the whole article complained of. But *held* also, that certain words in another paragraph which tendered an issue not material but which might be embarrassing should be struck out. *Deyo* v. *Brundage* (1856), 13 Howard P. R. (S. C. N. Y.) 221, specially referred to (*Hay* v. *Bingham*, 1902, 5. O. L. R. 224).

The word "blackmailing" is libellous *per se* requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge. For the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true if justification is pleaded.

Semble, *per* Boyd, C. The better view is that colloquial use has broadened the meaning of the

defamatory (*Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741).[4] Art. 46.

Canadian Cases.

word so that it may not have a criminal connotation.

In an action for two libels where the words used in one were not libellous *per se*, and were not, fairly taken, capable of the meaning alleged in the innuendo: *Held*, that the trial judge was right who had, after motions made for a nonsuit both at the close of the plaintiff's case, and after all the evidence was in, on which he reserved judgment, given judgment dismissing the action after a verdict was rendered by the jury in favour of the plaintiff.

But as to the other, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word "blackmailing" was contradictory: *Held*, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside and the verdict of the jury in favour of the plaintiff restored.

Judgment of Meredith, J., 32. O. R. 163, reversed in part (*Macdonald* v. *Mail Printing Co.*, 1901, 2 O. L. R. 278).

[4] The declaration charged on a libel the following words: "You have stolen goods in your house, and you know it," and imputed as the meaning that he (the defendant) knew the goods in his house were stolen. It was *held* that this was not actionable though spoken of and to an

Art. 46.

Illustrations of directly defamatory words.

(1) Thus, describing another as an infernal villain is a disparaging statement sufficient to sustain an action (*Bell* v. *Stone*, 1 B. & P. 331); and so is an imputation of insanity (*Morgan* v. *Lingen*, 8 L. T. (N.S.) 800); or insolvency, or impecuniousness (*Metropolitan Saloon Omnibus Co.* v. *Hawkins*, 28 L. J. Ex. 201;[5] *Eaton* v. *Johns*, 1 Dowl. (N.S.) 602); or even of past impecuniousness (*Cox* v. *Lee*, L. R. 4 Ex. 284); or of gross misconduct (*Clement* v. *Chivis*, 9 B. & C. 172); or of cheating at dice (*Greville* v. *Chapman*, 5 Q. B. 744); or of ingratitude (*Cox* v. *Lee*, *supra*).

(2) So, reflections on the professional and commercial conduct of another are defamatory: as for instance, to say of a physician that he is a quack. So, also, calling a newspaper proprietor "a libellous journalist" is defamatory

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Canadian Cases.

innkeeper (*Paterson* v. *Collins*, 11 U. C. R. 63; *Green* v. *Mimms*, 22 O. R. 177).

[5] An action for libel will lie against a corporation (*McLay* v. *The Corporation of Bruce*, 14 O. R. 398; *Owen Sound Building and Savings Society* v. *Meir*, 24 O. R. 109), but no action will lie for slander (*Marshall* v. *Central Ontario Ry. Co.*, *ante*, p. 76).

Where a declaration charged that the defendant had accused the plaintiff of having taken a false oath, meaning thereby that he was guilty of wilful and corrupt perjury, it was *held* sufficient on motion in arrest of judgment, and that no allegation of the oath having been made in a judicial proceeding was necessary (*McDonald* v. *Moore*, 26 U. C. C. P. 52).

The epithet "blackleg" is libellous (*Hugo* v. *Todd*, 1 B. C. Reps. 369; and see *Hunter* v. *Hunter*, *post*, p. 243).

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Art. 46.

Words indirectly defamatory.

(5) So, inserting the plaintiffs' names under the head of "first meetings under the Bankruptcy Act" is libellous, the innuendo being that the plaintiffs had become bankrupt, or taken proceedings in liquidation (*Shepheard* v. *Whitaker*, L. R. 10 C. P. 502).

Effigy.

(6) The exhibition of the waxen effigy of a person who has been tried for a murder and acquitted, in company with the effigies of notorious criminals, may be defamatory (*Monson* v. *Tussaud*, [1894] 1 Q. B. 672).

(7) So, again, there may be facts known to the person publishing the libel or slander, and the person to whom it is published, which make an apparently innocent statement bear a secondary, and decidedly defamatory, construction. For instance, a statement that the speaker saw the plaintiff at Portland some years since, is primarily innocent enough; but if the surrounding circumstances were such as to convey to the person to whom the words were addressed the insinuation that the speaker had seen the plaintiff working at Portland as a convict, the mere absence of a direct statement to that effect would not be sufficient to excuse the speaker. It must, however, be borne in mind that where a secondary meaning is to be imputed, it is necessary that the facts should be known both to the person who makes the statement and to the persons to whom it is published; because, if facts are known to the latter from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of any one. Again, if there are facts

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Canadian Cases.

Alcock, 12 U. C. C. P. 19; *Lemay* v. *Chamberlain*, 10. O. R. 638).

known to the person who makes the statement, which, if known to the persons to whom it is made, might reasonably lead them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons to whom it is made, that which is stated, although stated inadvertently or maliciously, could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person making the statement, the person who received it would have no reasonable ground for understanding it in any evil sense (*Capital and Counties Bank* v. *Henty*, 5 C. P. D. 515; 7 App. Cas. 741).[8] Art. 46.

Canadian Cases.

[8] The very words complained of by the plaintiff must be set out in his statement of claim. It is not permitted to a plaintiff to give by way of narration the effect of the words instead of the language used (*Phillips* v. *Odell*, 5 U. C. R. (O. S.) 483; *McBean* v. *Williams*, 5 U. C. R. (O. S.) 689).

The sense in which the words are spoken and the truth of the innuendo are for the jury to determine, unless the words cannot possibly have a slanderous meaning (*Jackson* v. *McDonald*, 1 U. C. R. 20; *Taylor* v. *Massey*, 20. O. R. 429).

"It is always a question for the judge, or for the court upon reading the *innuendo*, and after having heard the evidence upon it, to say whether the words are reasonably capable of bearing the meaning attributed to them" (*Huber* v. *Crookall*, 10 O. R. 481—Wilson, C.J.; *Anderson* v. *Stewart*, 8 U. C. R. 243).

Higgins v. *Walkern*, 17 S. C. R. 225; *The Manitoba Free Press* v. *Martin*, 21 S. C. R. 518; *Milner* v. *Gilbert*, 3 Kerr, N. B. R. 617.

In an action for slander a jury is not bound to return a verdict for the plaintiff even though the

Art. 46.

Words indirectly defamatory.

(8) When a firm of brewers sent out to their customers a circular in the following terms: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank," it was held that there was no evidence that the circular was defamatory even indirectly, and was not actionable although its effect had been to cause a run on the bank and loss to the plaintiffs (*Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741). In that case, BRETT, L.J., in the Court of Appeal, laid down the rule as to indirectly defamatory words as follows (5 C. P. D., at p. 539): "The first question for the jury is whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If, in the opinion of the jury, it would not be so read according to the *primâ facie* meaning of the language, then there is a further question (if there is any evidence upon which it can be raised) whether there were facts known both to the persons who framed the alleged libel and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a secondary defamatory sense, it was issued ironically or otherwise than in the primary sense of the language." And the court held that in that case there was no such evidence. Of course, if there had been, and the jury had found

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Canadian Cases.

defamatory words be proved, and a new trial will not be granted because in such a case they have returned a verdict for the defendant. New trial refused, notwithstanding rejection of evidence tendered in aggravation of damages where the plaintiff's pleading contained no allegations entitling him to give such evidence (*Milligan* v. *Jamieson* (1902), 4. O. L. R. 650).

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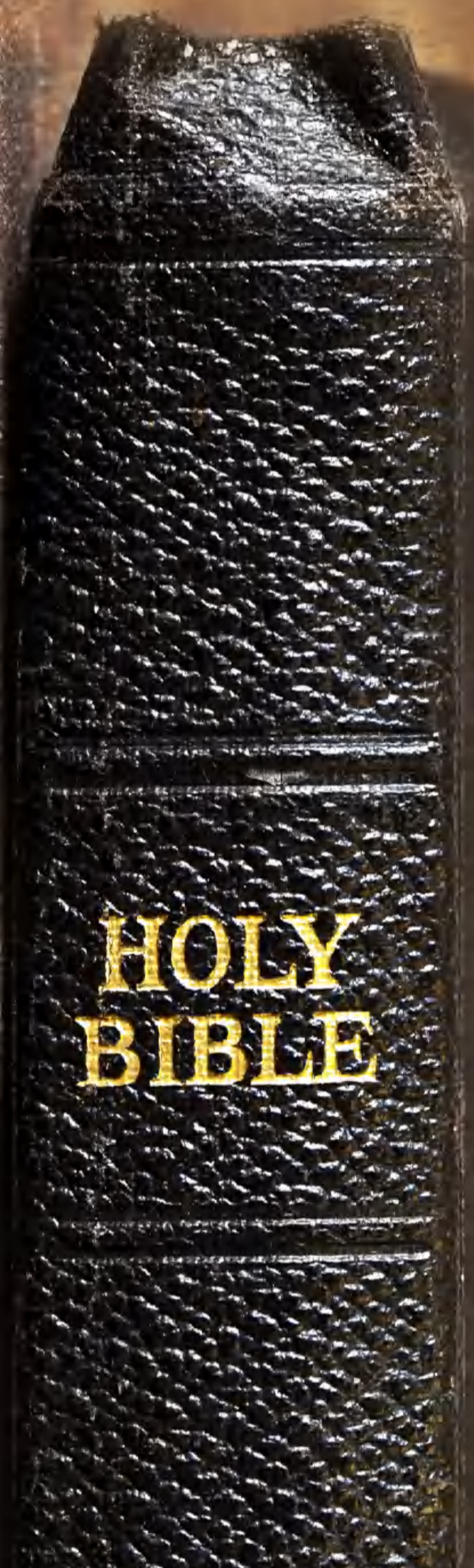

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Art. 46. causes loss, is not actionable (*Hubbuck & Co.* v. *Wilkinson & Co.*, [1899] 1 Q. B. 86).[10]

Slander of title.

Actions of this kind are analogous to actions for slander of title, which are not really actions for defamation. An action for slander of title only lies for a false statement disparaging the plaintiff's title to property *made maliciously* (see *Wren* v. *Weild*, L. R. 4 Q. B. 730).

ART. 47.—*Special Damage essential to Action for Slander.*[11]

(1) Except in the following cases spoken words are not actionable without proof of special

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Canadian Cases.

[10] See cases under note 19, *post*, p. 222; see Volition and Intention, *ante*, p. 24, and note [1a], p. 202.

[11] *Campbell* v. *Campbell*, 25 U. C. C. P. 368.

It is not libellous to write of a man that his outward appearance is more like an assassin than an honest man (*Lang* v. *Gilbert*, N. B. R. 4 All. 445).

The term "rebel" is not actionable unless it is used in a treasonable sense, which must appear on the record (*Beadsley* v. *Dibble*, N. B. R. 1 Kerr, 246; and see also *Hea* v. *McBeath*, N. B. R. 2 Kerr, 301; *Paint* v. *McLean*, 3 N. S. (Geldert & Oxley), 316).

The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used. Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece from her father's estate, had put it in a fictitious account

damage, and the damage complained of must be such as might fairly and reasonably have been anticipated from the slander (*Lynch* v. *Knight*, 9 H. L. Cas. 577). Art. 47.

(2) No proof of special damage need be given in the case of words imputing:

(a) A criminal offence (*Webb* v. *Beavan*,[12] 11 Q. B. D. 609);

(b) Some disease tending to exclude the party defamed from society (*Bloodworth* v. *Gray*, 7 M. & G. 334);

Canadian Cases.

for trifling matters, such as for candies, oranges, etc., and obtained payment of it, the special damage alleged being that in consequence the niece and his wife had left him and refused to live with him:—*Held*, that such damage was not recognisable at law, not being the natural and reasonable consequence of the words used (*Ludlow* v. *Batson* (1903), 5. O. L. R. 309).

[12] Any defamatory charge referable to wrong-doing under sect. 26 or sect. 58, R. S. C., c. 168 [now the Criminal Code, 1892], is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine, is imposed in the case of such offences, but it is otherwise in the case of a defamatory charge referable to offences punishable by fine only (*Routley* v. *Harris*, 18. O. R. 405).

McCann v. *Kearney*, 4 N. B. S. C. R. 84; *Lang* v. *Gilbert*, N. B. R. 4 All. 445; *Johnston* v. *Ewart*, 24 O. R. 116.

Art. 47.

(c) Unchastity in a female (Slander of Women Act, 1891);

(d) Unfitness of the plaintiff for his profession or trade, or office of profit (*Foulger* v. *Newcomb*,[13] L. R. 2 Ex. 327);

Canadian Cases.

[13] Words imputing the crime of incest to a paid preacher or lay exhorter of the Methodist Church are of themselves actionable, without showing a special damage arising from the slander, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office, nor is it any objection to such action that the slander was not spoken with reference to the office (*Starr* v. *Gardner*, 6 U. C. R. (O. S.) 512).

The offence need not be specified with legal precision, indeed it need not be specified at all, if the words impute felony generally. But if particulars are given they must be legally consistent with the offence imputed (*Ferris* v. *Irwin*, 10 U. C. C. P. 116; *Porter* v. *McMahon*, 25 N. B. R. 211).

A writing which tends to vilify and degrade a person is actionable, although no crime be imputed (*Cormick* v. *Wilson*, N. B. R. 2 Kerr, 617; *Martindale et ux.* v. *Murphy*, N. B. R., Ber. 85).

Where the words used charge the plaintiff with having committed a misdemeanour they are actionable (*Decow* v. *Tait*, 25 U. C. R. 188).

In *Young* v. *Sloan* (2 U. C. C. P. 284), it was *held*, on motion in arrest of judgment on the ground that plaintiff, being the bailee, could not be guilty of larceny [the Criminal Code, 1892, alters this], that the use of words imputing an indictable offence is actionable or not according to the sense

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Art. 47.

by Lord Ellenborough are too restrictive. I cannot agree that the special damage must be the natural *and legal* consequence of the words, if true. Lord Ellenborough puts an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond as a consequence of words spoken; but, I own, I can conceive that, when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very naturally produce that result, and compensation might be given for an act occurring as a consequence of an accusation of that crime." But the act of the third person causing the loss to the plaintiff must be the natural result of the slander. So where the defendants said of the plaintiff that the plaintiff had removed from premises leaving rent due to his landlord, and the plaintiff alleged that in consequence thereof his employer dismissed him, it was held that the damage alleged was too remote, and that an action for slander would not lie (*Speake* v. *Hughes*, [1904] 1 K. B. 138).

Damage caused by plaintiff himself.

(2) If the damage be immediately caused by the plaintiff himself, he cannot sue. For instance, where the plaintiff (a young woman) told the slander to her betrothed, who consequently refused to marry her, it was held that no action would lie against the slanderer (*Speight* v. *Gosnay*, 60 L. J. Q. B. 231).

Imputation of unchastity.

(3) Formerly, words imputing unchastity to a woman were not actionable without proof of special damage except in the city of London. But by the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), this scandalous state of the law has been altered, and it is enacted that words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable: provided that the plaintiff shall not recover more costs than damages,

unless the judge certifies that there was reasonable cause for bringing the action.[15] Art. 47.

(4) But, even before the Slander of Women Act, it was held that an action brought by a trader, alleging that defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, certain words accusing her of having committed adultery upon the premises where he resided and carried on his business, whereby *he was injured in his business*, and certain specified and other persons who had previously dealt with him ceased to do so, was maintainable on the ground that the injury to his business was special damage, the natural consequence of the words (*Riding* v. *Smith*, 1 Ex. Div. 91).[16]

Examples of damage implied from imputation of crime.

(5) The words, "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable *per se* (*Jones* v. *Herne*, 2 Wils. 87). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo "of the murder of D."] are a sufficient charge of murder to support an action without proof of special damage (*Peake* v. *Oldham*, W. Bl. 959). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or

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Canadian Cases.

[15] *Palmer* v. *Solmes*, 45 U. C. R. 15; and see R. S. O., 1897, c. 68, sect. 5; Consolidated Ordinances of the North-West Territories, 1898, c. 30; R. S. B. C., 1897, c. 120, sect. 5.

[16] By sect. 11 of the Libel Act, Manitoba (50 Vict. c. 22), actual malice or culpable negligence must be proved in an action for libel against a newspaper unless special damages are claimed (*Ashdown* v. *The Manitoba Free Press*, 20 S. C. R. 43).

Art. 47.

contract, they are not actionable (*per* ELLENBOROUGH, in *Thompson* v. *Barnard*, 1 Camp. 48; and *per* KENYON, *Christie* v. *Cowell*,[17] Peake, 4). Nor are words imputing an impossible crime, as "Thou hast killed my wife," who, to the knowledge of all parties, was alive at the time (*Snag* v. *Gee*, 4 Co. Rep. 16; *Heming* v. *Power*, 10 M. & W. 569).

(6) The allegation, too, must be a direct charge of punishable crime (*Lemon* v. *Simmons*, 57 L. J. Q. B. 260). Thus, saying of another that he had forsworn himself is not actionable *per se*, without showing that the words had reference to some judicial inquiry (*Holt* v. *Scholefield*, 6 T. R. 691). So where the plaintiff's pleadings alleged that the defendant called the plaintiff a "welsher" (meaning a person who dishonestly appropriates and

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Canadian Cases.

[17] Words imputing to the plaintiff having taken a false oath, but not in any judicial proceeding, or on any occasion when it would be an offence in law, are not actionable (*Hogle* v. *Hogle*, 16 U. C. R. 518).

"The words charged in the declaration impute the crime of incest, a crime not cognizable in our courts, and therefore not actionable without proof of special damage" (*Palmer* v. *Solmes*, 30 U. C. C. P. 482—Osler, J.).

No action will lie for words spoken where they only refer prospectively to some act which if committed would be a crime (*Conkey* v. *Thompson*, 6 U. C. C. P. 238; *Hall* v. *Carty*, N. S. Reps. (James), 379).

A general charge of forswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings the case is different (*Oakes* v. *Keating et al.*, 4 N. S. (Russell & Geldert), 554).

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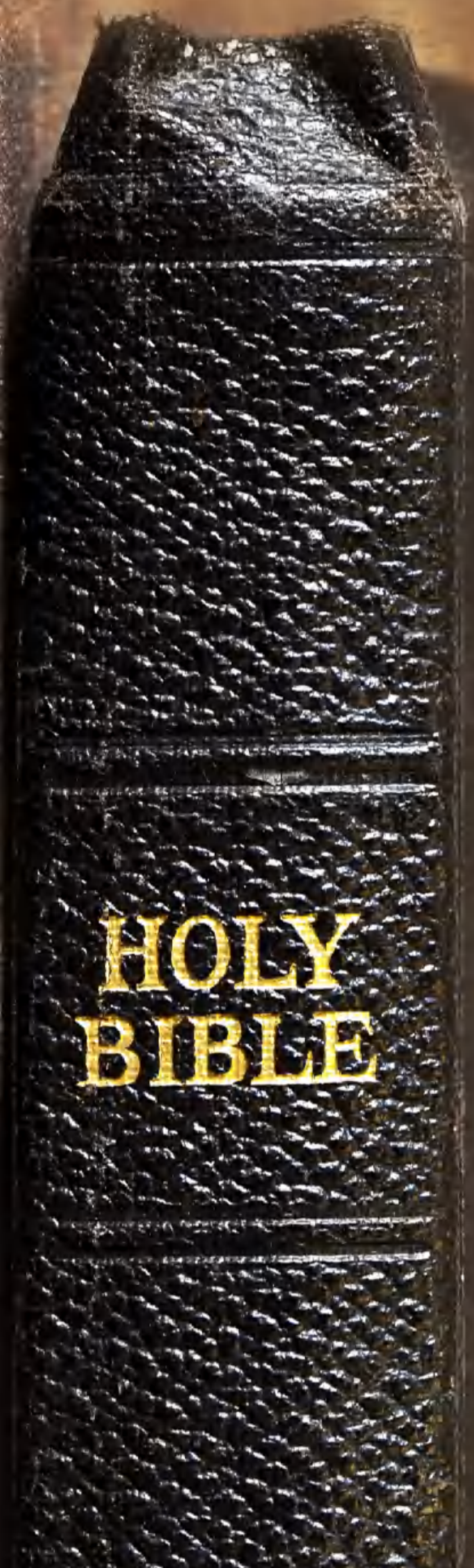

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Art. 47.

Examples of damage implied from imputation of unfitness for society.

Examples of damage implied from imputation of unfitness for business or office of profit.

(8) Again, to allege the *present* possession of an infectious, or even a venereal. disease is actionable, but a charge of past infection is not; for it shows no present unfitness for society (see *Carslake* v. *Mappledoram*, 2 T. R. 473; *Bloodworth* v. *Gray*, 7 M. & G. 334).

(9) It is quite clear that, as regards a man's business, or profession, or office, *if it be an office of profit*, the mere imputation of want of ability to discharge the duties of that office, is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct; the probability of pecuniary loss from such imputation obviates the necessity of proving special damage. But the mere disparagement of a tradesman's goods is not sufficient. The disparagement must be of his unfitness for business (see *White* v. *Mellin*,[19] [1895] A. C. 154), or some allega-

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Canadian Cases.

these words are applicable as well to a person not a clergyman as to a clergyman, and cannot be actionable as referable to the plaintiff's profession, and they are not actionable in themselves" (*Tighe* v. *Wicks*, 33 U. C. R. 482—Morrison, J.).

[19] Where a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is proved, an action may be maintained (*Acme Silver Co.* v. *Stacey*, 21 O. R. 261; and see cases under note [1a], *ante*, p. 202).

"It is not necessary that the words should disparage the plaintiff as to his unfitness for business, want of capacity, or unskilful conduct therein. It is sufficient to maintain an action to impute insolvency, or anything calculated to impugn his financial credit or standing. Special damage is not

Art. 47.

tion which must necessarily injure his business (see *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 Rep. Pat. Cas. 677). Thus, words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*Irwin* v. *Brandwood*, 2 H. & C. 960; 33 L. J. Ex. 257). And similarly where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallwey* v. *Marshall*, 23 L. J. Ex. 78).

So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southee* v. *Denny*, 17 L. J. Ex. 151; 1 Ex. 196). Or of an attorney that "he deserves to be struck off the roll" (*Phillips* v. *Jansen*, 2 Esp. 264). But without special damage it is not actionable to impute to a solicitor insolvency (*Dauncey*

Canadian Cases.

necessary to be proved" (*Lott* v. *Drury*, 1. O. R. 582 —Hagarty, C.J.).

To maintain an action for slander of title, the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved, and mere words of caution are not enough (*Gordon* v. *McGibbon*, N. B. Reps., 3 Pug. 49).

"I can see no difference between the slander of a steamboat and the slander of an inn or any other medium of business by which profit is made. The same principle governs all. No words that can be used respecting the vessel or the inn can be actionable *per se*, like slanderous words uttered respecting the person. The words must be shown to have occasioned damage, and then a cause of action arises" (Per Robinson, C.J., in *Hamilton* v. *Walters*, 4 U. C. R. (O. S.) 27; and see cases under note [1a], *ante*, p. 202).

Art. 47.

v. *Holloway*, [1901] 2 K. B. 441), or to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (see also *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; and *Miller* v. *David*,[20] L. R. 9 C. P. 118). But this

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Canadian Cases.

[20] Where in an action for defamation brought by a person describing himself in the declaration as a druggist, vendor of medicine, and apothecary, the witnesses proved that several persons practising physic had purchased medicine from him; this evidence upon a motion for nonsuit was considered sufficient to support the verdict (*Terry* v. *Starkweather*, Taylor's K. B. Reps. 57).

Words imputing the crime of incest to a paid preacher or an exhorter of the Methodist Church are of themselves actionable, without showing a special damage arising from the slander, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office; nor is it any objection to such action that the slander was not spoken with reference to the office (*Starr* v. *Gardner*, 6 U. C. R. (O. S.) 512).

"Where the libel is on a member of a firm in respect of his trade or business the partner libelled can recover without proof of special damage, but the partners must sue jointly for any special damage sustained by the copartnership" (*Bricker* v. *Campbell*, 21 O. R. 211—MacMahon, J).

"It is true no special damage was alleged or proved. It need not be if the words are spoken of a tradesman in the conduct of his business. . . . The plaintiff avers he is a corn merchant carrying on extensive business in buying wheat on commission and otherwise; the defendant says that he sold wheat to the plaintiff, who cheated him out of two bushels; and the residue of the words spoken

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Art. 47.

(which is not actionable). The point being that law is, but wit is not, essential in the profession of a counsellor (see *per* POLLOCK *arguendo*, *Ayre* v. *Craven*, 2 Ad. & Ell. 4).

Unfitness for offices of honour and credit.

(10) With regard to slander upon persons holding mere offices of honour, the loss of which would not necessarily involve a pecuniary loss, the mere imputation of want of ability or capacity is not enough. The imputation to be actionable *per se*, must be one which, if true, would show that the plaintiff ought to be and could be deprived of his office by reason of the incapacity imputed to him. The implied damage is the risk of loss of the office which he holds. Thus, an imputation of drunkenness against a town councillor is not actionable without proof of special damage. For such conduct,

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Canadian Cases.

plaintiff, that, in the absence of evidence to show how the words proved were spoken and understood, the court could not frame an innuendo to conform to the evidence.

On the trial defendant called plaintiff as a witness, and, plaintiff having admitted that he had collected a sum of money for a client which he failed to pay over, and that he had given a note for the amount collected which he had also failed to pay, and that a judgment had been obtained against him for the amount, which was unpaid at the time of the trial. *Held*, that this evidence showed conduct which was dishonourable to plaintiff as a solicitor, and fully justified the language used by defendant. *Held*, that if the words proved were spoken and understood in the sense that plaintiff was not an honourable solicitor, defendant had substantiated a good defence. *Held*, that the communication was a privileged one, L. being a party who had an interest in knowing of it (*Tobin* v. *Gannon*, 34 N. S. L. R. 9).

however objectionable, is not such as would enable him to be removed from, or deprived of that office, nor is it a charge of malversation in his office (*Alexander* v. *Jenkins*, [1892] 1 Q. B. 797). But a charge of dishonesty in his office, against one who holds a public office of trust, such as that of an alderman of a borough, is actionable without special damage, even although there be no power to remove him (*Booth* v. *Arnold*, [1895] 1 Q. B. 571). The American Courts have held that to say of a magistrate (apparently an unpaid one), that "He is a damned fool of a justice," is actionable *per se* (*Spiering* v. *Andrea*, 30 Am. Law Rep. 744). It seems somewhat curious that the point has never arisen here, where a similar form of defamation is far from unusual; but, perhaps, our magistrates are less sensitive, and more sensible. Art. 47.

Art. 48.—*Publication.*[21]

The making known, knowingly or negligently, of a libel or slander to any person *other than the object of it*, is publication in its legal sense.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to Publication explained.

Canadian Cases.

[21] For definition of publication see the Criminal Code, 1892, sect. 286. The manager of the defendant company handed to his stenographer to be type-written a draft letter written in the interest of the Company, but unconnected with its ordinary business, which contained defamatory statements. *Held*, that privilege was taken away by the publication to the stenographer, and the defendant company was liable (*Puterbaugh* v. *Gold Medal Furniture Company*, 7 O. L. R. 582).

Art. 48.

the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*Rex* v. *Burdett*, 4 B. & Ald. 143). Publication, therefore, being a question of law, it is for the jury to find whether the facts by which it is endeavoured to prove publication are true; but for the court to decide whether those facts constitute a publication in point of law (*Street* v. *Licensed Victuallers' Society*, 22 W. R. 553; *Hart* v. *Wall*, 2 C. P. D. 146).

Telegrams and post cards.

(2) If the libel be contained in a telegram, or be written on a post card, that is publication, even though they be addressed to the party libelled; because the telegram must be read by the transmitting and receiving officials, and the post card will in all probability be read by some person in the course of transmission (*Williamson* v. *Freer*,[22] L. R. 9 C. P. 393), unless the statement on the

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Canadian Cases.

[22] A libel may be published by transmission through the electric telegraph (*Dominion Telegraph Co.* v. *Silver*, 10 S. C. R. 238).

"I am at a loss to understand how a newspaper proprietor can be liable for the publication of a libel and the party who prepares the libel and delivers it at the office of the newspaper for publication, and without whose acts no publication of the libellous matter could take place, can escape an equal liability with the printer or publisher of the paper: they are all engaged in one and the same transaction, viz., collecting, transmitting and publishing matter collected, the aid and participation of all being necessary to the publication" (*Ibid.*—Ritchie, C.J., 259).

An action for oral slander will not lie against several defendants jointly (*Carrier* v. *Garrant et al.*, 23 U. C. C. P. 276; *ante*, p. 73).

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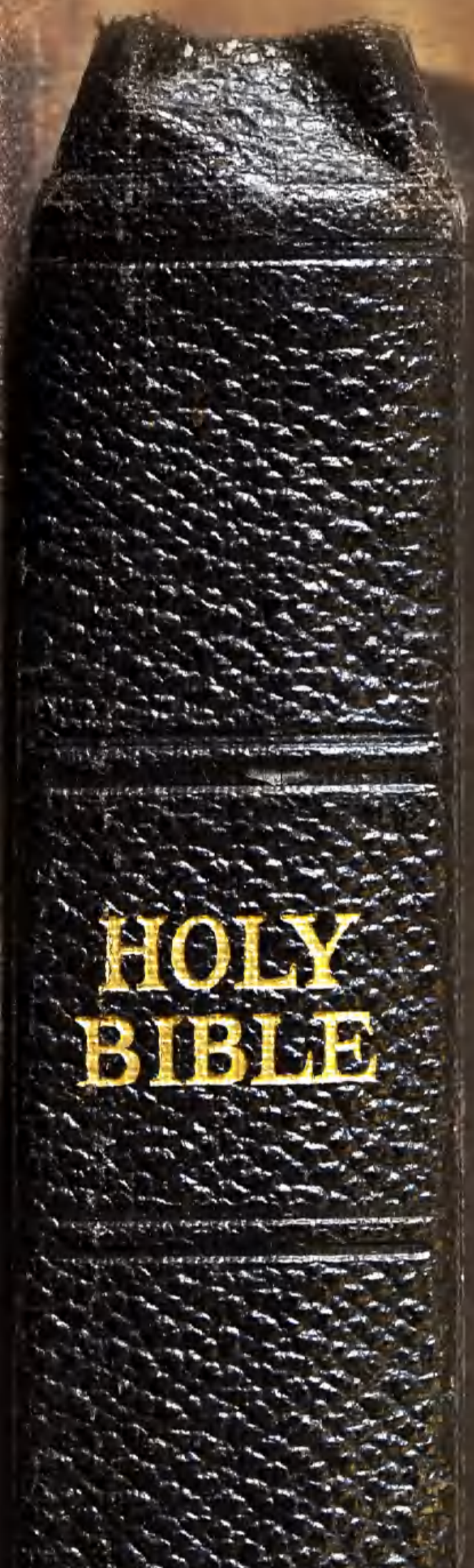

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Art. 48

good, so that if a defamatory statement be made to the wife of *the plaintiff*, that is a sufficient publication to sustain an action (*Wenman* v. *Ash*, 13 C. B. 836).

ART. 49.—*Justification.*

That the statements complained of as defamatory are true in fact is an absolute defence in an action of defamation.

Proof of justification.

(1) The burden of proving a defence of justification lies on the defendant: and if justification be set up it must be strictly proved, and it is not enough to say that the statements are partly or in the main true. The plaintiff must prove that the facts alleged in justification are at any rate substantially true in every material particular. Nor is it enough to show that the plaintiff had a general reputation for the misconduct alleged. It must be proved that in fact he was guilty of the misconduct (*Wood* v. *Durham*, 21 Q. B. D. 501).

Explanation of justification.

(2) LITTLEDALE, J., thus explains the principle of the defence of justification: "If the defendant relies upon the truth as an answer to the action, he must plead that matter specially; not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to, possess" (see *M'Pherson* v. *Daniels*, 10 B. & C. 263, at p. 272).

Fair criticism.

(3) Closely akin to the defence of justification is that of fair criticism of a matter of public interest. It was at one time considered, that criticisms on matters of public interest, such as books, works of art, plays, the acts of public men, and the like, were privileged

Art. 49.

communications, and that proof of actual malice was necessary in order to give rise to an action by the person criticised. This is, however, no longer the law. The true rule, as laid down by the Court of Appeal in *Merivale* v. *Carson* (20 Q. B. D. 275), is, that where an action of libel is brought in respect of comment on a matter of public interest, the case is not one of privilege properly so called, and it is not necessary in order to give a cause of action, that actual malice should be proved. The question is one for the jury, whether the disparaging statements go beyond the limits of fair criticism. In other words, "Is the article, in the opinion of the jury, beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men, with ordinary judgment, must say whether any *fair* man would have made such a comment on the work. It is very easy to say what would be clearly beyond the limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit" (*per* Lord ESHER, M.R., in *Merivale* v. *Carson*, 20 Q. B. D. 275).

Lord TENTERDEN, in a passage in his judgment in *Macleod* v. *Wakley* (3 C. & P. 313), quoted with approval by BOWEN, L.J., in the above case, said: "Whatever is fair, and can be reasonably said of the works of authors or *of themselves as connected with their works*, is not actionable unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author."

Art. 49.

So, comment on a musical play which a jury may not think to be a just or reasonable appreciation of the work criticised, is nevertheless not libellous if it is an expression of honest opinion and does not go beyond the limits of what may fairly be called criticism (*McQuire* v. *Western Morning News*, [1903] 2 K. B. 100).

Under these principles, not only books and works of art, but even tradesmen's advertisements may be fairly criticised (*Paris* v. *Lery*,[23] 30 L. J. C. P. 11).

Criticism of public men.

So, too, fair criticism is allowed upon the public life of public men, or men filling public offices; such as the conduct of public worship by clergymen (*Kelly* v. *Tinling*, L. R. 1 Q. B. 699), provided such criticism does not touch upon their private lives (*Gathercole* v. *Miall*,[24] 15 M. & W. 319; *Odger* v. *Mortimer*, 28 L. T. 472), or impute, without any foundation in fact, base and sordid motives (*Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292). And the same rule applies to fair criticism of the past exploits of one who is endeavouring to push a scheme of national importance (*Henwood* v. *Harrison*, L. R. 7 C. P. 606). But although the acknowledged or proved public acts of public men may be lawfully criticised, that gives no right to publish false and defamatory statements *of facts*, unless, of course, they are published in the course of parliamentary or judicial proceedings (*Davis* v. *Shepstone*,[25] 11 App. Cas. 187).

Canadian Cases.

[23] *Macdonell* v. *Robinson*, 12. O. A. R. 270.

[24] *R.* v. *Wilkinson*, 41 U. C. R. 1; *Farmer* v. *Hamilton Tribune Printing and Publishing Co.*, 3. O. R. 223.

[25] *Mills* v. *Carman*, 17. O. R. 223; *Douglas* v. *Stephenson*, 29. O. R. 616; *The Manitoba Free Press* v. *Martin*, 21. S. C. R. 518, and the Criminal Code, 1892, s. 293.

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Art. 50. *primâ facie* wrongful without proof of actual malice.[27]

(2) No action lies for a statement made upon an occasion which is absolutely privileged, although made maliciously. Judicial, Parliamentary and State proceedings are occasions of absolute privilege.

(3) No action lies for a privileged communication, *i.e.*, for a communication made upon an occasion of qualified privilege and fairly warranted by it, unless it be proved to have been made maliciously in fact (*Stuart* v. *Bell*,[28] [1891] 2 Q. B. 341).

(4) Communications are made upon privileged occasions if made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. Such communications, if fairly warranted by any reasonable occasion or exigency and honestly made, are protected for the common convenience and welfare of society (see *Toogood* v. *Spyring*, 1 C. M. & R., p. 193).

(5) It is the duty of the judge to determine whether an occasion is privileged or not. and if

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Canadian Cases.

[27] *Ross* v. *Bucke*, 21. O. R. 692, and *post*, 246.
[28] *Green* v *Miller*, 33 S. C. R. 193.

Art. 50.

it is, and there is no evidence of actual malice to go to the jury, he must enter judgment for the defendant (*Clark* v. *Molyneux*, 3 Q. B. D. 246).

(6) The question whether a communication made upon a privileged occasion is privileged or not, *i.e.*, whether the communication is fairly warranted by the occasion and made without actual malice, is for the jury (*Cooke* v. *Wildes*, 5 E. & B. 328, and *per* LOPES, L.J., in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. 529).

(7) If the occasion is privileged the onus is on the plaintiff to prove malice, *i.e.*, "actual malice" or "malice in fact" (*Clark* v. *Molyneux*, 3 Q. B. D. 237; *Jenoure* v. *Delmege*,[29] [1891] A. C. 73).

Canadian Cases.

[29] In case for slander, the defendant may, under the general issue, show that the words were used in a privileged communication, and where the words imputed slanderous are spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding before the defendant can be pronounced guilty (*Richards* v. *Boulton*, 4 U. C. R. (O. S.) 95).

Roberts v. *Climie*, 46 U. C. R. 264; *Wilcocks* v. *Howell*, 5 O. R. 360; *Colvin* v. *McKay*, 17 O. R. 212; *Blagden* v. *Bennett*, 9 O. R. 593; *Stewart* v. *Scullthorp*, 25 O. R. 544; *Wells* v. *Lindop*, 15 O. A. R. 695; *Robinson* v. *Dun*, 24 O. A. R. 287.

"I think the law is very clear on this subject.

Art. 50. (8) A communication is made maliciously in fact if made from an indirect motive, such as

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Canadian Cases.

It is for the judge to rule whether the occasion creates privilege. It is clear that defendant was *de facto*, and, I think, *de jure*, in the discharge of a public duty, and the words were spoken while in the discharge of that duty, and in reference thereto, to a subordinate officer having a corresponding duty, and therefore were privileged; that being so, it is equally clear that the burden of proof was on the plaintiff to show actual malice. There was no evidence in this case whatever that the defendant was actuated by motives of personal spite or ill-will; and the occasion and surrounding circumstances repel the presumption of malice. Therefore, I think the evidence in this case clearly establishes that the occasion created the privilege, and that the occasion was used *bonâ fide* and without malice. The plaintiff having given no evidence of malice, it was the duty of the judge to say that there was no question for the jury, and to direct a nonsuit or a verdict for the defendant" (*Dewe* v. *Waterbury*, 6 S. C. R. 154, 155—Ritchie, C.J. [appeal from Supreme Court of New Brunswick allowed]).

"All questions of fact are within the exclusive province of the jury, but questions of fraud and malice may be said to be more peculiarly so than any other; and the court in those cases does not, I think, where the defendant is acquitted of the fraud or malice, ever exercise the right of sending the case to a second jury in the same manner as in other questions of fact which appear to the court to be found against the evidence, or as in cases where those issues are, in the judgment of the

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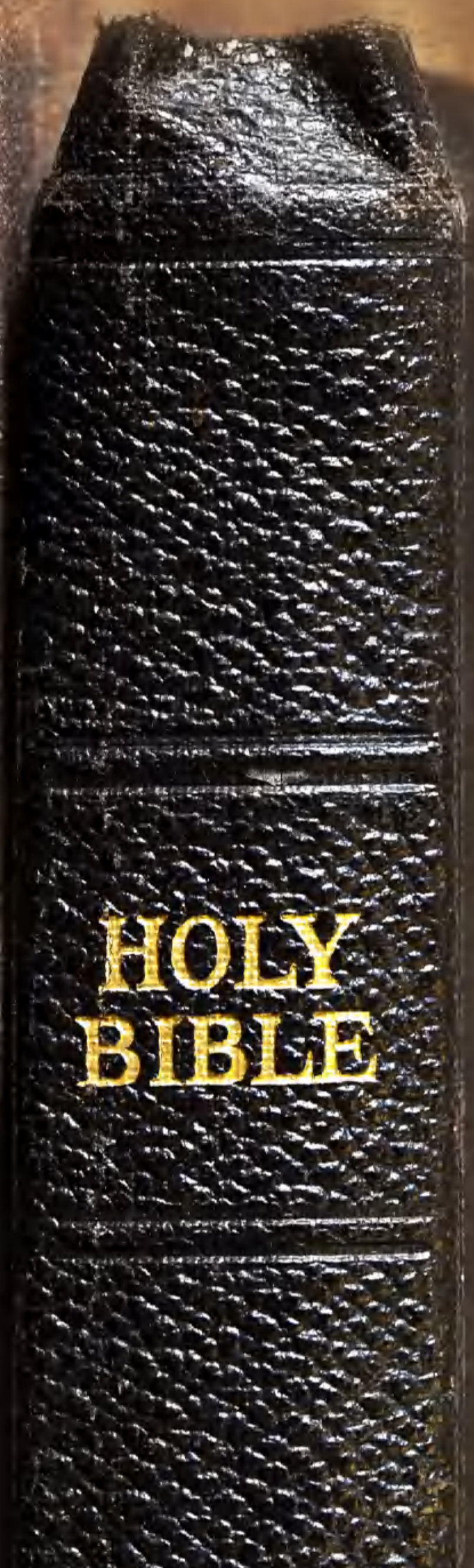

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Art. 50.

reason which makes the occasion privileged, but for an indirect and wrong motive. . . . Malice does not mean malice in law, a term of pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing from some wrong motive. So, if it be proved that out of anger or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

Absolute privilege. Parliamentary proceedings.

(1) Speeches in Parliament are absolutely and irrebuttably privileged (*Stockdale* v. *Hansard*, 9 A. & E. 1; *Dillon* v. *Balfour*, 20 L. R. Ir. 601); and a faithful report in a public newspaper of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason* v. *Walter*, L. R. 4 Q. B. 73). Statements of witnesses before Parliamentary Committees are also privileged (*Goffin* v. *Donnelly*,[30] 6 Q. B. D. 307).

Judicial proceedings and matters of State.

(2) Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott* v. *Stansfield*, L. R. 3 Ex. 220); and so are those of counsel, however irrelevant and however malicious (*Munster* v. *Lamb*, 11 Q. B. D. 588). Solicitors acting as advocates have a like privilege (*Ib.* and *Mackay* v. *Ford*, 29 L. J.

Canadian Cases.

[30] The Criminal Code, 1892, sect. 290.

Art. 50.

Ex. 404). Statements of witnesses made in the course of proceedings in a court of justice, or in any authorised tribunal acting judicially, can never be the subject of an action (*Seaman* v. *Netherclift*,[31] 2 C. P. D. 53; *Barratt* v. *Kearns*, [1905] 1 K. B. 504); and a military man giving evidence before a military court of inquiry which has not power to administer an oath, is entitled to the same protection as that enjoyed by a witness under examination in a court of justice (*Dawkins* v. *Rokeby*, L. R. 7 H. L. 744). So also is a person who fills in a form required for obtaining a lunacy order (*Hodson* v. *Pare*, [1899] 1 Q. B. 454). Communications relating to affairs of State made by one officer of State to another in the course of duty are also absolutely privileged (*Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189).

Qualified privilege.

Speeches at county councils, etc.

(3) In speeches before district and county councils, and the like, although the occasion is privileged, the privilege is not (as in the case of Parliament) absolute, and the speaker is only protected in the absence of actual malice (*Royal Aquarium Society* v. *Parkinson*,[32] [1892] 1 Q. B. 431; *Pittard* v. *Oliver*, [1891] 1 Q. B. 474).

Reports of legal proceedings.

(4) Fair and accurate reports of trials (unless obscene or demoralising) published in a newspaper contemporaneously with the proceedings are privileged (51 & 52 Vict. c. 64, s. 3 (Law of Libel Amendment Act, 1888)); and the same rule applies to a report of an *ex parte* application for a summons, made to a magistrate in open court (*Kimber* v. *Press Association*,[33] [1893] 1 Q. B. 65). And a report of a trial published by a private person is

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Canadian Cases.

[31] *Cowan* v. *Landell*, 13 O. R. 13; and the Criminal Code, 1892, sect. 290.

[32] *Hanes* v. *Burnham*, 26 O. R. 528.

[33] R. S. O., 1897, c. 68, sect. 9.

Art. 50.

probably *primâ facie* privileged in the absence of express malice. But, on the other hand, *dicta* of Lord Halsbury and Lord Bramwell in the case of *Macdougall* v. *Knight* (14 App. Cas. 194) lay it down that a report of the judge's summing up, or judgment only, is not a fair report of a trial, and is only privileged if, in point of fact, the summing up or judgment gave reasonable opportunity to the reader to form a correct conclusion. The publication, by the order of magistrates, of the report made to them by the chief constable as to the conduct of publicans is privileged, in the absence of actual malice (*Andrews* v. *Nott-Bower*, [1895] 1 Q. B. 888).

Reports of *quasi* judicial proceedings.

(5) Reports of their proceedings published by *quasi* judicial bodies, *bonâ fide* and without any sinister motive, are privileged. For instance, where the General Council of Medical Education and Registration (who are empowered by statute to strike the names of persons off the register of qualified medical practitioners) struck off the plaintiff's name, and, in their annual published report, stated the circumstances which induced them to do so, it was held that in the absence of actual malice the publication was privileged (*Allbutt* v. *General Council, etc.*, 37 W. R. 771). The Court of Appeal intimated that the same principle would apply to reports of the proceedings of all bodies entrusted by Parliament with duties in which the public are interested, *e.g.*, county councils and the like. If, however, the statement is published maliciously, the privilege is gone, as there is no *absolute* privilege in such cases (*Royal Aquarium Society* v. *Parkinson*, [1892] 1 Q. B. 431).

Newspaper reports of meetings, and publication of public notices, etc.

(6) By s. 4 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64),[34] it is enacted that a fair and

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Canadian Cases.

[34] R. S. O., 1897, c. 68, sect. 8; and the Criminal Code, 1892, sect. 291.

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Art. 50. was a valet, and whilst he and his master were staying at Newcastle as the guests of the defendant, who was a

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Canadian Cases.

partiality, corruption and connivance at extortion, signed by a number of persons, and praying for redress, is an absolutely privileged communication in its nature, and no action for libel will lie upon it, though the defendant had circulated it, and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description (*Stanton* v. *Andrews*, 5 U. C. R. (O. S.) 211).

"The declaration in the celebrated Bill of Rights has been relied on by the defendant. That declaration—'That it is the right of the subject to petition the King, and that all commitments and prosecutions for such petitions are illegal;' and it is relied upon not without reason as a solemn recognition by the highest authority of a principle of the law which certainly applies to the case before us" (*Ibid.*—Robinson, C.J., at p. 219).

S., the general manager of the defendants' railway, without special instructions of the directors, dismissed the plaintiff, a conductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in circular books of the conductors, for the information and warning of the company's employees, 2,000 in number. It was *held* that the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest (*Tench* v. *Great Western Railway Co.*, 33 U. C. R. 8).

"But I have heard no argument, nor have I

Art. 50.

magistrate and mayor of Newcastle, the chief constable showed the defendant a letter which he had received from the Edinburgh police stating that the plaintiff was

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Canadian Cases.

found any authority, which shows that a notification, written or printed, to all the employees, that one of them was dismissed, assigning the cause truly, would enable the party dismissed, even though he were charged with fraud towards his employers, to maintain an action; for I think it is clear such a communication is privileged" (*Ibid.*—Draper, C.J., at p. 16; *Hanes* v. *Burnham*, 23 O. A. R. 90).

An action for a libel contained in communications made to the executive Government with a view to obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously, and without probable cause (*Rogers* v. *Spalding*, 1 U. C. R. 258; *Corbett* v. *Jackson*, 1 U. C. R. 128).

Defendant, a Government detective, knowing that M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars, which defendant had been the means of breaking up, and put him upon his guard. It was *held* that the communication was privileged, and, there being no evidence of malice, that the plaintiff was properly nonsuited (*Smith* v. *Armstrong*, 26 U. C. R. 57).

Where the words used may be reasonably understood to impute that the person addressed had previously stolen similar articles they are actionable (*Hunter* v. *Hunter*, 25 U. C. R. 145, *ante*, p. 208).

A complaint addressed to a public body, or to Government, respecting the conduct of an officer, whose conduct the Government or such public body may have the power of controlling, is not necessarily a privileged communication. That

Art. 50.

suspected of having committed a theft at a hotel in Edinburgh which he had recently left, and suggesting a cautious inquiry. The defendant, without making any inquiry, told the plaintiff's master privately that there had been a theft at the hotel and that suspicion had fallen on the plaintiff. It was held that the defendant made the statement to the plaintiff's master in discharge of a moral or social, though not a legal duty, and that the occasion was privileged. There being no evidence of malice judgment was given for the defendant.

(8) So advice given, in confidence, at the request of another, and for his protection, is privileged; and it seems that the presence of a third party makes no difference (*Taylor* v. *Hawkins*, 16 Q. B. 308; *Clark* v.

Canadian Cases.

depends on the motives with which such communication is made (*Corbett* v. *Jackson*, 1 U. C. R. 128).

A niece wrote to her aunt, with whom she was on terms of great intimacy, and whom she was in the habit of staying with, a letter, making, on the authority of a correspondent, statements derogatory to the character of a clergyman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on the one side and denied on the other that in the letter, which had been destroyed, the niece told the aunt "to spread this about town at once." *Held*, that such a moral and social duty existed as made the communication a privileged one; and that though a direction to spread the statement about would be some evidence of malice, it should have been left to the jury to say whether that direction had been in fact given.

Judgment of Robertson, J., reversed (*Fenton* v. *Macdonald*, 1901, 1 O. L. R. 422).

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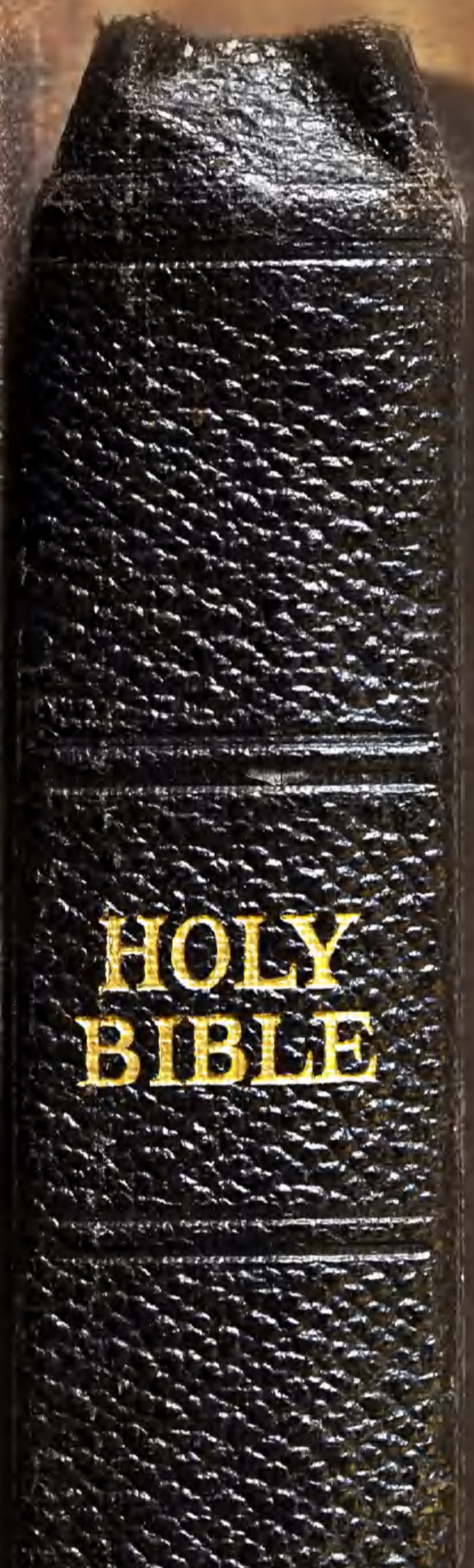

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Art. 50.

(one of their guards), on the ground that he had been guilty of gross neglect of duty, and published his name in a monthly circular addressed to their servants, stating the fact of, and the reason for, his dismissal, it was held that the statement was made on a privileged occasion, and that the defendants were not liable. For, as Lord ESHER, M.R., said, "Can any one doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service?" (*Hunt* v. *Great Northern Rail. Co.*,[42] [1891] 2 Q. B. 189).

Imputations made to persons not having a corresponding interest.

(11) However, imputations which, if made to persons

Canadian Cases.

[42] *Ross* v. *Bucke*, 21 O. R. 692, *ante*, p. 234; *Wells* v. *Lindop*, 14 O. R. 275; *Lemay* v. *Chamberlain*, 10 O. R. 638; *Todd* v. *Dun Wiman & Co. and Chapman*, 12 O. R. 791.

"The meaning in law of a privileged communication is a communication made on such an occasion as rebuts the *primâ facie* inference of malice arising from the publication of matter prejudicial to the character or credit of the plaintiff, and throws on the latter the onus of proving malice in fact, *i.e.*, that the defendant was actuated by motives of personal spite or ill-will, or some other indirect or improper motive independent of the occasion on which the communication was made" (*Todd* v. *Dun Wiman & Co.*, 15 O. A. R. 91, 92—Burton, J.A.; and *Robinson* v. *Dun*, *infra*).

Art. 50.

having a corresponding interest, would be privileged in the absence of actual malice, cease to be so if spread broadcast. Thus, imputations circulated freely against another in order to injure him in his calling, however *bonâ fide* made, are not privileged. For instance, a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin* v. *Fowler*, 9 Ex. 615).[43] So, the unnecessary transmission by a post-

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Canadian Cases.

Holliday v. *The Ontario Farmers' Mutual Ins. Co.*, 1 Tupper's Reps. in Appeal, 483; *Tench* v. *G. W. Ry.*, *ante*, p. 242.

[43] Where defendant, a clerk in the Receiver-General's office, told his principal that the plaintiff, another clerk, had robbed him (the R.-G.) of money; there being no proof that any money had been stolen, or that the Receiver-General had ever suspected it, it was *held* that such communication was not privileged.

Per Sherwood, J.: "When a master gives a character of his servant, whether he is requested to do so or not, malice will not be presumed, but must be expressly proved to sustain an action. The superintending authority of a master and the subordinate situation of a servant necessarily imply a right in the master to express an opinion of the conduct and moral principles of a servant. The interests of society sanction this right, and the policy of the law supports it, but it seems to me no good arguments can be found in favour of a right in the servant to impeach the character of a third person to his master whenever he may feel disposed, without any apparent cause for his assertions. I am inclined to think the communications of a servant to his master stand on the same footing as other communications made from one individual to another in society, and may be

Art. 50.

office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*Williamson* v. *Freer*,[44] L. R. 9 C. P. 393). And where by the defendant's negligence that which would be a privileged communication if made to A., is in fact placed in an envelope directed to B., whereby the defamatory matter is published to B., the defendant will be liable (*Hebditch* v. *MacIlwaine*,[45] [1894] 2 Q. B. 54).

Canadian Cases.

confidential, and consequently privileged, or not, according to the facts and circumstances which attend them and the occasion on which they are made. When the words are spoken in the discharge of any duty, the performance of which is required by the ordinary exigencies of society, although the party was under no absolute and legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *primâ facie* justification" (*Prentice* v. *Hamilton*, 1 Draper, K. B. Reps. 410; *Nolan* v. *Tipping*, 7 U. C. C. P. 524).

[44] *Holliday* v. *Ontario Farmers' Mutual Ins. Co.*, 38 U. C. R. 76.

[45] *Bourgard* v. *Barthelmes*, 24 O. A. R. 431; *Gorst* v. *Barr*, 13 O. R. 644.

In a mortgage foreclosure action the Lion Brewery Co., as second mortgagees, was joined as a party defendant, and a mercantile agency published in a notice or circular distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Co., claiming foreclosure of a mortgage and indicating by means of the words *et al.* that there were other defendants. It was *held* that the publication was libellous and not privileged (*Lion Brewery Co.* v. *The Bradstreet Co.*, 9 B. C. Reports, 435).

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Art. 51.

person the subject of it unfit to associate with his wife and daughters), the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

Example.

(2) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorised repetition and not of the original statement (*Ward* v. *Weeks*, 4 Moo. & P. 808).

Printing slander.

(3) So the printing and publishing by a third party of oral slander (not *per se* actionable) renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action for libel, although the originator, who merely *spoke* the slander, will not be liable (*M'Gregor* v. *Thwaites*, 3 B. & C. 24).

Publisher of libel.

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*per* BEST, J., *De Crespigny* v. *Wellesley*, 5 Bing. 403).

Art. 52.—*Libels by Newspaper Proprietors.*[48]

(1) In an action for libel against the proprietor or editor of any newspaper or other periodical, the defendant, in addition to pleading the privileges conferred on newspaper proprietors and editors by the third and fourth sections of the Law of Libel Amendment Act, 1888 (*supra*, pp. 133, 134), may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such newspaper or other periodical a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And with his defence, the defendant may pay a sum into court by way of amends (6 & 7

Canadian Cases.

[48] *Farmer* v. *Hamilton Tribune Printing and Publishing Co.*, 3 O. R. 538.

In an action brought against a newspaper company for alleged libellous articles published in the company's newspaper, the notice complaining of the publication given in pursuance of R. S. O., 1887, c. 57, sect. 5, sub-sect. 2 [now R. S. O., 1897, c. 68, sect. 6], was addressed to the editor of the paper and was served on the city editor at the company's office, and a similar notice was served on the chairman of the board of directors at the said office. *Held*, that this was a notice merely to the editor and not to the defendants, and therefore was not sufficient under the statute (*Burwell* v. *London Free Press Printing Co.*, 27 O. R. 6).

Art. 52. Vict. c. 96, s. 2. See *Hawkesley* v. *Bradshawe*,[49] 5 Q. B. D. 22, 302).

(2) In any such action as aforesaid, the defendant shall be at liberty to give in evidence in mitigation of damages, that the plaintiff has already recovered or brought actions for damages for, or has received or agreed to receive compensation in respect of, a libel or libels to the same purport or effect (44 & 45 Vict. c. 60, s. 6 (*a*)).

Art. 53.—*Limitation for Actions for Defamation.*[50]

An action for slander must generally be commenced within two years next after the cause of

(*a*) The Act gives very exhaustive definitions of "Newspaper" and "Proprietor." As to the consolidation of several actions brought against different persons for the same libel. see 51 & 52 Vict. c. 64. s. 5.

Canadian Cases.

[49] In an action for libel contained in a newspaper the defendant may plead that the libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the newspaper a full apology for the libel (R. S. O., 1897, c. 68, sect. 6).

[50] *E*very action for libel contained in a newspaper shall be commenced within three months after the publication complained of has come to the notice or knowledge of the person defamed (R. S. O., 1897, c. 68, sect. 13).

As to costs in libel action when verdict for

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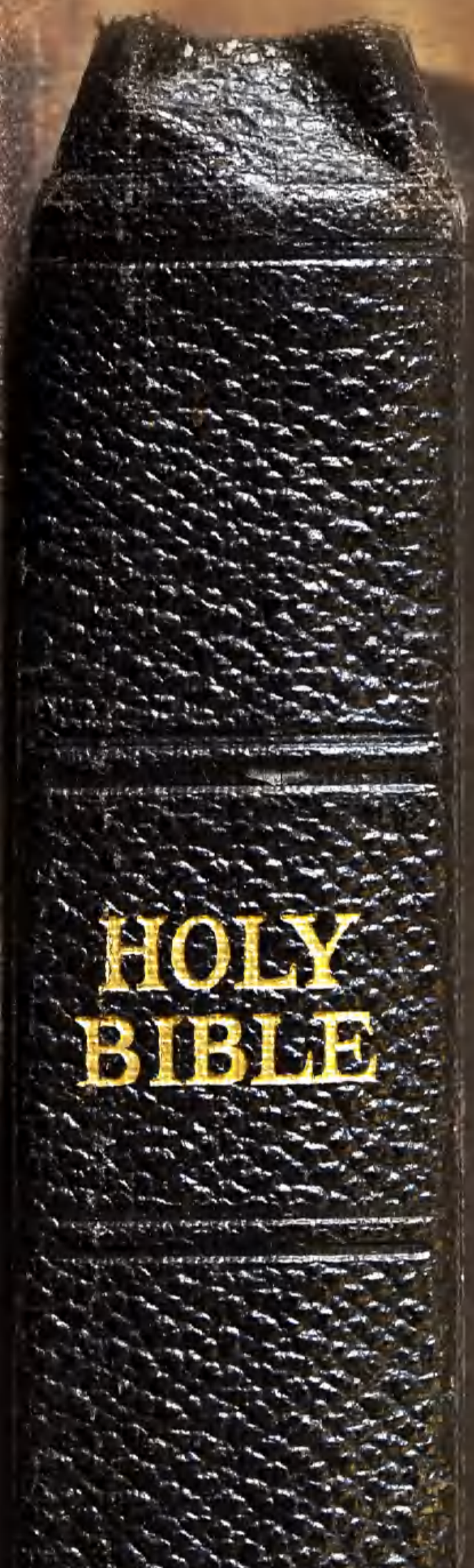

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CHAPTER II.

OF MALICIOUS PROSECUTION.

ART. 54.—*Definition.*

(1) Malicious prosecution consists of the malicious institution against another of unsuccessful criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause (see *Churchill* v. *Siggers*, 3 E. & B. 937; *Johnson* v. *Emerson*, L. R. 6 Ex. 329; and *Quartz Hill, etc. Co.* v. *Eyre*,[52] 11 Q. B. D. 674).

Canadian Cases.

[52] In *Sherwood* v. *O'Reilly* (3 U. C. R. 4), it was *held* that in an action for a malicious arrest without any probable cause of action, it is not sufficient to establish a *primâ facie* case, that the plaintiff puts in at the trial the exemplification of the judgment in the former case, by which it appears that a verdict was rendered for the defendant in that action.

"I was inclined to think upon the argument that the record of acquittal, while wholly unexplained, might, in an action for malicious arrest, be held to supply *primâ facie* want of probable cause and malice so as to call upon the defendant to show ground for the arrest. Upon examining into the question I have now no doubt that actions for malicious prosecutions, and for malicious arrests,

(2) Malicious prosecution causing actual damage to the party prosecuted is a tort, for which he may maintain an action. Art. 54.

It will be seen from the above article, that in order to sustain an action for malicious prosecution, five factors Analysis.

Canadian Cases.

stand on the same footing, as regards the onus of proof of want of probable cause and malice, and that the weight of authority is against the position that a mere acquittal by the jury with nothing more shown, supplies any proof of want of probable cause; something besides that must be shown tending to lead to a conclusion that the plaintiff was not proceeding in good faith and with a sincere conviction that he had a legal cause of action, though very slight evidence might be received, for the purpose of putting the other party on his defence." *Ibid.* Robinson, C.J. See also *McDonald* v. *Cameron*, 4 U. C. R. 1.

"Actions for malicious prosecution are founded on the idea of bad faith on the part of the defendant. When he acts honestly and without malice, under a mistaken impression of facts, he will not be liable in this form of action, still less will he be liable for the mistake of the justice in acting upon his information" (*Lucy* v. *Smith*, 8 U. C. R. 520—Robinson, C.J.).

"We have considered the evidence in this case and the objections taken at the trial. It was not necessary, in our opinion, to prove that the defendant made an information on oath. It was enough to show that he set the magistrate in motion. It is not alleged in the declaration that the defendant did make any information on oath; that fact, therefore, is not brought in issue, and

Art. 54.

must co-exist, viz.: (1) a prosecution of the plaintiff by the defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice; (4) the determination of the prosecution in favour of the party prosecuted; and (5) damage caused to that party by the prosecution.

Canadian Cases.

the action may be sustained without showing it. As to the second objection, that the prosecution is not shown to have been terminated—that is, legally and officially—we find several cases in which the allegation was merely, as in this case, that the person prosecuted was discharged by the magistrate, as in *Gregory* v. *Derley* (8 C. & P. 749); and it is not indispensable to an action for malicious prosecution that the party charged should have been arrested or imprisoned. On the contrary, it is laid down that the damage which will sustain the action may be either to the plaintiff's person by imprisonment; to his reputation by scandal; or to his property by expense" (*Sinclair* v. *Haynes*, 16 U. C. R. 251—Robinson, C.J.).

In an action for maliciously making a charge against the plaintiff, before a magistrate, upon which he was arrested, and afterwards discharged, it was *held* necessary to produce the information or lay a foundation for secondary evidence, and that the plaintiff having done neither was properly nonsuited (*Nourse* v. *Foster*, 21 U. C. R. 47).

Webber v. *McLeod*, 16 O. R. 609; *Colbert* v. *Hicks*, 5 Tupper's Reps. in App. 571.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it is done maliciously and without reasonable and probable cause (*Mitchell* v. *McMurrich*, 22 O. R. 712).

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Art. 55.

Art. 55.—*Prosecution by the Defendant.*

(1) The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant.

(2) A person who has not instituted proceedings maliciously may be guilty of malicious prosecution if, after they have been begun properly by himself or another, he continues them maliciously and without reasonable and probable cause, as when in the course of the proceedings he acquires positive knowledge of the innocence of the accused (*per* Cockburn, C.J., in *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505, and see *Weston* v. *Beeman*, 27 L. J. Ex. 57 (*a*)).

(1) Thus, if a person *bonâ fide* lays before a magistrate

(*a*) This seems to be the effect of the cases cited; but the point is nowhere very clearly decided. *Fitzjohn* v. *Mackinder* should be carefully studied, as the judges deciding it give different reasons for their decision.

Canadian Cases.

he was not justified in charging the plaintiff with theft, because he believed the dog was his own; the real question being, not whether the defendant believed the dog to be his, but whether he believed that the plaintiff had stolen him, and that the case should have been left to the jury. Judgment of the county court of Middlesex reversed (*Pring* v. *Wyatt*, (1903) 5 O. L. R. 505; *Robitaille* v. *Mason and Young*, 9 B. C. Reports, 499).

Art. 55.

Illustrations.

Mistake of magistrate.

a state of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*Wyatt* v. *White*, 29 L. J. Ex. 193; *Cooper* v. *Booth*, 3 Esp. 144). But if a person goes before a magistrate and makes a specific charge against another, as by swearing an information that that other has committed a criminal offence, he is the person prosecuting, for he and not the magistrate has set the law in motion. So, too, if a person instructs a solicitor to prosecute, he is liable for the consequences if he does it maliciously and without reasonable and probable cause.

(2) It has been held that if a person acting *bonâ fide* swears an information before a magistrate, under s. 10 of the Criminal Law Amendment Act, 1885, that he has reasonable grounds for suspecting that a woman or girl is detained for immoral purposes, and thereupon the magistrate issues a search warrant, the person swearing the information is not a prosecutor, as the magistrate acts judicially upon such information, and the decision of the magistrate that there is reasonable cause for suspicion protects the person giving the information (*Hope* v. *Evered*,[54] 17 Q. B. D. 338).

Canadian Cases.

[54] "If a private person, suspecting a felony to have been committed, state facts to a constable, and the latter on his own responsibility makes an arrest without a warrant, no action will lie for the arrest against the private person. But if the private person do more than simply put the law in motion; if he direct or command the arrest, he may be sued in trespass. There is a distinction between a private individual and a constable in

Art. 56.

ART. 56.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests

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Canadian Cases.

the case of an arrest for suspicion of felony. In order to justify a private person in causing the arrest of another, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by somebody; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities" (*Patterson* v. *Scott*, 38 U. C. R. 644—Harrison, C.J.).

In laying an information against the plaintiff, the defendant only intended to charge him with having unlawfully carried away a saw, and stated facts to the magistrate which merely amounted to a charge of trespass, but in drawing the information the magistrate of his own accord used the word "feloniously," which word the defendant did not know the meaning of. *Held*, that under these circumstances an action for malicious prosecution would not lie (*Rogers* v. *Hassard*, 2 Tupper's Reps. in App. 507).

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable

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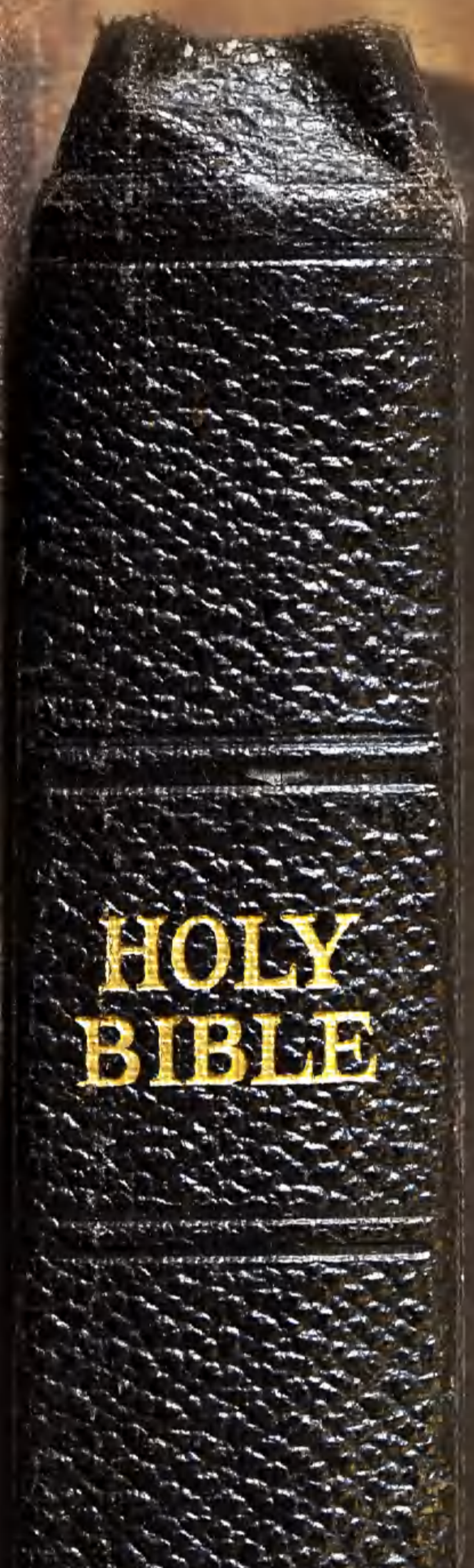

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Art. 56.

(3) No definite rule can be laid down for the exercise of the judge's determination (*Lister* v. *Perryman*, L. R. 4 H. L. 521); but the defendant will be deemed to have had reasonable and pro-

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Canadian Cases.

and wherever that is the case a nonsuit should follow of course; for actions of malicious prosecution are founded on the idea of bad faith on the part of the defendant. When he acts honestly and without malice, under a mistaken impression of facts, he will not be liable in this form of action, still less will he be liable for any mistake of the justice in acting upon his information" (*Lucy* v. *Smith*, 8 U. C. R. 520—Robinson, C.J.).

"The case quoted from Salkeld [*Savil* v. *Roberts*, 1 Salk. 13] is an express authority that in this case, when the plaintiff was imprisoned, the ignoring of the bill by the grand jury was some evidence of want of reasonable and probable cause. The *dicta* of the judges which I have quoted are in accordance with the general sentiment of the profession, that the ignoring of the bill by the grand jury, on a charge of felony, when the defendant himself was the prosecutor and went before the jury, was evidence of want of reasonable and probable cause in an action for a malicious arrest and prosecution" (*McCreary* v. *Bettis*, 14 U. C. C. P. 97—Richards, C.J.).

Scougall v. *Stapleton*, 12 O. R. 206; *Malcolm* v. *Perth Mutual Fire Ins. Co.*, 29 O. R. 717; *Milner* v. *Sanford*, 25 N. S. R. 227, and *Grant* v. *Booth*, 25 N. S. R. 266.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which

bable cause for a prosecution where (a) he took reasonable care to inform himself of the true facts; (b) he honestly, although erroneously, believed in his information, and (c) that information, if true, would have afforded a *primâ facie* case for the prosecution complained of (see *Abrath* v. *North Eastern Rail. Co.*, *ubi supra*).[56] Art. 56.

Note, that in both malicious prosecution and false imprisonment the question of what amounts to reasonable and probable cause is for the judge. But there is this important difference, that in malicious prosecution it is Burden of proof.

Canadian Cases.

reasonable and probable cause may be inferred, but the inference must be drawn by the judge (*Archibald* v. *McLaren*, 21 S. C. R. 588).

The question of reasonable and probable cause is for the judge and not for the jury (*Rice* v. *Saunders*, 26 U. C. C. P. 27; *Joint* v. *Thompson*, 26 U. C. R. 519, followed; *Wilson* v. *City of Winnipeg*, 4 Manitoba L. R. 193; *Wishart* v. *City of Brandon*, *ibid.* 453; *Miller* v. *Manitoba Lumber and Fuel Co.*, 6 M. L. R. 487; *Anderson* v. *Bell*, 24 N. S. R. 100; *Raymond* v. *Bider*, 24 N. S. R. 363).

"No doubt, although the existence of probable cause is a question of law, generally speaking, yet where there is a conflict of evidence, or where a proper foundation is laid by evidence for inquiring into the motives with which a party acted, the question may become a mixed question of law and fact" (*Smith* v. *McKay*, 10 U. C. R. 414—Robinson, J.).

[56] Where in the opinion of the trial judge want of reasonable and probable cause had not been shown by the evidence, the charge to the jury should be peremptory to find for the defendant (*Tyler* v. *Babington*, 4 U. C. R. 202).

Art. 56.

for the plaintiff to prove the absence of reasonable and probable cause; whereas in false imprisonment, the imprisonment is *primâ facie* wrongful, and it is for the defendant, if he can, to prove that he had reasonable and probable cause.

Reasonable and probable cause defined.

In *Hicks* v. *Faulkner* (8 Q. B. D., at p. 171), HAWKINS, J., says: "I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead an ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was *probably* guilty of the crime imputed. There must be first an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conviction; thirdly, such secondly mentioned belief must be based upon *reasonable* grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."[57]

A man who makes a criminal charge against another, cannot absolve himself from considering whether the

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Canadian Cases.

[57] "Reasonable and probable cause is the existence of such facts and circumstances as would excite in the mind of a reasonable man a belief of guilt: see *Patterson* v. *Scott* (38 U. C. R. 639), recently before me. Good faith merely in making a criminal charge is not sufficient. Mere suspicion cannot in any case amount to reasonable and

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Art. 56.

With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would seem that although he must not act upon mere tittle-tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the hearsay (*Lister* v. *Perryman*,[59]

Canadian Cases.

the facts of his case fairly before counsel, and acts *bonâ fide* on the opinion given by that counsel, however erroneous the opinion, he is not liable to this action" (*Fellowes* v. *Hutchison*, 12 U. C. R. 634—Draper, J.).

"In actions for malicious prosecution, or for maliciously arresting another, it is always the rule that the defendant has exculpated himself if he has fairly and fully stated all the facts to the magistrate, or to his professional adviser, or to some other competent person to act and advise in such a case, and he has been governed by their direction or advice" (*Jackson* v. *Hide*, 28 U. C. R. 296—Adam Wilson, J.; but see *Scougall* v. *Stapleton*, *ante*, p. 262, and *St. Denis* v. *Shoultz*, *infra*).

Nourse v. *Calcutt*, 6 U. C. C. P. 15.

"The law certainly seems to be now settled that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel, he is not liable to an action" (*Rex* v. *Stewart*, M. L. R. 264—Taylor, C.J.).

[59] *Hagarty* v. *Great Western Railway Co.*, 44 U. C. R. 319; *Hamilton* v. *Cousineau*, 19 O. A. R. 203; *Cox* v. *Gunn*, 2 N. S. Reps. (Russell & Chesney), 528; see *St. Denis* v. *Shoultz*, 25 O. A. R. 131, *post*, p. 269).

L. R. 4 H. L. 521). But as circumstances are infinite in variety, it is quite impossible to lay down any guiding principle as to what steps a person ought reasonably to take for informing himself of the truth before instituting a prosecution. Art. 56.

Art. 57.—*Malice.*

Malice means not necessarily spite or ill-will but any indirect or improper motive—any motive other than that of securing the ends of justice. If there is want of reasonable and probable cause, malice may be inferred without other evidence; but this inference is not conclusive, and may be rebutted (*Brown* v. *Hawkes*, [1891] 2 Q. B. 718).[60]

(1) If a person prosecutes another to prevent that other bringing actions against him (*Leith* v. *Pike*, 2 W. Illustrations. Improper motives.

Canadian Cases.

[60] "An action of this kind lies for the scandal, vexation, and expense the plaintiff has been exposed to, and has suffered, and not for the danger of conviction he has been subjected to" (*Macdonald* v. *Henwood*, 32 U. C. C. P. 440—Wilson, C.J.; and see *Campbell* v. *McDonell*, 27 U. C. R. 343; *McNellis* v. *Gartshore*, 2 U. C. C. P. 464; *Wilson* v. *Tennant*, 25 O. R. 339).

"The defendant had no legal ground of charge against the plaintiff, but I am inclined to think if he honestly believed he had, and believed also that the case was one of false pretences, he would be justified in prosecuting for it. That would, of course, be a matter to be submitted to the jury" (*Reid* v. *Maybee*, 31 U. C. C. P. 391—Wilson, C.J.) (see also *Crandall* v. *Crandall*, 30 U. C. C. P. 497, *post*, p. 272).

Art. 57.

Bla. 1326), or to stop the mouth of a witness (*Haddrick* v. *Heslop*, 12 Q. B. 267), or to frighten others and thereby deter them from committing depredations on the prosecutor's property (*Stevens* v. *Midland Rail. Co.*, 10 Ex. 356), all these are indirect and improper motives which may constitute malice.

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings knowing that he was wrong and had no just cause of complaint, malice may be presumed (*Hinton* v. *Heather*,[61] 14 M. & W. 131).

Honest mistake.

(3) In *Brown* v. *Hawkes* ([1891] 2 Q. B. 718) it was pointed out that a prosecutor may act without reasonable and probable cause and yet not be malicious. Stupidity and malice are not the same thing; and if the defendant honestly believed in the plaintiff's guilt, and there is no evidence that he was actuated by any improper motive, even though he had not taken care to inform himself of the facts, and had no reasonable and probable cause for prosecuting, yet he cannot be said to have acted maliciously.

Canadian Cases.

[61] *Watt* v. *Clark*, 18 O. R. 602.

"Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was a reasonable and probable cause for the prosecution. The plaintiff is entitled to have the circumstances relied on as a justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong" (*Sutton* v. *Johnstone*, 1 T. R. 493, distinguished: *Routhier* v. *McLaurin*, 18 O. R. 112).

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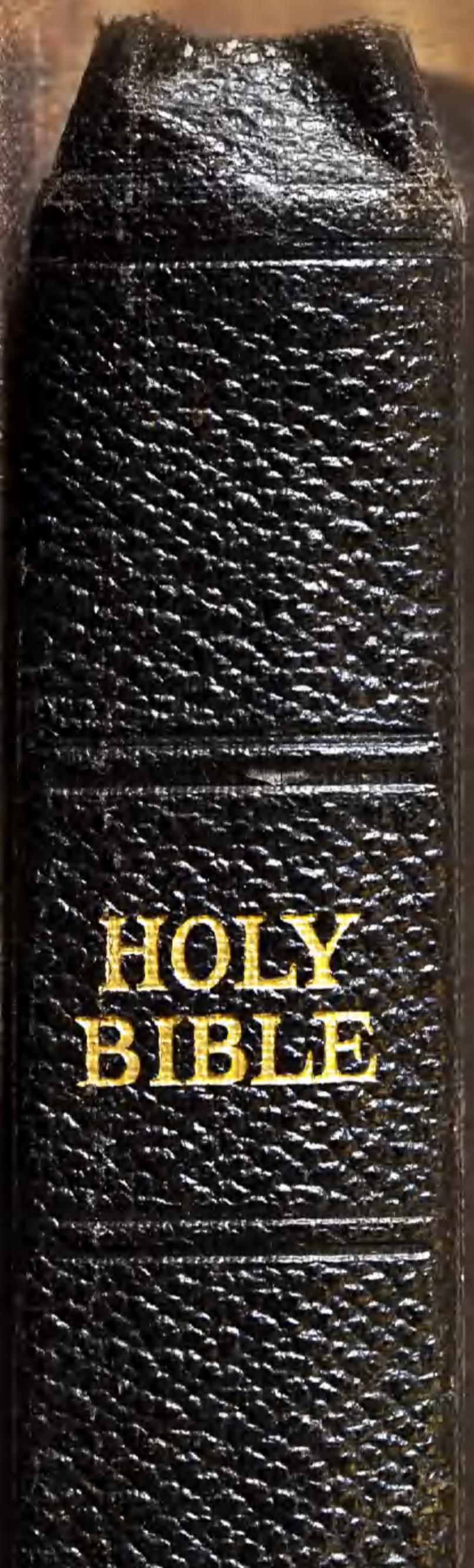

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Art. 58.

Art. 58.—*Failure of the Prosecution.*

It is necessary to show that the proceeding alleged to have been instituted maliciously, and without reasonable or probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*Basèbè* v. *Matthews*, L. R. 2 C. P. 684; and as to bankruptcy proceedings, *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210).

Explanation of reasons for rule.

(1) This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where the result of the prosecution cannot be appealed (*Basèbè* v. *Matthews*, *ubi supra*). As Crompton, J., said, in *Castrique* v. *Behrens* (30 L. J. Q. B. 168), "there is no doubt on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

Procuring bankruptcy.

(2) In *Metropolitan Bank* v. *Pooley* (10 App. Cas. 210), it was held that no action will lie for maliciously procuring a person's bankruptcy until the adjudication in bankruptcy has been set aside.

(3) In *The Quartz Hill Consolidated Gold Mining Co.*

v. *Eyre* (11 Q. B. D. 674) it was held that a trading company against which a petition for winding up had been brought maliciously and without reasonable and probable cause had a right of action after the petition had been dismissed. Art. 58.

Art. 59.—*Damage.*

In order to support an action for malicious prosecution, it is necessary to show some damage resulting to the plaintiff as the natural consequence of the prosecution complained of (*Byne* v. *Moore*, 5 Taunt. 187).

Damage need not be pecuniary.

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is obliged to spend money in necessary charges, to acquit himself of the crime of which he is accused" (Mayne's Treatise on Damages, p. 345). Thus, in *The Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (11 Q. B. D. 674), it was held that, in an action for maliciously taking proceedings to wind up a company, no pecuniary loss or special damage need be proved, as the presentation of a petition for winding up is from its very nature calculated to injure the credit of a trading company.

N.B.—There are certain torts analogous to malicious prosecution which occur too rarely to require notice in an elementary work of this kind. One of these is malicious arrest, which consists in wilfully putting the law in motion to effect the arrest of another *under civil process* without cause. Arrest under civil process is,

Art. 59.

however, now so rarely possible that this form of tort may be almost deemed obsolete. Another wrong of the same nature is causing injury to another by an abuse of legal procedure (see *Grainger* v. *Hill*,[67] 4 Bing. N. C. 212).

Canadian Cases.

[67] *Erickson* v. *Brand*, 14 O. A. R. 614.

The Statute of Limitations commences to run from the date of acquittal, not from date of arrest (*Crandall* v. *Crandall*, *ante*, p. 267).

The plaintiffs, on the information of the defendant, a constable, and another constable were summoned before a magistrate, charged with wilfully damaging a spring of water on a highway, but did not attend, and in their absence were convicted and jointly fined. A question having been raised as to the regularity of the proceedings, the magistrate hesitated about issuing a warrant until the defendants, the township council, passed a resolution indemnifying him against costs, which they did.

The warrant directed "To all or any constables," etc., was issued, following the form of the conviction, and handed to the defendant constable and another constable, who between them arrested the plaintiffs, who were imprisoned until the fine and costs were paid.

In an action against the township council and one of the constables for maliciously enforcing an illegal warrant: *Held*, that the defendant constable had acted as such in the execution of the warrant and was entitled, although he had laid the information, to the protection extended by law to public officers of the peace; that the warrant being bad on its face, he was by virtue of sect. 21 of the Code exempt from all criminal responsibility, and was protected from a civil action by virtue of R. S. O., 1897, c. 88, sects. 1 (2), 13 and 14, and sects. 975

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Art. 59. student who desires information regarding it is referred to larger works.

Canadian Cases.

illegally, where they do so in the supposed performance of, and with a *bonâ fide* intention of discharging their duty (*Moriarty* v. *Harris*, 8 O. L. R. 251; and see R. S. O., 1897, c. 88).

CHAPTER III.

OF MAINTENANCE.[67a]

ART. 60.—*Definition.*

(1) Maintenance is the unlawful assistance, by money or otherwise, proffered by a third person to either party to a *civil suit*, to enable him to prosecute or defend it.

Canadian Cases.

[67a] "In my opinion the agreement before us comes within the principles laid down in the cases and authorities referred to. It contains all the ingredients which are obnoxious to public policy, and which constitute maintenance and champerty. It contains an undertaking to remove an impediment in the way of proceeding with the suit in question by paying into court the money required as security for the defendant's costs. It further provides for the payment of all costs then incurred, and for all future costs in that suit, or in any other suit necessary to be brought or defended respecting the subject-matter, and also that the defendant shall attend to the prosecution of the suit; and it further provides for a division of the property in the event of the suit being favourable, viz., that the plaintiff shall be entitled to receive one-tenth part and the defendants and their associates nine-tenths. During the

Art. 60.

(2) Assistance of another in a suit is not unlawful if (a) the maintainer has a common interest in the action with the party maintained; or (b) the maintainer is actuated by motives of

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Canadian Cases.

arguments it was said that in modern times the law relating to maintenance has been relaxed in its application. No doubt the former strict rule of law in some instances is, perhaps, inapplicable to the present state of society, but upon examination of the latest decisions the early law and principles are still recognised and adhered to. It seems to me that if we were to hold that the agreement under discussion was not one tainted with maintenance and champerty, we would virtually ignore all the principles upon which the previous decisions proceeded. I see no ground upon which the purchase of a disputed right upon such terms as this agreement and the allegations in the plea disclose should be sanctioned" (*Carr et al.* v. *Tannahill et al.*, 30 U. C. R. 226—Morrison, J., and 31 U. C. R. 201).

The laws relating to champerty and maintenance were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England, and as a law of public order, the principles of which and the reasons for which apply as well to the Province of Quebec as to England and the other provinces of Canada (*Price* v. *Mercier*, 18 S. C. R. 303; *Miloebe* v. *McGuire*, 34 S. C. R. 24).

The laws of champerty and maintenance as they existed in England on 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void (*Briggs and Giegerich* v. *Fleutot*, 10 B. C. Reports, 309).

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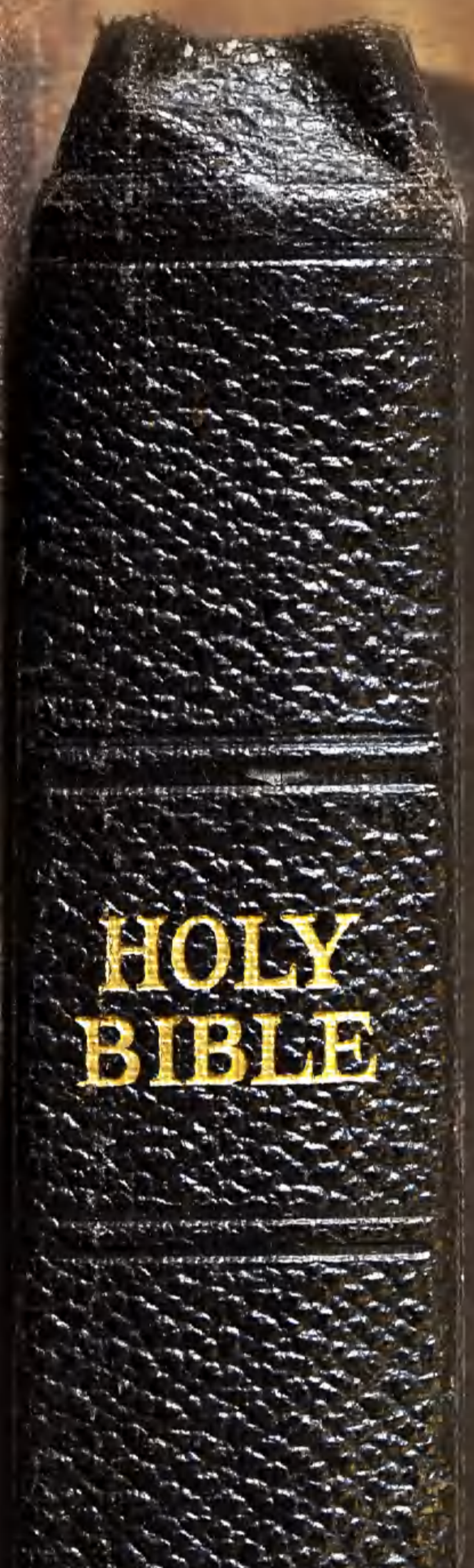

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Art. 60.

defending his tenant in a suit for tithes (*per* Coleridge, L.C.J., in *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 11).

(3) So, where, during the pendency of an action, the plaintiffs became bankrupt, and the trustee in bankruptcy assigned the right of action to F., with power to continue it, on the terms that if F. was successful he should take three-fourths of the net result, and that the remaining one-fourth should be paid to the trustee in bankruptcy, and it further appeared that F. was in reality trustee for himself and certain other creditors of the bankrupt, it was held that the transaction was lawful. For F. and the trustee in bankruptcy had a common interest in the subject-matter of the action, and so had the other creditors for whom F. was trustee (*Guy* v. *Churchill*, 40 Ch. D. 481; and see *Seear* v. *Lawson*, 15 Ch. D. 426).

(4) In the case of *Alabaster* v. *Harness* ([1895] 1 Q. B. 339), the defendants, being interested in the sale of certain electrical appliances for the treatment of disease, employed T. to report thereon. T. reported favourably. The plaintiffs, proprietors of a newspaper, then published an article commenting adversely on T.'s report, and casting reflections on T.'s qualifications as an expert, and on his conduct in connection with the report and the sale of the electrical appliances. T. brought an action for libel at the instigation and expense of the defendants. The newspaper proprietors having succeeded in the action for libel, commenced an action against the defendants for maintenance, claiming as damages the costs they had incurred in defending the action against T., which T. had been unable to pay. It was held that the defendants and T. had no sufficient common interest in the action for libel, and that the action of maintenance was maintainable.

Charity.

(5) But where a rich man in the *bonâ fide*, but erroneous, belief that a poor man was being oppressed,

advanced money to him for the purpose of maintaining an action against the oppressor, it was held that he was justified; notwithstanding that if he had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*Harris* v. *Brisco*, 17 Q. B. D. 504). Art. 60.

CHAPTER IV.

OF SEDUCTION.

ART. 61.—*General Rule.*

*E*very person is liable to an action for damages who wilfully—

(1) *E*ntices away another's servant or wife, or knowingly harbours a servant who has wrongfully quitted his or her master's service (*Winsmore* v. *Greenbank*, Willes, 577; *Blake* v. *Lanyon*, 6 T. R. 221).

(2) Debauches a female who is in the actual or constructive service of another so that that other is deprived of her services.[68]

Canadian Cases.

[68] See Ontario Seduction Act (R. S. O., 1897, c. 69); ; Manitoba Seduction Act (55 Vict. c. 43).

The plaintiff declared in trespass complaining of breaking and entering his close and debauching his daughter, and the defendant pleaded the leave and license of the daughter. Plea *held* bad on demurrer.

"The defendant has cited no authority in support of his plea. If the debauching the plaintiff's servant is an injury to the plaintiff, the servant cannot give license to the defendant to commit that injury. If this defence could be sustained

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Art. 61. and loss of services by the act of the defendant must be proved. No actual contract of service need be proved, provided there is, in fact, some service rendered, and some loss of that service.

Actions for enticing away servants are not now often brought, but in *Evans* v. *Walton* (L. R. 2 C. P. 615), it

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Canadian Cases.

that the fact of the defendant having been previously acquitted on an indictment for rape was not a bar to the action (*Cole* v. *Hubble*, 26 O. R. 279).

"It was denied on the trial, and the point has been strenuously argued on this rule that any action can lie for seduction before the birth of the child. Few things, perhaps, could be less desirable, than that parties could be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy. It would seem a most unreasonable and unwise principle which should prevent the action lying before the birth of the child, which is no part of the seduction, but a consequence only, and, it may be, not the most afflicting consequence that might follow. It might happen that the child might never be born; the mother might die of disease, induced by pregnancy, and before delivery, and then all the injury to feelings would be suffered, embittered by the death of the daughter, and probably a much greater expense, occasioned by her illness, to the father than would generally attend the birth of a child; while in such a case the same loss of labour might also have occurred in reality, which is in contemplation of law the foundation of the action. I infer from these considerations that

Art. 61.

will be noticed that the wrong done was not debauching the plaintiff's daughter, but enticing her away, and it was held that the action lay provided the relationship of master and servant in fact existed. As to the more modern development of this form of action, viz., the action for procuring a breach of a contract to do work or supply goods, etc., see *post*, Chap. VI.

Canadian Cases.

the injury must, with a view to a remedy for actual loss of service, be complete when pregnancy follows, and interruption of service is occasioned by it, which may well be the case before the child is born, and consequently I take it, that by the law of England, it cannot be an indispensable condition to the maintenance of the action that there must be a child born. I should bring myself very reluctantly to any other conclusion; because in England in effect, and in this country I may say in terms, since our statute 7 Will. 4, c. 8 [now R. S. O., 1897, c. 69], the grievance which the law regards and desires to afford redress for, is the injury to feelings, the mortification, the domestic unhappiness, the blighted hopes which follow the seduction—and this must all be suffered before the birth when the pregnancy is known. . . . The only difference created by our statute is, that it dispenses with evidence to prove what the legislature says shall be presumed—namely, the performance of acts of service by the daughter for the father; and it provides further, that whether the daughter be living at home or abroad at the time of being seduced, her parent may equally sustain an action for the wrong" (*L'Esperance* v. *Duchene*, 7 U. C. R. 147 *et seq.*—Robinson, C.J.; and see *Kimball* v. *Smith*, 5 U. C. R. 33; *McLeod* v. *McLeod*, 9 U. C. R. 331, which follows *L'Esperance* v. *Duchene*).

Art. 62.

ART. 62.—*Relationship of Master and Servant in ordinary Actions for Seduction.*[69]

(1) The plaintiff must prove (a) that the female seduced was at the time of the seduction in his service, actual or constructive (*Davies* v. *Williams*, 10 Q. B. 725); (b) that he lost the services of the female, either by reason of her pregnancy and confinement, or by reason of her being kept away by the persuasion of the defendant (*Hedges* v. *Tagg*, L. R. 7 Ex. 283; *Evans* v. *Walton*, L. R. 2 C. P. 615).

(2) Where the female seduced is the daughter of the plaintiff she is constructively in his service

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Canadian Cases.

[69] The mother of an illegitimate daughter may maintain an action for her seduction (*Muckleroy* v. *Burnham*, 1 U. C. R. 351. See, however, *Hicks* v. *Ross*, 25 U. C. R. 52, *post*, pp. 286 and 287).

"We are of opinion that this verdict should be allowed to stand. It rests on the common law principles on which such actions are sustained independent of our statute 7 Will. 4, c. 8. It is sufficiently established that a person standing *in loco parentis* may bring this action and recover compensation for injury to wounded feelings in the same manner as a parent may; the claim, in such case, not being necessarily restricted to the actual damage resulting from loss of service and expenses attending the illness of the female seduced" (*Muckleroy* v. *Burnham*, 1 U. C. R. 352—Robinson, C.J.

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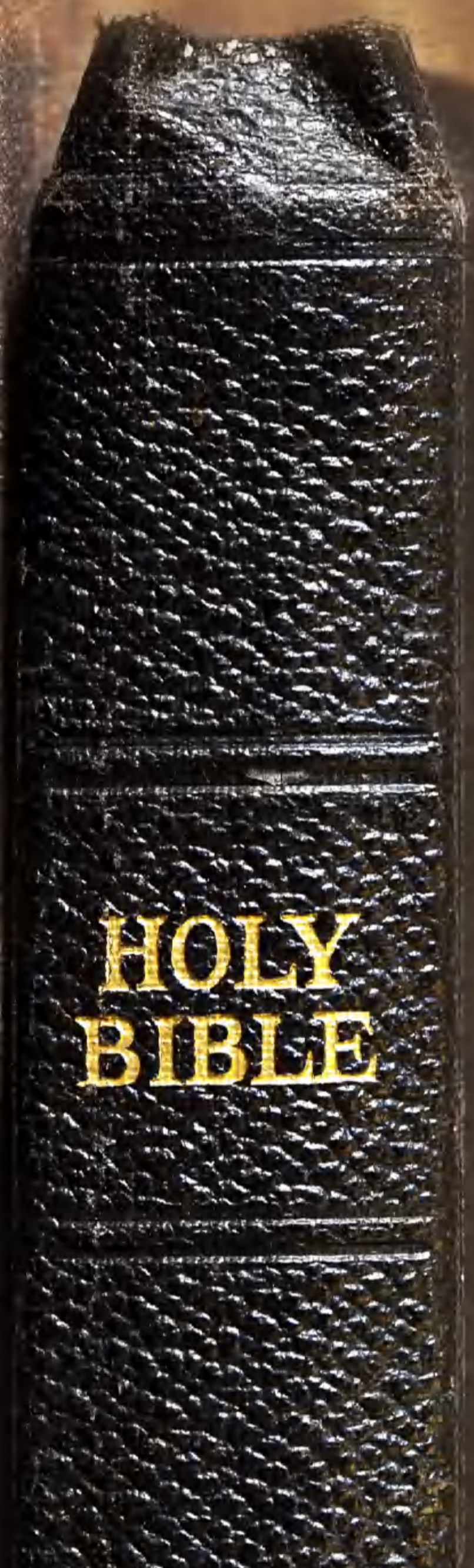

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Art. 62.

(3) A daughter under the age of twenty-one, unmarried and not in other service, is presumed

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Canadian Cases.

six months, either the master is wholly deprived of his remedy or the seducer is liable to two actions.

"In the present case, however, the mother was resident in the province at the time of the seduction and of the birth of the child, and this action was commenced within six months from the latter event, and hence, according to the apparent meaning of the statute, as an action at common law, it is brought too soon" (*M'Intosh* v. *Tylhurst*, 23 U. C. R. 568—Draper, C.J.).

"The intention which I assume the legislature to have entertained—namely, to secure a prior right of action to the father or mother of the female seduced, and to postpone to it the common law right of action of a third party with whom such female resided as a servant when she was seduced—can hardly, I think, be held to extend to a case where the mother, to whom the statutory right of action is only given after the death of the father, marries a second time" (*M'Intosh* v. *Tylhurst*, 24 U. C. R. 445—Draper, C.J.; see also *Green* v. *Wright*, 24 U. C. R. 245, and *Smith et ux.* v. *Crooker*, 23 U. C. R. 84). The Statute R. S. O., 1897, c. 69, sect. 1, includes a mother who re-marries.

The headnote to the case of *Muckleroy* v. *Burnham* (1 U. C. R. 361) is, though literally correct, very likely to lead to a false impression, that the mother of an illegitimate daughter may maintain such an action *under the statute* (C. S. U. C., c. 77) against the seducer, whereas, on reading the judgment, the decision is obviously this, that the mother in such a case can only maintain the action upon the principles of the common law, but that she

to be in the service of her parents (*Harris* v. *Butler*, 2 M. & W. 542). Art. 62.

Canadian Cases.

so far is to be considered as *in loco parentis* that the damages may go beyond the mere loss of service, and include compensation for wounded feelings (*Hicks* v. *Ross*, 25 U. C. R. 52—Draper, C.J.).

Section 1 of 55 Vict. c. 43 (Manitoba, 1892) does not apply to the case of the seduction of an illegitimate female (*St. Germain* v. *Charette*, M. L. R. 63).

In *Hogan and wife* v. *Ackman*, 30 U. C. R. 14, it was held that an action would lie by husband and wife for the seduction of K. after the death of the father of K., K. being the daughter and servant of the wife, notwithstanding that at the time of the seduction K. was residing with the defendant.

"Whatever differences of opinion may exist on the construction of this Act, it seems to be conceded on all hands that the principal object the legislature had in view, was to give the right of action to parents for the seduction of their daughter when residing away from home. And the most revolting features of the law as it formerly stood was, and still is in England, that the master with whom the female might be residing at the time of her seduction was often himself the seducer, and yet no action could be maintained against him. I do not find any decided cases in our own courts that an action will not lie against a defendant who seduces a girl residing with him, whose father is dead and whose mother has married again" (*Ibid.* —Richards, C.J., at pp. 19 and 20).

"Both in that case (*M'Intosh* v. *Tyhurst*) and this, the seduction of the young woman happened after the marriage of the mother with her

Art 62.

Illustrations.

(1) Thus, the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on

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Canadian Cases.

second husband. I think the decision is one which must be followed, because this is not a case in which the mother can maintain an action for the seduction of her daughter while dwelling under the protection of herself and her stepfather" (*Waters et ux.* v. *Powers*, 29 U. C. R. 339). Since the passing of the Married Women's Property Act, R. S. O., 1897, c. 163, and the inclusion of the mother of an unmarried female who has married again by R. S. O., 1897, c. 69, the cases of *M'Intosh* v. *Tyhurst* and *Waters* v. *Powers* are no longer binding upon the Courts.

"It is clear that this is not an action falling within the scope of our statute, for the female for whose seduction this action is brought is not unmarried; she is a widow, the mother of four children. The plaintiff's case must therefore be supported as it would require to be supported in England" (*Anderson* v. *Rannie*, 12 U. C. C. P. 537—Draper, C.J.; and see *Kirk* v. *Long*, *post*, p. 290).

The plaintiff, a widow, sued the defendant for the seduction of her daughter, and loss of service thereby caused. It was proved on the trial that the seduction took place in October, 1861, during the lifetime of the plaintiff's husband, father of the plaintiff's daughter. On the 15th June, 1862, the father died, and on the 16th July, 1862, a child was born by plaintiff's daughter. It was held that the action was not maintainable without proof of actual service to support it, and as the plaintiff, neither at the time the seduction occurred, nor subsequently, when the daughter being pregnant and the right of action became complete, was

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Art. 62.

of her confinement she was in the service of another employer, and afterwards returned home to her mother:—

Canadian Cases.

whomsoever rendered in law is considered service to the parent (*Westacott* v. *Powell*, 2 U. C. Error and Appeal, 525).

In an action after the death of the father by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, it was *held*, as no evidence of the actual relationship of mistress and servant was given, that the action would not lie (*Entner* v. *Bennewcis*, 24 O. R. 407; and *Smart* v. *Hay*, *supra*).

A parent may maintain an action for the seduction of his daughter, though resident abroad at the birth of the child (*Cromie* v *Skene*, 19 U. C. C. P. 328).

"If I was asked what cases the statute (7 Will. 4, c. 8, now c. 77 of the Con. Stat. Upper Canada) [now R. S. O., 1897, c. 69] was intended to provide for, I should instance the present as one of the most, if not the most prominent, as being a case wholly remediless, unless the parent, in the position of the present plaintiff, is entitled to avail himself of the provisions of the statute to maintain this action" (*Ibid.*—Gwynne, J., at p. 336; *James* v. *Hawkins*, 25 U. C. C. P. 346).

A widow is not within the meaning of the term "unmarried female" as used in the statute (7 Will. 4, c. 8), and her father cannot maintain an action for her seduction when she was not living in his service, but in that of her seducer (*Kirk* v. *Long*, 7 U. C. C. P. 363; and *ante*, p. 288).

Mere abandonment does not divest the mother of the right of action when the father is dead (*Hebb* v. *Lawrence*, 7 M. L. R. 222; *James* v. *Hawkins*, 25 U. C. C. P. 346).

Art. 62.

Held, that there was no evidence of service at the time of the seduction. And by KELLY, C.B., and MARTIN and BRAMWELL, BB., that the action must fail also on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*Hedges* v. *Tagg*, L. R. 7 Ex. 283).

Constructive service.

(2) In *Long* v. *Keightley* (11 Ir. Rep. C. L. 221), however, there was held to be a sufficient loss of service under the following circumstances: The plaintiff's daughter, aged twenty-four years, was seduced in the house and service of the plaintiff. The day after, she left Ireland for America, pursuant to a prior arrangement. Finding herself pregnant while in service there, she returned to her native country, and went to stay at her sister's house, where she was confined. Afterwards she returned to the house of her mother (the plaintiff). On the authority of *Hedges* v. *Tagg*,[70] it was argued, that

Canadian Cases.

[70] "The Act respecting seduction (R. S. O., 1877, c. 57) does not give any new right of action for the seduction of an unmarried woman to any one except the father or the mother of such female, and a person standing *in loco parentis* to an unmarried woman can maintain an action for her seduction only where the father, if living, could have maintained it without the aid of the Act; in other words, only where the relationship of master and servant at the time of the seduction does not exist between such unmarried female and some person other than the father or person standing *in loco parentis*" (*McKersie* v. *McLean*, 6 O. R. 432 —Cameron, C.J.).

The mother of the girl seduced, suing as her mistress, has a sufficient common law right to bring the action in the absence from the province of the girl's father (*Gould* v. *Erskine*, 20 O. R. 347;

Art. 62.

inasmuch as the confinement did not take place while the daughter was in the service of the mother, the action must fail. But the court distinguished the two cases on the ground, that in *Hedges* v. *Tagg*, the girl's confinement happened when she was in the service of *another*; while in the case in discussion she was *constructively* in the service of the plaintiff directly she returned to Ireland.

(3) In *Evans* v. *Walton* (L. R. 2 C. P. 615), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express contract or wages, was induced by the defendant to leave her father's house, and live with him at his lodgings; it was held, that the relation of master and servant might be implied from these circumstances, and that it mattered not whether the service was at will or for a fixed period. There was no allegation of debauchery—but the plaintiff lost the services of his daughter whilst she was living with the defendant.

(4) In the case of a daughter living at home, such small services as milking, or even making tea, are sufficient evidence of service (*Bennett* v. *Allcott*, 2 T. R. 166; *Carr* v. *Clarke*,[71] 2 Chit. R. 261).

Canadian Cases.

Tweedie v. *Bogie*, 27 U. C. C. P. 561; and *Abernethy* v. *McPherson*, 26 U. C. C. P. 516).

"If the father is dead, the mother of an unmarried female can maintain an action for the seduction of her daughter, though the daughter be serving or residing with another person at the time of the seduction. This is the plain intention of the statute, and it ought not to be defeated by the accident of the mother marrying again" (*Meyer* v. *Bell*, 13 O. R. 37—Boyd, C.; *Evans* v. *Watt*, 2 O. R. 167).

[71] Case for seduction will lie to recover damages,

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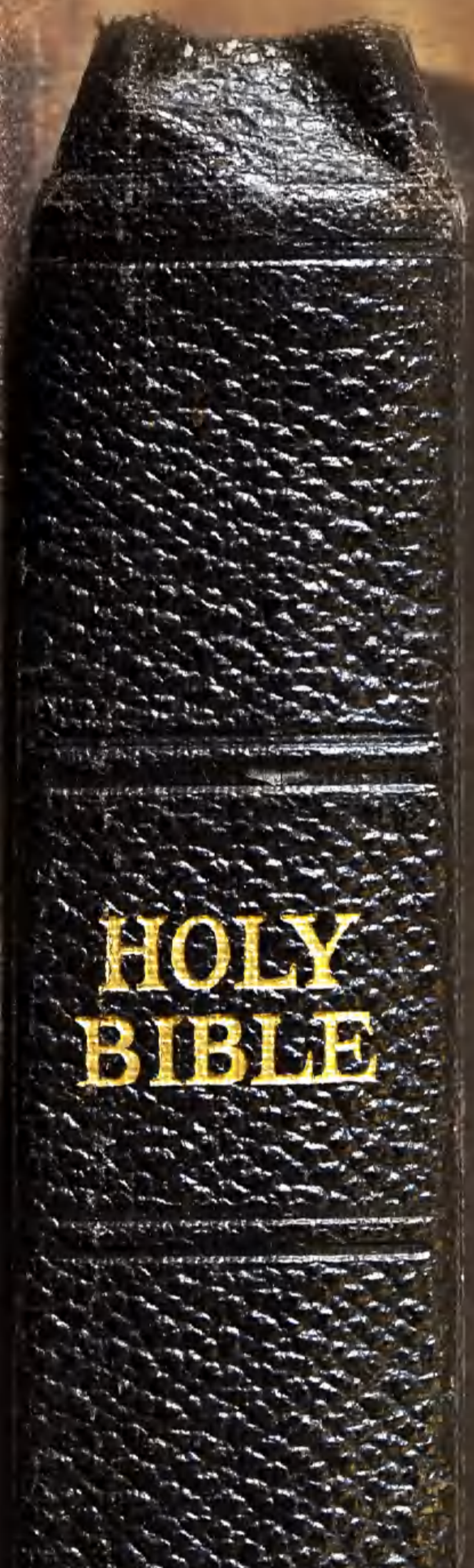

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Art. 62. her services, provided she still continues, in point of fact, one of his own household (*Griffiths* v. *Teetgen*, 15 C. B. 344).

Art. 63.—*Misconduct of Parent.*[72]

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that the wife was dying, and the defendant seduced the daughter; it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie* v. *Scoolt*, 1 Peake, 316).

Canadian Cases.

[72] Gross neglect on the part of the parents is held a ground for a new trial in an action of seduction (*Hogle* v. *Ham*, Taylor's K. B. Reps. (U. C.) 248).

"It is an established maxim with me that no man has a right to sue for compensation in damages for any loss or inconvenience which has arisen from his own fault or criminal neglect of duty" (*Ibid.*—Campbell, J.; *Beadstead* v. *Wyllie*, Taylor's K. B. Reps. 60).

Art. 64.—*Damages.*

(1) In cases of seduction, in addition to the actual damage sustained, including any expenses incurred through the daughter's illness, damages may be given for the loss of the society and comfort of the daughter who has been seduced, and for the dishonour, anxiety, and distress which the plaintiff has suffered (*Bedford* v. *McKowl*, 3 Esp. 120; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599).

(2) Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated. On the other hand, the defendant may show, in mitigation of damages, the loose character of the girl seduced.

(1) Thus, as was observed by Lord Eldon, in *Bedford* v. *McKowl* (3 Esp. 120), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort, will, therefore, rarely be reduced by the court on the ground that they are excessive.

Aggravation of damages.

(2) *A fortiori* will this be the case, where the seducer has made his advances under the guise of matrimony. As was said by Wilmot, C.J., in a case of that character:

Art. 64

"If the party seduced brings an action for breach of promise of marriage (*a*), so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*Tullidge* v. *Wade*, 3 Wils. 18).

Mitigation of damages.

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager* v. *Grimwood*, 16 L. J. Ex. 236; *Verry* v. *Watkins*, 7 C. & P. 308). And, generally, the previous loose or immoral character of the girl seduced is ground for mitigation; as, for instance, the using of immodest language or submitting herself to the defendant under circumstances of extreme indelicacy.

Art. 65.—*Limitation.*[73]

An action for seduction must be commenced within six years.

It is the better opinion that an action of seduction is an "action on the case." If this be so, six years is the

(*a*) The loss caused to the plaintiff by *breach* of a *promise* to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

Canadian Cases.

[73] "We take it to be undeniable that the Statute of Limitations began to run from the time of the seduction, for the plaintiff could have then brought his action, and need not have waited till the child was born. And upon the other point, the principles of the common law which regulate this action are

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CHAPTER V.

OF DECEIT OR FRAUD.

ART. 66.—*Definition of Fraud.*[74]

Fraud consists of a false statement made with intent to deceive and to be acted upon, and either known to be false to the party making it, or made without belief in its truth, or recklessly without caring whether it be true or false.[75]

Moral delinquency necessary.

After considerable diversity of opinion, it is now well settled, that in order to make a person liable for damages

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Canadian Cases.

[74] *McKay* v. *Campbell*, 2 N. S. (Geldert & Oxley); *Milburn* v. *Wilson*, 31 S. C. R. 481.

[75] "The law upon the subject is well settled that it is not necessary in order to set aside a contract obtained by material false representations to prove that the party who obtains it knew at the time that the representation was made, that it was false, because a man is not allowed to get a benefit from a statement which he now admits to be false, if the other contracting party has done nothing to disentitle him to rescind and is in a position to place the party he contracted with *in statu quo*. But a misrepresentation to be material should be in respect of an ascertainable fact as distinguished from a mere matter of opinion, or as to the legal effect of a document, for the law in general is

Art. 66.

in a common law action of deceit, moral delinquency is necessary; but, as will be seen below, an exception has been made in the case of directors and promoters of companies with regard to untrue prospectuses.

The leading case of *Derry* v. *Peek* (14 App. Cas. 337; and see *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491), establishes that, in an action of deceit, the plaintiff must prove actual fraud; he may prove it by showing that the false representation was made knowingly, or without belief in its truth, or recklessly, not caring whether it was true or false. But a false statement made through carelessness, and *without reasonable ground for believing it to be true*, does not amount to fraud: and if the court comes to the conclusion that it was made in the honest belief that it was true, the defendant will not be liable in an action of deceit, however unreasonable his belief may have been, though he may be liable in an action for breach of contract if the statement amounts to a *warranty* (see *post*, p. 313).[76]

Canadian Cases.

equally within the knowledge of all, and therefore a representation or statement of mere matter of law, although erroneous, will not in general be a sufficient ground for imputing fraud" (*McKenzie* v. *Dwight*, 11 O. A. R. 382—Burton, J.A.).

See also *Petrie* v. *Guelph*, *ibid.* 341; *Garland* v. *Thompson*, 9 O. R. 376; *Beatty* v. *Neelon et al.*, 9 O. R. 385; *Moffat* v. *Merchants' Bank*, 11 S. C. R. 46.

[76] An action for deceit will lie against a corporation (*Moore* v. *Ontario Investment Association*, 16 O. R. 269; *Budd* v. *McLaughlin*, 10 M. L. R. 75).

"That decision [*Derry* v. *Peek*], which commends itself fully to my sense of justice, puts an end to the difference of opinion as to whether an action

Art. 66.

Exception in case of false prospectus.

This view of the law was considered to be so dangerous in the case of company promoters and directors, that it led to the passing of the Directors' Liability Act, 1890, by which it was enacted that where, after the passing of that Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at that time, or has authorised his name to be mentioned as a director, or has agreed to become a director, and every promoter of such company, and every person who has authorised the issue of such prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock, on the faith of such prospectus or notice, for loss or damage sustained by any untrue statement in the same, or in any report or memorandum appearing on the face thereof, or by reference

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Canadian Cases.

for *negligent* misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained, and I think very properly holds that it cannot, and that there must be proof of fraud, and that nothing short of that will suffice" (*White* v. *Sage*, 19 O. A. R. 136—Burton, J.A.). *Aliter*, when action on contract only, *McKenzie* v. *Dwight*, *supra*.

"An action for deceit is not maintainable unless there is actual moral fraud" (*Bell* v. *Macklin*, 15 S. C. R. 581—Strong, J.).

Petrie v. *Guelph Lumber Co.*, 11 S. C. R. 450, judgment of Court of Appeal, Ont., affirmed; *Young* v. *Vickers*, 32 U. C. R. 385; *Ontario Copper Lightning Rod Co.* v. *Hewitt*, 29 U. C. C. P. 491; *Tupper* v. *Crowe*, 3 N. S. (Russell & Geldert), 261).

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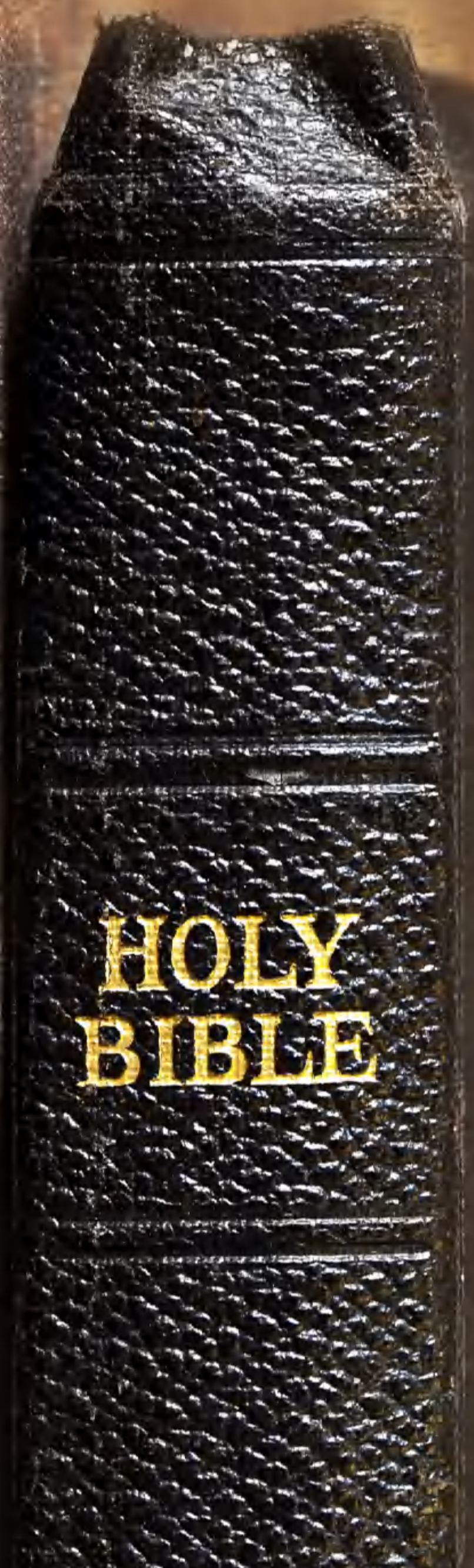

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Art. 66.

Elements of fraud.

To return to the subject of the present section, the elements of legal fraud are: (1) intentional deceit; (2) practised with intent to induce another to act upon it. For if it were otherwise, a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit (*Barley* v. *Walford*, 9 Q. B. 197, 208).

Art. 67.—*When an Action will lie for fraudulent Statements.*[77]

(1) An action will lie, where, by reason of a

Canadian Cases.

[77] "It is averred that the defendant *wrongfully* and falsely made a statement in regard to the credit of the Lewines, and the amount in which they were indebted *to himself and his partners* and to Moss, which *he knew* at the time to be false. To make wrongfully and knowingly a false statement of the amount of a party's indebtedness to the very person of whom the inquiry is made, is in itself a fraud. We mean the allegation includes it so clearly as to make it unnecessary to apply the epithet. The distinction, as we take it, is between cases in which the party may be supposed to be expressing his opinion or conviction merely, and not to be stating a fact necessarily known to himself" (*Fowler* v. *Benjamin*, 16 U. C. R. 177—Robinson, C.J.).

"I understand the cases, although not very plainly expressed, to decide that a false affirmation by a person, which he knows to be untrue, or which

fraudulent representation made by the defendant: Art. 67.

(a) The person to whom it was made has been induced to act to his loss (*Pasley* v. *Freeman*,[78] 2 Sm. L. C. 71); or has otherwise suffered loss which is the natural consequence of the fraudulent representation; or

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Canadian Cases.

he has no knowledge of at all, made with intent to induce another to act upon it to his damage, and such person does act upon it, describes a good cause of action; but, that if the affirmation be falsely and fraudulently made, and it is averred it is false in fact, it is not necessary to allege in pleading that the defendant knew it to be false" (*Young* v. *Vickers*, 32 U. C. R. 389—Wilson, J.).

The vendor, defendant, in the agreement for sale, represented that a block of buildings which he was selling to the plaintiff had been constructed by him of solid stone and brick, and so described them in formal deeds subsequently executed relating to the sale. The wall subsequently began to crack and it was discovered that a portion of the buildings had been improperly built of framed lumber filled in and encased in stone and brick in a manner to deceive the purchaser. It was *held* that the contract was vitiated on account of error and fraud and should be set aside, and that as the vendor knew of the faulty construction, he was liable not only for the return of the price, but also for damages (*Pagnuelo* v. *Choquette*, 34 S. C. R. 102).

[78] "Having gone over the authorities referred

Art. 67.

(b) A third person has been so induced, if the representation was made with the direct intention that he should so act (*Langridge* v. *Levy*, 2 M. & W. 519).

(2) Provided that where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another,

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Canadian Cases.

to by the plaintiff, we think they will sustain the general doctrine that a party who makes a false statement knowing it to be such, to be acted upon by another, may be held in law liable for the injury caused by its being so acted on" (*Sparkes* v. *Joseph*, 7 U. C. C. P. 73—Richards, J.).

By a covenant in a lease of a farm from defendant to plaintiff, it was provided that upon receiving six months' notice from lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation. *Held*, that the plaintiff was entitled to recover the damage sustained by him in consequence of the notice (*Cowling* v. *Dickson*, 5 Tupper's Reps. in App. 549; *Silverthorne* v. *Hunter*, *ibid.* 163; *Brennan* v. *Brennan*, 19 O. R. 327; *McKay* v. *The Commercial Bank*, N. B. R. 1 Pug. 1, and L. R. 5 P. C. Appeals, 394).

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Art. 67.

the plaintiff was induced to enter into a contract to take shares: "I conceive that in an action of deceit it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." In short, as was said by BULLER, J., in *Pasley* v. *Freeman*, *ubi supra*: "Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies." For an example of fraud without damage, see *Ajello* v. *Worsley* ([1898] 1 Ch. 274).

To whom made.

"It is now well established that in order to enable a person injured by a false representation to sue for

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Canadian Cases.

have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct (*Garland* v. *Thompson*, 9 O. R. 376).

Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with the knowledge of the facts, and it (the representation) must be plain and not a matter of mere inference of opinion (*McGee* v. *Kane*, 14 O. R. 226; and see *Newman* v. *Kissock*, 8 U. C. C. P. 41; and *Fowler* v. *Benjamin*, 16 U. C. R. 174).

damages it is not necessary that the representation should be made to the plaintiff directly: it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on and the plaintiff as one of the public acts on it and suffers damage thereby" (*per* QUAIN, J., in *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, and see *Richardson* v. *Silvester*, L. R. 9 Q. B. 34). Art. 67.

Illustrations of fraud followed by damage.

(1) Thus, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*Dobell* v. *Stevens*, 3 B. & C. 623; *Smith* v. *Chadwick*, *ubi supra*). But a mere careless statement as to the percentage of profits on capital, made honestly, but untrue in point of fact by reason of the defendant having omitted to include trade buildings in his computation of capital, has been held to give no right of action (*Glasier* v. *Rolls*,[80] 62 L. T. 133).

(2) Similarly, where a gunmaker sold a gun to B., for the use of C., fraudulently warranting it to be sound, and the gun burst while C. was using it, and he was thereby injured:—*Held*, that C. might maintain an action of fraud against the gunmaker, as the statement with

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Canadian Cases.

[80] An action will not lie by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract (*Brennan* v. *Brennan*, 19 O. R. 327).

Art. 67.

regard to the soundness of the gun, though made to B., was intended to be acted upon by C. (*Langridge* v. *Levy*, *ubi supra*).

(3) Previously to the Directors' Liability Act, 1890, the directors of a company circulated a prospectus, which offered the issue of 7 per cent. preference shares to the amount of £50,000, and represented that "guaranteed dividends at the minimum rate of 7 per cent. per annum, or £3 10*s*. each half-year's dividend," were payable half-yearly on these shares until a specified date, and that this dividend was "secured by a deposit with trustees, of a sufficient amount of Government securities and first-class bank and insurance stock to cover same." There was, in fact, no such guarantee for the payment of the dividends, nor were the dividends secured by deposit of any Government securities or first-class bank or insurance stock. The plaintiff, on the faith of this prospectus, applied for, and was allotted, shares which proved worthless, and she therefore sued the directors for fraud. On these facts, and on the evidence, it was held, that the statements in question were false to the knowledge of the directors who made them; that they were made for the purpose of inducing persons to take shares, and were calculated to mislead; and that consequently it was impossible to say that an action for deceit would not lie (*Knox* v. *Hayman*, 67 L. T. 137).

Negligent misrepresentation.

(4) On the other hand, in *Angus* v. *Clifford* ([1891] 2 Ch. 449), where directors (also prior to the Directors' Liability Act, 1900) carelessly, but honestly and without any intention to deceive, stated, in a prospectus, that reports of certain engineers were "prepared for the directors," the fact being that they were prepared for the vendors who sold to the company, it was held, that the directors were not liable. As Lindley, L.J., said, "Speaking of *Derry* v. *Peek* broadly, I take it that it has settled once for all the controversy which was well

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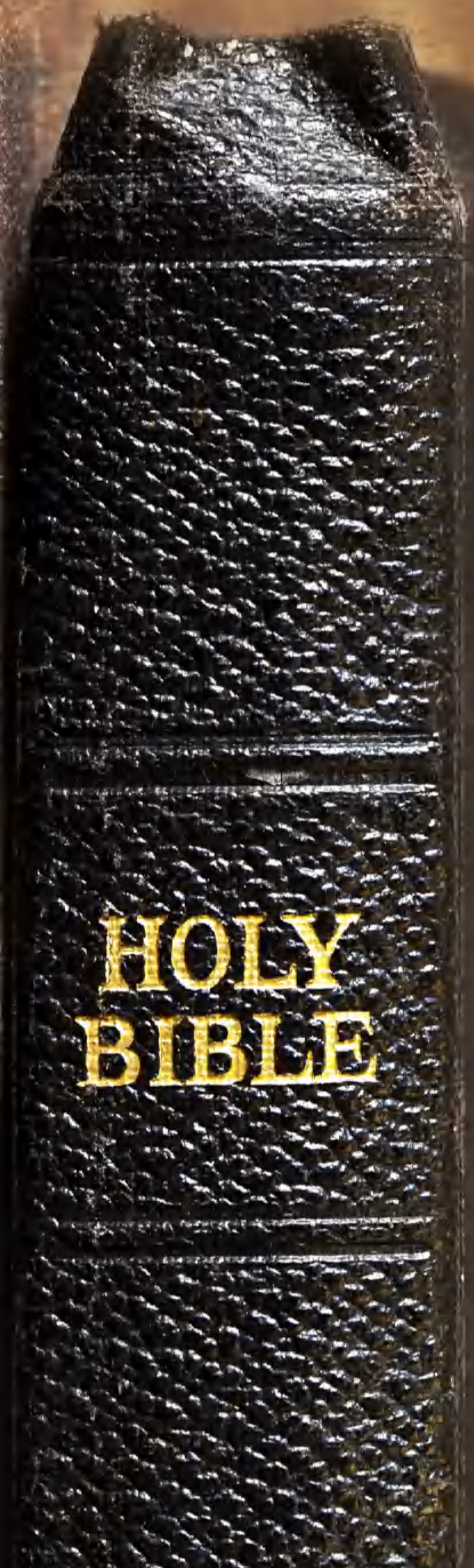

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Art. 67.

and with a view of benefiting the principal, is, in law, the fraud of the principal. Thus, a plaintiff, having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats, on credit, for carrying out a Government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee, to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid on receipt of the Government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff, thereupon, supplied the oats to the value of £1,227. The Government money, amounting to £2,676, was received by J. D. and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of £2,676 in payment of J. D.'s debt to them. The plaintiff having brought an action for fraud:—*Held*, first, that there was evidence to go to the jury that the manager represented the guarantee to be a guarantee which would probably, or might probably, be paid, whereas he knew, and fraudulently concealed from the plaintiff a fact which would make it highly improbable that it would be paid, and accordingly there was fraud in the agent; and, secondly, that the defendants would be liable for such fraud of their agent committed in the course of his service and for their benefit (*Barwick* v. *English Joint Stock Bank*,[81] L. R. 2 Ex. 259).

Scope of employment.

(S) Of course where an agent makes a fraudulent

Canadian Cases.

[81] *Gilpin* v. *Royal Canadian Bank*, 26 U. C. R. 445.

statement outside the general scope of his employment, the principal will not be liable. For instance, where the secretary of a company by false statements induced persons to take shares, it was held that the company was not liable; for it is no part of the duty of a secretary of a company to make representations to persons to induce them to become shareholders (*Newlands* v. *National Employers' Accident Assurance Co.*, 54 L. J. Q. B. 428). And *à fortiori* will this be the case where an agent makes the fraudulent statements for his own benefit (*British, etc. Banking Co.* v. *Charnwood, etc. Rail. Co.*, 18 Q. B. D. 714). Art. 67.

(9) In *Cornfoot* v. *Fowke* (6 M. & W. 358) the question arose whether a principal is liable for the act of his agent who makes, on behalf of his principal but without his authority, a false statement which he believes to be true, but which the principal would have known to be untrue. A house agent represented to an intending lessee that there was no objection to a house. There was, in fact, a brothel next door. The principal knew of this; the agent did not:—*Held*, the principal was not liable in an action of fraud. The agent was not fraudulent, because he did not know that the statement was untrue, and the principal had not himself committed a fraud, because he did not make the statement. How then could the principal be liable for a fraud which neither he himself nor his agent had committed? Unauthorised statement of agent.

ART. 68.—*There must be active Fraud.*

The general rule of law is, that mere silence with regard to a material fact will not give a right of action for fraud.

(1) There may, however, be statements of a Illustrations.

Art. 68.

fragmentary character, true as far as they go, but so distorted as to convey a wholly erroneous impression; and statements of that kind made with intent to deceive may amount to fraudulent statements although literally true. "Supposing you state a thing partially, you make as much a false statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report and leave out a third passage which qualifies them, that is an actual misstatement" (*per* JAMES, L.J., in *Arkwright* v. *Newbold*, 17 Ch. D., at p. 311; and compare *Barwick* v. *English Joint Stock Bank*, *supra*, p. 310).

(2) The defendant sent for sale, to a public market, pigs which he knew to be infected with a contagious disease. They were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs which became infected. Some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease:—*Held*, that the defendant was not liable for the loss sustained by the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease (*Ward* v. *Hobbs*, 4 App. Cas. 13). But if there had not been a warning that the purchaser must take the goods "with all faults," an action might have lain, not for fraud, but for breach of the vendor's duty to disclose dangerous qualities known to him, as in *Clarke* v. *Army and Navy Co-operative Society* ([1903] 1 K. B. 155, 166).

(3) So, also, in *Peek* v. *Gurney* (L. R. 6 H. L. 403),

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Art. 68.

[1903] A. C. 114; affirming *Oliver* v. *Bank of England*, [1902] 1 Ch. 610).

Fiduciary relation.

In earlier editions of this work it was stated that an action of deceit would lie (a) where there has been actual artificial means to prevent the plaintiff from ascertaining the truth; or (b) where the essence of the transaction implies confidence reposed in the party concealing to divulge all material facts. It seems, however, on further consideration, that tacit dishonesty of this kind belongs rather to the law of contract. A court of equity will set aside a contract for mere concealment of material facts, where the relation of the parties is of a fiduciary kind, so that one party is under a duty to make a full disclosure to the other, as, for instance, in the case of contracts between vendor and purchaser, between partner and co-partner, parent and child, and guardian and ward (*Erlander* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, at pp. 1230, 1343).

Art. 69.—*Limitation.*[82]

An action for deceit must be brought within six years, unless the existence of the fraud was concealed by the defendant, in which case the action must be brought within six years after the plaintiff discovers, or might by reasonable diligence have discovered, the fraud (*Gibbs* v. *Guild*, 9 Q. B. D. 59).

Canadian Cases.

[82] In an action on the case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damages accrued (*Dickson* v. *Jarvis*, 5 U. C. R. (O. S.) 694).

CHAPTER VI.

OF UNLAWFUL COERCION AND CONSPIRACY.

ART. 70.—*General Rules.*[82a]

(1) A person who knowingly and without sufficient justification induces another to break a contract with a third person, whereby that third person suffers damage, commits a tort, and may be sued for damages.

Canadian Cases.

[82a] See *Hynes* v. *Fisher*, 4 O. R. 60, *ante*, p. 187.

Damages are recoverable against a trade union and the members thereof in an action by employers of workmen when by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers and other workmen are prevented from entering into the employment in their stead. And a foreign officer of an organised body of which the local trade union was a part, who came to the Province of Ontario and aided, encouraged and directed the members in their unlawful acts, was *held* liable with them for the consequences.

After a trade union has appeared and pleaded in an apparently corporate capacity, it is too late at the trial to raise the objection that it is not in

Art. 70

(2) It is not actionable merely to induce or persuade another not to enter into a contract with a third person, although it is done maliciously, and although the third person suffers damage.

(3) One who intentionally and without sufficient justification by threats, intimidation, molestation or conspiracy, induces persons not to work for or trade with another whereby that other suffers damage, commits an actionable wrong.

(4) A combination of two or more persons, the object of which is to injure a man's trade, is a combination for an unlawful purpose, and, if it result in damage, is actionable.

(5) A combination of two or more persons, with the design not of injuring the trade of another but of carrying on most advantageously the trade of those who are parties to the combination, is not unlawful and is not actionable, although it results in damage to another.

Examples.

Lumley v. *Gye.*

(1) The plaintiff agreed with a famous singer to perform in an opera. The defendant, a rival manager, offered the singer a large sum of money to break her contract with the plaintiff and sing for him. Assuming that there was *an actual contract of service*, a breach of which the defendant

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Canadian Cases.

fact incorporated or liable to be sued. Such an objection must be specially pleaded (*Krug Furniture Company* v. *Berlin Union of Amalgamated Woodworkers* (1903), 5 O. L. R. 463).

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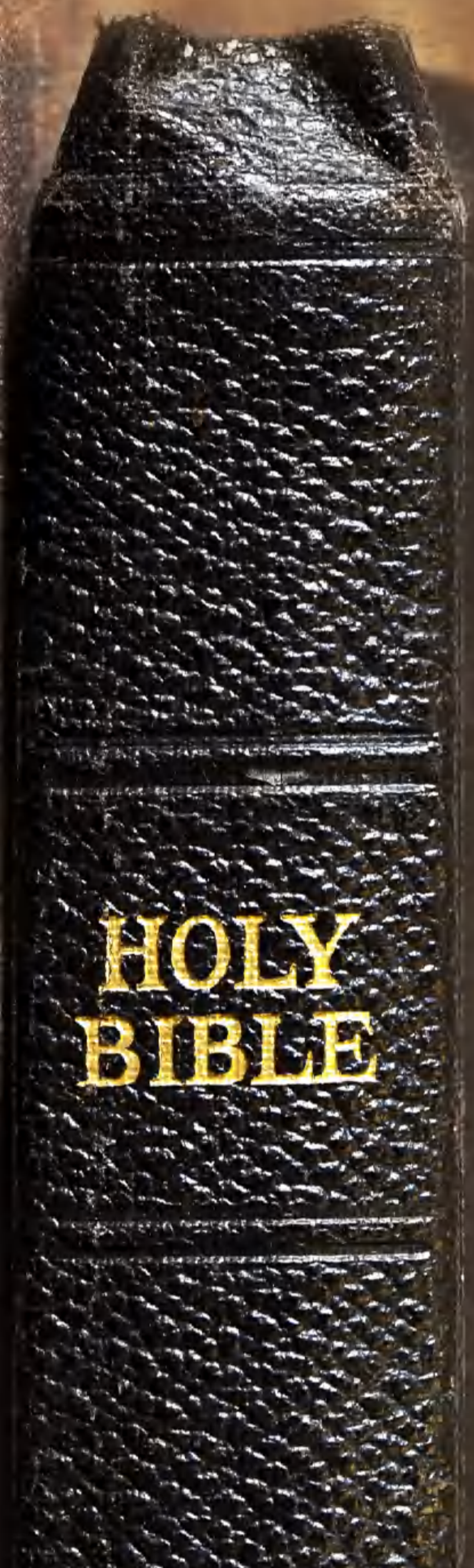

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Art. 70.

men were doing their best to put an end to the practice in question, and that wherever the shipwrights were employed the iron men would cease work. There was evidence that this was done to punish the plaintiffs. The employers, giving way to this coercion, discharged the plaintiffs, *i.e.*, lawfully terminated their contracts of employment and refused to enter into fresh contracts of employment with them, and they thereupon sued the defendant, and the jury found that he had maliciously induced the employers to "discharge" the plaintiffs, and gave damages. The House of Lords, however, by a majority, dismissed the action, on the ground that the defendant had violated no legal right of the plaintiffs, done no unlawful act, and used no unlawful means in inducing the employers to cease employing the plaintiffs; and that therefore his conduct, however malicious or bad his motive might be, was not actionable (*Allen* v. *Flood*, [1898] A. C. 1). This case is clearly distinguishable from *Lumley* v. *Gye* and *Temperton* v. *Russell*, for in those cases the defendants induced an actual breach of contract; whereas in this case all the defendant did was to induce the employers to discharge their men in accordance with the terms of the contract of service and not to re-engage them. There was no breach of contract, and the employers were only induced to do what they had a perfect right to do. It would be strange indeed if an action lay against A. at the suit of B. for inducing C. to do what C. had a right to do.

Molestation.

(5) The plaintiffs were endeavouring to trade with natives on the coast of Calabar. The defendant fired a cannon at the natives in order to drive them away and thereby deterred them from trading with the plaintiffs. This was held actionable (*Tarleton* v. *M'Gawley*, 1 Peake, N. P. C. 270).

(6) The plaintiff was a stone mason. The defendant was held liable for threatening his workmen and

customers with mayhem and suits so that they desisted from doing business with the plaintiff (*Garrett* v. *Taylor*, Cro. Jac. 567).

Trade picketing.

(7) By s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

"(1) uses violence to or intimidates such other person or his wife or children, or injures his property; or,

"(2) persistently follows such other person about from place to place; or

"(3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

"(4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place (*a*); or,

"(5) follows such other person with two or more other persons in a disorderly manner in or through any street or road . . . ";

commits a criminal offence.

In *J. Lyons & Sons* v. *Wilkins* ([1899] 1 Ch. 255), the facts were as follows: A strike was in progress at the plaintiffs' works, in the course of which the works were "picketed" by persons employed by the trade union of which the defendant was an executive officer. It was admitted that the pickets used no violence, intimidation,

(*a*) By the same section it is provided that attending at or near the house or place where a person resides or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed to be watching or besetting within the meaning of the section.

Art. 70.

or threats; but, in the opinion of the court, the evidence showed that the picketing, or the acts done by the pickets, were done with the view to compel the plaintiffs to change their mode of conducting their business, and constituted watching and besetting, as distinguished from "attending merely to obtain or communicate information," and accordingly an injunction was granted, the court holding that the defendant had committed both an offence against the Act and a tort at common law. LINDLEY, M.R., in giving judgment, said: "The truth is, that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do, is wrongful and without lawful authority, unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset, and such conduct would support an action for a nuisance at common law. Proof that the nuisance was 'peaceably to persuade other people' would afford no defence to such an action. Persons *may be peaceably persuaded, provided the method employed is not a nuisance to other people.*"

Lawful trade combination.

(8) The owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulations; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited, on pain of dismissal, from acting in the interest of competing shipowners, any member to be at liberty to withdraw on giving certain notices. The plaintiffs, who were shipowners excluded from the association, sent ships to the

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Art. 70.

The effect of the authorities at present seems to be that combinations to injure a man in his trade—

(a) by inducing customers or servants to break their contracts with him, or not to deal with him, or continue in his employment (*Quinn* v. *Leathem*, [1901] A. C. 495; *Temperton* v. *Russell*, [1893] 1 Q. B. 715); or

(b) by compelling employers not to employ him (*Giblan* v. *Labourers' Union*, [1903] 2 K. B. 600),

are *primâ facie* unlawful combinations and actionable if followed by damage.

It would seem, also, that even if the object were lawful (as in *Allen* v. *Flood*), a conspiracy to procure such object by threats and molestation would be unlawful by reason of the unlawfulness of the means employed, as in *J. Lyons & Sons* v. *Wilkins* (*supra*).

CHAPTER VII.

OF NEGLIGENCE.

ART. 71.—*Definition.*

(1) Negligence consists in the omission to do something which a prudent and reasonable man would do, or the doing something which a prudent and reasonable man would not do (*Blyth* v. *Birmingham Waterworks Co.*,[83] 11 Ex. 781, 784).

Canadian Cases.

[83] A toll house extended to the edge of the highway and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain, which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought. *Held*, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence (*The Kingston and Bath Road Co.* v. *Campbell*, 20 S. C. R. 605).

Negligence is a relative term (*McDougall* v. *McDonald*, 3 N. S. R. 219; *Neal* v. *Allan et al.*, 6 N. S. R. 449.

Art. 71.

(2) Negligence is wrongful whenever, as between the plaintiff and the defendant, there is a duty cast upon the latter to be careful; and any

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Canadian Cases.

Articles 11 and 15 (*l*) of the Collision Regulations do not apply to the case of a ship made fast to a lawful wharf in a harbour—a vessel which ran into another so moored was guilty of negligence (*Bank Shipping Co.* v. *The "City of Seattle,"* 10 B. C. Reports, 513).

B.C.

Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402, applied. (*Love* v. *The New Fairview Corporation, Limited*, 10 B. C. Reports, 330).

B.C.

A fire started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands adjoining. It was *held* that the case of *Fletcher* v. *Rylands* applied, and that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it (*Crewe* v. *Mottershaw*, 9 B. C. Reports, 246).

B.C.

Neither a solicitor nor a sheriff is a tort-feasor as against a transferee whose transfer is unregistered, by registering in the discharge of their respective duties, an execution of a judgment against lands of a judgment debtor.

A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence, although the decision upon which he

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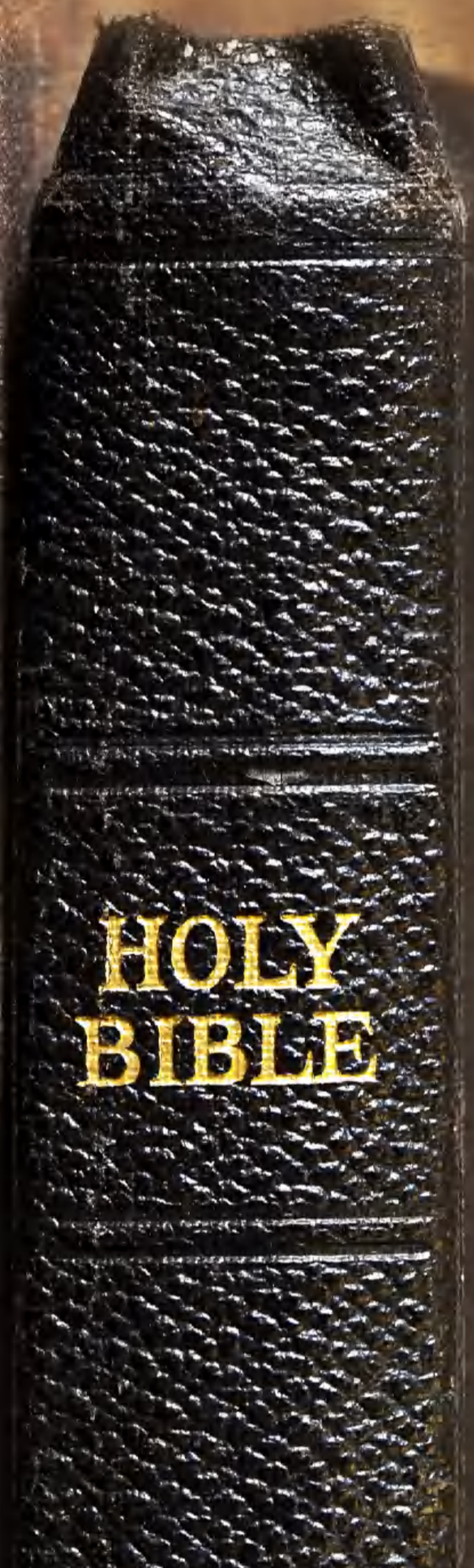

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Art. 71. HERSCHELL, *Caledonian Rail. Co.* v. *Mulholland*, [1898] A. C. 225).

Canadian Cases.

the plaintiff a team of horses with a driver for use in moving the engine about, and in drawing straw and grain during the work of threshing. While threshing for a certain farmer sparks from the engine set fire to a stack of grain, and the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling into a place of safety; but the fire spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed. It was held (1) that the evidence fully warranted the finding of negligence, and unless the plaintiff's driver was guilty of contributory negligence, the defendant was responsible for the loss of the horses. (2) That the driver was not guilty of contributory negligence in exposing the horses to danger (*Thorn* v. *James*, 14 M. L. R. 373).

For an instance of damage to a building caused by blasting operations see *Miller* v. *Campbell*, 14 M. L. R. 437.

The plaintiff's mare, kept for him in an open stall in defendant's stable, was kicked by a horse kept in the adjoining open stall, which had broken his halter shank during the night and got loose. This horse had got loose in the stable on several previous occasions, and on one of such occasions the plaintiff's mare had received a slight injury to one of her legs, which defendant supposed had been caused by the same horse. In the opinion of the majority of the court it was not proved that the horse was a vicious one, or that he had even broken a halter shank before, or that the shank he broke on that night was not as strong as

It will be seen that there are three points to be established to found an action for negligence: **Art. 71.**

(i) A duty to take care.
(ii) A breach of that duty—negligence.
(iii) Damage as the proximate result.

The duty to take care arises out of many relations equally impossible of strict definition or of enumeration in a short compass. Briefly they may be grouped as follows: Duty to take care.

(a) A person who has in his custody or control or delivers to another a dangerous thing, such as a gun, dangerous chemicals, or a dangerous animal, owes a duty to every one to take care that the dangerous thing shall do no damage (see *Dixon* v. *Bell*, 5 M. & S. 198; *Vaughan* v. *Menlove*, 3 Bing. N. C. 468; *George* v. *Skivington*, L. R. 5 Ex. 1). There are some things of so

Canadian Cases.

halter shanks usually are. Plaintiff's mare died shortly afterwards as the result of the kicking and it was *held* defendant was not liable (*Templeton* v. *Waddington*, 14 M. L. R. 495).

The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff. A municipal bye-law made unlawful for any person to allow horses to run at large. *Held*, that the horse was unlawfully on the highway, and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to, his negligence.

Judgment of a Divisional Court, 1 O. L. R. 412, affirmed (*Patterson* v. *Fanning*, 1901, 2. O. L. R. 462).

Art. 71.

dangerous a character that a man keeps them at his peril—for example, a large body of water (see *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, *supra*, p. 30). The same rule applies at common law to fire (*Tubervil* v. *Stamp*, 1 Salk. 13) (*a*) and wild animals. See *post*, pp. 330, 331.

(b) Every person using a highway owes a duty to take care as regards every other person lawfully on the highway. So if a person driving or riding on a highway by his negligence runs over and otherwise damages another person on the highway an action will lie for the damage suffered (see *Davies* v. *Mann*, 10 M. & W. 549, and *post*, p. 385). So, too, persons in charge of ships at sea or on rivers are bound to use care not to do damage to other ships.

(c) Proprietors of public conveyances owe to passengers a duty of taking care quite apart from contract (see *supra*, p. 64).

(d) Bailees of all kinds, including carriers of goods, owe to their bailors a duty to take care of the goods bailed. The degree of care required varies with the nature of the bailment (see *Coggs* v. *Bernard*, 1 Sm. L. C., and *supra*, Art. 13).

(e) An occupier of premises owes a duty to persons coming on to the premises on business, as guests, as bare licensees, and even as trespassers—the degree of care required varying according to the purpose for which the persons come on his premises (see *Heaven* v. *Pender*, 11 Q. B. D. 503, *post*, p. 333 ; *Indermaur* v. *Dames*, L. R. 1

(*a*) By 14 Geo. 3, c. 86, it is enacted that no action shall be brought against any person upon whose premises any fire shall *accidentally* begin. But it seems that a person is still liable for the consequences if he urposely or negligently lights a fire. He does so at his peril (*Vaughan* v. *Menlove*, *supra*, and *Jones* v. *Festiniog Railway*, L. R. 3 Q. B. 733).

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Art. 71.

was no evidence of negligence (*Richardson* v. *North Eastern Rail. Co.*, L. R. 7 C. P. 78).

Duty arising from control of dangerous things.

(4) Where the plaintiff was in the occupation of certain farm buildings, and of corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held, that the defendant was liable (*Vaughan* v. *Menlove*, 3 Bing. N. C. 468).

(5) So, where the defendant entrusted a loaded gun to an inexperienced servant girl, with directions to take the priming out, and she pointed and fired it at the plaintiff's son, wounding and injuring him, it was held that the defendant was liable. For entrusting a loaded gun to such a person was an act which a reasonable and prudent man would not have committed (*Dixon* v. *Bell*,[86] 5 M. & S. 198).

(6) Again, where the defendant negligently compounded a hair wash of dangerous chemical ingredients, and a person using it, and for whose benefit it was bought, suffered injury, the defendant was held liable (*George* v. *Skivington*, L. R. 5 Ex. 1).

(7) Quite apart from any warranty or the terms of the contract of sale, the vendor of goods which have some dangerous quality of which he knows, but of which the purchaser cannot be expected to be aware, owes a duty to the purchaser to take reasonable precautions by warning him that special care will be requisite, and for damages resulting from breach of that duty an action lies. Thus, where the defendants sold a tin of chlorinated lime, knowing that it was likely to cause danger to a person opening it unless special care was taken, and the danger was not such as would be known by the purchaser,

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Canadian Cases.

[86] *Carroll* v. *Freeman*, 23 O. R. 283.

the defendants were held liable for damages caused to the plaintiff by opening the tin without taking proper precautions, in consequence of which there was an explosion and her eyes were injured (*Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155). And there is a similar duty on the part of one gratuitously lending goods to another, for breach of which, followed by damages, an action will lie. Note, that in this case, too, it is essential to show knowledge of the defect on the part of the lender (*Coughlin* v. *Gillison*,[87] [1899] 1 Q. B. 145). Art. 71.

(8) So, if a man *knowingly* keeps dangerous animals, he is answerable for any injury they may commit, and Dangerous animals.

Canadian Cases.

[87] *Caldwell* v. *Mills*, 24 O. R. 462.

"The evidence seems to have established very clearly that the wharf or pier in question was carelessly suffered to be for a long time out of repair on that part on which the plaintiff received the injury, while nothing more seems to have been necessary than the substituting a sound plank for one that had become rotten. The defect was apparent; others had fallen into the hole; it was considered dangerous; and it was suffered to be in that state, though it was on that part of the wharf at which vessels generally lie while they are taking in or discharging their cargo. The plaintiff was a deck hand on board of one of their vessels. He stepped from the vessel on the wharf after dark, got his leg into this hole, and broke it. The principles of the common law sustain this action, if it be true, as the jury found it was, that the pier in question was in the possession of the defendants, and used and enjoyed by them, and under their control" (*Johnson* v. *The Port Dover Harbour Co.*, 17 U. C. R. 155, 156—Robinson, C.J.).

Art. 71.

that, too, though he has done his best to secure their safe keeping. In other words, he who keeps an animal of the above description (*May* v. *Burdett*, 9 Q. B. 101), knowing it to be dangerous, does that which, in the eyes of the court, a reasonable man would not do (*Cox* v. *Burbidge*, 13 C. B. (N.S.) 430). If the animal is by nature dangerous, no actual knowledge of its previous disposition is necessary, and in that case he keeps it at his risk (see *Filburn* v. *People's Palace Co.* (the case of a tame elephant), 25 Q. B. D. 258). But if the animal is naturally domestic, then actual knowledge (technically called "scienter") of its fierceness must be proved (*R.* v. *Huggins*, 2 Ld. Raym. 1583). It is not necessary in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal has actually bitten another person before it bit the plaintiff: it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite (*Worth* v. *Gilling*, L. R. 2 C. P. 1; and see also *Simson* v. *General Omnibus Co.*, L. R. 8 C. P. 390, a case of a kicking horse). The previous tendency to bite must, however, have been to bite human beings, and not merely other animals (*Osborne* v. *Choqueel*, [1896] 2 Q. B. 109). It has been held that, if the owner of a dog appoints a servant *to keep it*, the servant's knowledge of the animal's disposition is the knowledge of the master, for it is knowledge acquired by him in relation to a matter within the scope of his employment (*Baldwin* v. *Casella*, L. R. 7 Ex. 325). But where the complaint is made to a servant, who has no control over the defendant's business, nor of his yard where his dog was kept, nor of the dog itself, the knowledge of the servant would not necessarily be that of the master (*Stiles* v. *Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310; and see *Applebee* v. *Percy*,[90] L. R. 9 C. P. 647).

Canadian Cases.

[90] *Shaw* v. *McCreary*, 19 O. R. 39; *Vaughan* v.

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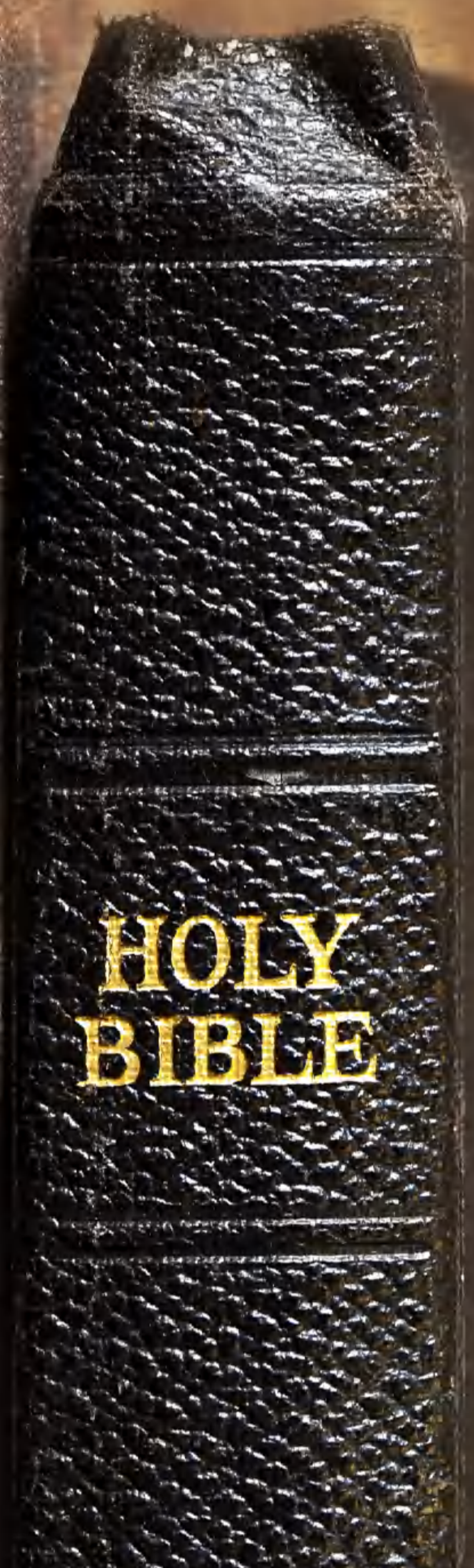

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Art. 71.

had contracted with the shipowner for the painting of the ship. In order to do this the plaintiff had to use the staging. Owing to the defendant's negligence the staging fell, and the plaintiff was injured :—*Held*, reversing the court below, that the plaintiff being engaged on work in the performance of which the defendant as dock owner was interested, the defendant was under an obligation to him to take reasonable care that the staging was safe, and that for neglect of that duty the defendant was liable.

(12) Where a dock-master or wharfinger invites a vessel to a particular place to unload, and, owing to an inequality in the bottom of the dock, the vessel is injured, the dock company or wharfinger is liable. For the dock-master or wharfinger either knew, or ought to have known, of the danger; and in either view was negligent (see *Owners of Apollo* v. *Port Talbot Co.*, [1891] A. C. 499).

Landlord and tenant.

(13) So too, though apart from contract, a landlord owes no duty to his tenant to take care that the demised premises shall be safe (*Lane* v. *Cox*, [1897] 1 Q. B. 415); yet where he lets flats but retains control of the common staircases, passages, and roof, he owes a duty towards the tenants and persons coming to the flats on business with the tenants, to keep them in a reasonably safe condition, and an action will lie at the suit of such a person who is injured by reason of their defective condition (*Miller* v. *Hancock*, [1893] 2 Q. B. 177; *Hargroves Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472) (*a*).

Guests, licensees, and trespassers.

(14) There is also a duty imposed on occupiers of premises to take reasonable care that guests, licensees, and even trespassers shall not be injured by the dangerous state of the premises. But the amount of care which an occupier is bound to take is less than in the case of persons coming on business. "No higher duty is imposed

(*a*) Damage to tenants by reason of landlord's neglect to clean out rainwater gutter of roof, control of which was retained by the landlord.

on the defendant than that he should not set a trap" (*per* WILLES, J., in *Hounsell* v. *Smythe*, 7 C. B. (N.S.) 731); that is to say, guests and licensees can only claim if they are injured by hidden dangers, dangers which the defendant by his conduct has led them to suppose do not exist. Thus, in *Southcote* v. *Stanley* (1 H. & N. 247), the plaintiff was a guest of the defendant, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held that the plaintiff, being a guest, was for the time being one of the family and could not recover for an accident, the liability to suffer which he shared in common with the rest of the family.

(15) Where a contractor was engaged in making an excavation with a steam crane, and a person came and looked on idly, and, in consequence of a defect in the crane, he was killed, it was held that there was no evidence to sustain an action by his widow. As Lord ESHER, M.R., put it: "There was no evidence to show that the defendant's workmen had reason to expect the deceased to be at the spot where he met his death. There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place (*Batchelor* v. *Fortescue*, 11 Q. B. D. 474).

(16) *Corby* v. *Hill* (4 C. B. (N.S.) 556) is a case in which an occupier was held liable for a "trap." The plaintiff was permitted to use a private road belonging to the defendant. One night a heap of slates was left in the road unlighted, and the plaintiff coming along in the dark fell over it, and was hurt. The permission to use the road was an implied intimation that it was safe for use, and the leaving the heap of slates on it in the dark amounted to setting a trap. Compare with this

Art. 71.

case *Hounsell* v. *Smythe*, 7 C. B. (N.S.) 731. There the defendant was allowed to cross some waste land, and in doing so he fell into an unfenced quarry. The quarry was not near a highway:—*Held*, there was no duty to fence the quarry for the benefit of a mere licensee.

Degree of care required depends on circumstances.

From the above rule and illustrations, it will be seen that the degree of care which a person is bound to use in regard to others is relative, and that in deciding whether a given act is, or is not, negligent, the circumstances attending each particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the things he carries. Such person would be bound to keep a better look out than the man who merely carried an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."[91]

Canadian Cases.

[91] A street ran to the north and to the south from the defendants' tracks in a city but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track, waiting for a train on another track to pass, he was struck by a train running at a speed of about forty miles an hour and was killed. *Held*, that there was a clear neglect of a statutory duty by the defendants in permitting the track to remain unfenced and at

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Art. 71.

Canadian Cases.

S. C. R. 541; *C. P. Ry. Co.* v. *Fleming*, 22 S. C. R. 33; *Winckler* v. *G. W. R. Way Co.*, 18 U. C. C. P. 260; *Tyson* v. *The Grand Trunk R. Way Co.*, 20 U. C. R. 256, *post*, p. 385).

Consolidated Statutes of Canada, c. 66, sect. 104 [now Railway Act, Canada (51 Vict. c. 29, sect. 256)], must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from actual collision or, as in this case, by a horse being brought over near the crossing and taking fright at the appearance or noise of the train (*Grand Trunk R. W. Co.* v. *Rosenberger*, 9 S. C. R. 311; and see *Peart* v. *Grand Trunk R. Way Co.*, *post*, pp. 403, 404; and *N. B. Ry. Co.* v. *Van Wart*, *post*, p. 405).

A railway company has no authority to build its road so that part of its road bed shall be some distance below the level of the highway, unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road, and any other company operating it, is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. A company which has not complied with the statutory conditions of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of a carriage over the dangerous part of the highway

Art. 71.

Canadian Cases.

on to the track, though there was no contact between the engine and the carriage (*Grand Trunk Ry. Co.* v. *Rosenberger*, followed; *Grand Trunk Ry. Co.* v. *Sibbald*, 20 S. C. R. 259; *Grand Trunk R. W. Co.* v. *Beckett*, 16 S. C. R. 713; *Moggy* v. *Can. Pacific R. W. Co.*, 3 M. L. R. 209; *Thompson* v. *G. W. R. Co.*, 24 U. C. C. P. 429; *Dunsford* v. *Michigan Central R. W. Co.*, 20 O. A. R. 577; and *McMichael* v. *G. T. R. W. Co.*, 12 O. R. 547).

In *Brown* v. *Great Western Railway Company*, 3 S. C. R. 159, the Supreme Court *held* that the company were guilty of negligence in not applying the air-brakes at a sufficient distance from another railway crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way.

A railway car in which was a horse in charge of the plaintiff had on arrival at a station been shunted on to one of several lines of rails in the defendants' station yard. The plaintiff left the car and returned to it, crossing several tracks in doing so, and again left it, in broad daylight, to procure water for the horse. There was less snow between the rails than upon the spaces between the tracks, and the plaintiff, according to his own evidence, having to walk for some little distance along the railway lines, chose to walk between the rails to avoid getting his feet wet, and while so walking was overtaken by an engine and tender slowly moving, reversed, without the necessary warning, and was knocked down and injured. *Held*, affirming the non-suit at the trial, that even if the defendants were guilty of negligence in not giving

Art. 71.

Canadian Cases.

notice that the engine and tender were in motion, the accident was caused not by reason of their negligence, but by the plaintiff's own negligence in choosing to walk in a place of extreme danger, instead of a place of perfect safety which was open and known to him. *Callendar* v. *Carleton Iron Co.*, *Ltd.* (1893), 9 Times L. R. 646; and (1894), 10 Times L. R. 366, followed (*Phillips* v. *The Grand Trunk Railway of Canada*, 1 O. L. R. 28).

When a car of a foreign railway company forms part of a train of a Canadian railway company, it is "used" by the latter company within the meaning of sect. 192 of the Railway Act, 51 Vict. c. 29 (D.), so as to make that company liable in damages for the death of a brakesman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge.

Judgment of Meredith, C.J., affirmed (*Atcheson* v. *Grand Trunk Railway Company* (1901), 1 O. L. R. 168).

Persons lawfully using a highway are entitled to assume that the statutory warning will be given by a train crossing the highway, and are not necessarily guilty of contributory negligence because, while driving a restive horse, they approach, in the absence of warning, so close to the crossing as to be unable to control the horse when the train crosses, and are injured, even though by looking or listening they probably would have learned of the approach of the train in time to stop far enough away to be in safety. The question of contributory negligence in such a case is for the jury to determine under

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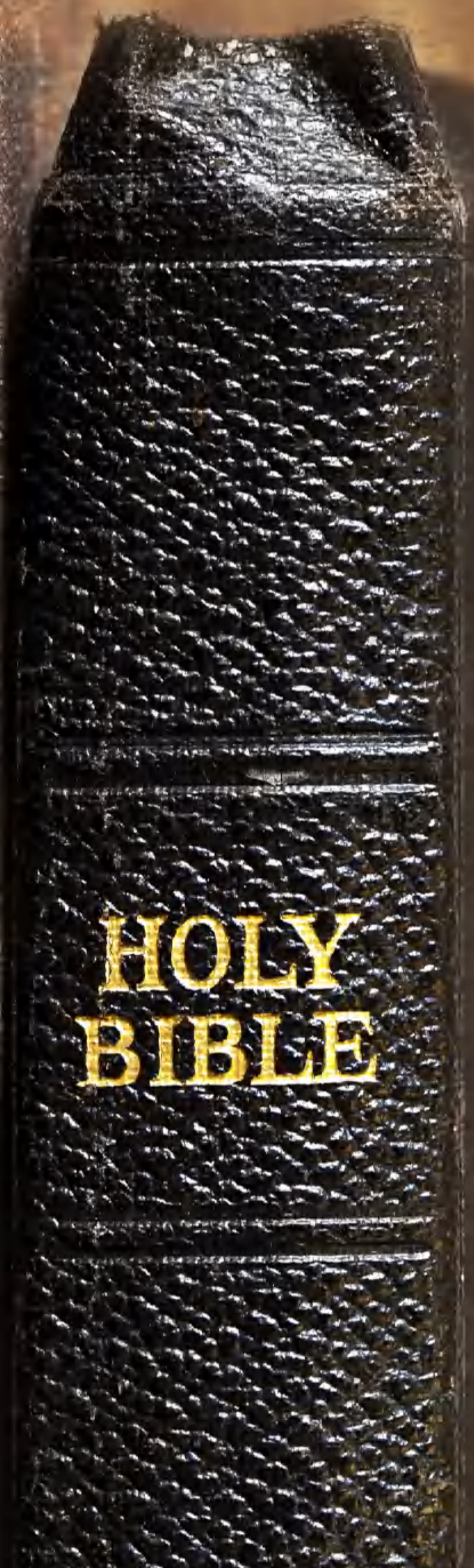

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Art. 71.

Canadian Cases.

by this Act" do not refer to the turning in of the fence to the cattle guards; and, although no other fence is specifically prescribed in the railway legislation, the meaning of sect. 259 is, that unless the track, including the crossing, is properly fenced or otherwise protected so as to efficiently warn or bar the traveller while a train is crossing, or immediately about to cross, the maximum speed at which a train may cross in thickly peopled portions of cities, towns, and villages, is six miles an hour.

The plaintiff was struck by a train at a crossing over a main street in an incorporated town, not protected by a gate or watchman. In an action to recover damages for his injuries, the jury found that the train was travelling at the rate of twenty miles an hour, and that the injury complained of was caused by this excessive speed, coupled with the absence of proper protection at the crossing, and without negligence on plaintiff's part; and the court, though there was strong evidence of contributory negligence, declined to interfere (*McKay* v. *Grand Trunk R. W. Co.* (1903), 5 O. L. R. 313).

Upon the proper construction of sect. 192 of the Dominion Railway Act of 1888, a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using higher freight cars than such as admit of an open and clear headway of seven feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway. *McLauchlin* v. *The Grand Trunk Railway* (1886), 12 O. R. 418; and *Gibson* v. *Midland Railway Co.* (1883), 2 O. R. 658, distinguished.

Art. 71.

Canadian Cases.

Contributory negligence may be a defence to an action founded on a breach of statutory duty.

A brakeman standing on the top of a freight car, part of a moving train, was killed by coming in contact with an overhead bridge. *Held*, that as the evidence showed he was on the top of the car contrary to the rules of the company, of which he was aware, the accident was caused by his own negligence, and the defendants were not liable, although there was not a clear headway space as required by the above section (*Deyo* v. *The Kingston and Pembroke R. W. Co.*, 8 O. L. R. 588).

B., in driving towards his home on a night in September, had to cross a railway track between nine and ten o'clock at night on a level crossing near a station. Shortly before, a train had arrived from the west, which had to be turned for a trip back in the same direction and also to pick up a passenger car on a siding. After some switching the train was made up, and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross when he was struck by the latter and killed. There was no warning of the approach of the cars which struck him. In an action by his widow, under Lord Campbell's Act, the jury found that the railway company was guilty of negligence, and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal. *Held*, affirming the judgment of the Court of Appeal, that it was properly left to the jury to

Art. 71.

Canadian Cases.

determine whether or not, under the special circumstances, it was unnecessary for the company to take greater precautions than it did, and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level railway crossings to warn persons about to cross the line (*Lake Erie & Detroit River Railway Company* v. *Barclay*, 30 S. C. R. 360).

S., an elderly lady, was travelling on a train of the Canadian Pacific Railway from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine, she tried to turn round in the berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shown that the speed of the train was excessive or that there was any defect in the road bed at the place where the accident occurred to which it could be attributed. It was *held*, reversing the judgment of the Supreme Court of Nova Scotia (34 N. S. L. R. 22), that the accident could not be attributed to any negligence of the servants of the company, which would make the defendants liable in damages to S. (*Smith* v. *Canadian Pacific Railway Co.*, 31 S. C. R. 367).

In passing through a thickly peopled portion of a city, town, or village, a railway train is not limited to the maximum speed of six miles an hour prescribed by 55 & 56 Vict. c. 27, sect. 8,

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Art. 71.

Canadian Cases.

rate of speed the street railway company is responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching, if in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross (*The Toronto Ry. Co.* v. *Gosnell*, 24 S. C. R. 582, and 21 O. A. R. 553).

"We have to say here whether the fact of a horse in the street of a city being seen running away, upsetting the cutter and throwing out the driver and then running into the sidewalk and injuring a passenger thereon, does not show a *primâ facie* case. I am inclined to think that it does" (*Ibid.*—Hagarty, C.J.O., 444).

Although a street railway company may be permitted by its charter to run its cars on the public streets at high rates of speed, it is not, therefore, relieved from the duty of exercising proper care to prevent accidents (*Lines* v. *Winnipeg Electric Street Ry. Company*, 11 M. R. 77; and see *Coll* v. *Toronto R. Way Co.*, 25 O. A. R., *ante*, p. 106; *Haight* v. *Hamilton Street R. Way Co.*; and *Cornish* v. *Toronto St. R. Way Co.*, *ante*, and R. S. O., 1897, c. 209, sect. 40).

It is the duty of a motorman in charge of an electric car on a street railway to take special care to have the car sufficiently under control, to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly

Art. 71.

Canadian Cases.

evident, and who may be crossing the line of railway at a street crossing (*Haight* v. *The Hamilton Street Railway Co.*, 29 O. R. 279; *Cornish* v. *Toronto St. R. W. Co.*, 23 U. C. C. P. 355).

Defendant's horses and carriage, driven by his servant westerly along S. road, met opposite the gate of defendant's stable yard, situated on the northern side of the road, a horse and truck coming in the opposite direction, and instead of passing on the south side, attempted to pass on the side nearest the stable yard (the intention of the driver being to proceed to a house a few yards west of the stables), when the horses suddenly turned in towards the yard, knocking down and injuring the plaintiff, who was coming along the sidewalk near the gate. *Held*, that the accident resulted from the careless and negligent driving of the defendant's servant, and verdict for plaintiff upheld (*Lownd* v. *Robinson*, 2 N. S. Reps. (Russell & Chesney), 364; *Courser* v. *Kirkbride*, 23 N. B. R. 404; *Black* v. *Municipality of St. John*, 23 N. B. R. 249).

Where plaintiff was injured by an explosion of gas in defendant company's mine, occasioned by an erroneous plan of the workings, but it was not proved that the company had employed incompetent men to superintend the mining and plaintiff was not employed under any special agreement. *Held*, that he could not maintain an action against the company for the injury (*Smith* v. *Inter-Colonial Coal Mining Company*, 2 N. S. Reps. (Russell & Chesney), 556).

When contributory negligence is set up in an action to recover damages for negligence, which

Art. 71.

Canadian Cases.

is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point.

In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks. *Held*, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence.

Per Osler, J.A.—Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?"

Judgment of Meredith, C.J., reversed (*Brown* v. *London Street Railway*, 2 O. L. R. 53).

The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track and the waggon was struck by a car which had been coming behind. The plaintiff said that about one hundred feet from the point at which he tried to cross he looked back and that no car

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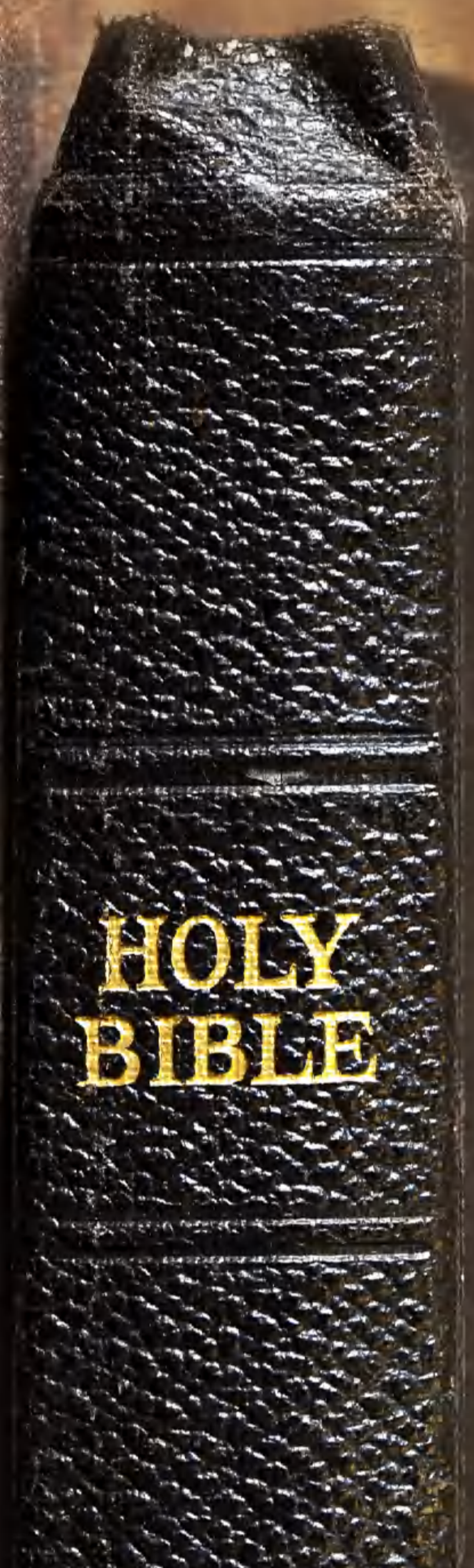

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Art. 71.

Canadian Cases.

across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman, after seeing the cab, tried to stop the car with the brakes, and that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the cabdriver was negligent in not looking more sharply for the car, but that notwithstanding such negligence the accident could have been averted by the exercise of reasonable care. It was *held*, affirming the judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 117), that the last finding neutralised the effect of that of contributory negligence; that as the car was on the down grade and going at an excessive rate of speed it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to any one on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run (*Halifax Electric Tramway Co.* v. *Inglis*, 30 S. C. R. 256).

"The jury have found, upon evidence appearing to us sufficient to warrant the finding, that notwithstanding such supposed evidence, the defendants' servants could, in the result, have averted the accident by the exercise of reasonable

Art. 71.

Canadian Cases.

care. If this was found upon evidence warranting it, *i.e.*, upon evidence on which the jury could reasonably find it, then, of course, the driver's act of negligence (if it existed at all) could no longer be considered as a contributing efficient cause, but would be reduced merely to a link in the chain of anterior circumstances without which the accident could not have happened" (*Ibid.*—King, J.).

In an action founded on personal injuries caused by a street car, the jury found that defendant's negligence was the cause of the accident, and also that plaintiff had been negligent in not looking out for the car. *Held*, reversing the decision of the Court of Appeal (2 O. L. R. 53), that as the charge to the jury had properly explained the law as to contributory negligence, the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence, and he could not recover (*The London Street Railway Co.* v. *Brown*, 31 S. C. R. 642).

Negligence of Municipal Corporations. Neglect to remove ice or snow, and see post.

The Municipal Act, R. S. O., 1897, c. 223, sect. 606, makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks. A bye-law of the city of Kingston required frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings, which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the

Art. 71.

Canadian Cases.

crossings. A young lady slipped and fell on one of these inclines, and being severely injured, brought an action of damages against the city and obtained a verdict. It was *held*, affirming the decision of the Court of Appeal that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 S. C. R. 301, *ante*, p. 77), followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the bye-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty (*The Corporation of the City of Kingston* v. *Drennan*, 27 S. C. R. 46, and see *Walker* v. *City of Halifax*, 16 N. S. Reps. 371).

An action does not lie against a municipal corporation for damages in respect of mere nonfeasance unless there has been a breach of some duty imposed by law upon the corporation (*Pictou* v. *Geldert*, [1893] A. C. 524, and *The Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433, followed; *Montreal* v. *Mulcair et al.*, 28 S. C. R. 458; and see *Williams* v. *City of Portland*, *ante*; *Badams* v. *City of Toronto*, *ante*; and *The City of St. John* v. *Campbell*, 26 S. C. R. 1, *ante*, p. 77).

The plaintiff while proceeding along a sidewalk attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow where there was a slight declivity in the sidewalk, and in doing so slipped and fell, thereby

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Art. 71.

Canadian Cases.

on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there. *Held*, that there was no evidence of negligence on the part of the defendants (*Forward* v. *The Corporation of the City of Toronto*, 22 O. R. 351).

The mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulation of snow or ice may amount to non-repair, for which the corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger (*City of Kingston* v. *Drennan*, 27 S. C. R. 46, followed; *Taylor* v. *City of Winnipeg*, 12 M. R. 479; *Atcheson* v. *Portage La Prairie*, 10 M. L. R. 39). For cases bearing upon the liability of a householder to remove snow or ice from the roofs and sidewalks, see *Atkinson* v. *G. T. R. W. Co.*, *ante*, p. 43; *Lazarus* v. *The Corporation of Toronto*, *post*, p. 433; and the Municipal Act, R. S. O., 1897, c. 223, sect. 559.

About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw, followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employés of the city had scattered sand on the crossing, but the high wind prevailing at the time had probably

Art. 71.

Canadian Cases.

blown it away. It was *held* that these facts were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R. S. O., 1897, c. 223, sect. 606 (2) (*Ince* v. *City of Toronto*, 31 S. C. R. 323).

Defective Highways.

The liability of road companies is regulated by R. S. O., 1897, c. 193, sects. 79—116.

Where plaintiff's horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city, it was *held* that the drain being proved to be well constructed and of a kind (uncovered) usual in the suburbs, the city was not liable (*Mackinlay* v. *City of Halifax*, 2 N. S. Reps. (Russell & Chesney), 305).

Plaintiff while crossing on horseback a bridge within the municipality received injuries found to have resulted from the negligence of the corporation and its officers. *Held*, that the corporation was liable (*McQuarrie* v. *The Municipality of St. Mary's*, 5 N. S. (Russell & Geldert), 493; *Grant* v. *Town of New Glasgow*, 6 N. S. (Russell & Geldert), 87; *Watson* v. *Municipality of Colchester*, *ibid.* 549).

On one side of a travelled road which the defendants were bound to keep in repair was a declivity, down which a pile of wood had been thrown by a person living near the highway. Some of the wood was upon the bed of the road, but a portion estimated at from twenty-one to twenty-six feet was free from obstruction, and the road itself was not defective. The plaintiff's horse in passing shied at the wood, threw him off and injured him. *Held*, that the defendants were not guilty of a breach of the statutory duty imposed upon them by

Art. 71.

Canadian Cases.

R. S. O., 1877, c. 174, sect. 491 [now R. S. O., 1897, c. 223, sect. 606], to "keep in repair," and they were therefore not liable (*Maxwell* v. *The Corporation of Clarke*, 4 Tupper's Reps. in App. 460; and see *Lucas* v. *Moore*, and *Walton* v. *York*, *post*, p. 358).

The obligation expressed by the words "keep in repair" [now R. S. O., 1897, c. 223, sect. 606], is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality (*Lucas* v. *Corporation of Moore*, 3 Tupper's Reps. in App. 602).

A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality and knowing that there is close at hand a safe passage-way across the trench (*Keachie* v. *The City of Toronto*, 22 O. A. R. 371).

A municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk is at an elevation of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street (*The Corporation of London* v. *Goldsmith*, 16 S. C. R. 231).

The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city. It was *held* that neither the railway company nor the city was responsible in damages (*Aitken* v. *City of Hamilton*, 24 O. A. R. 389).

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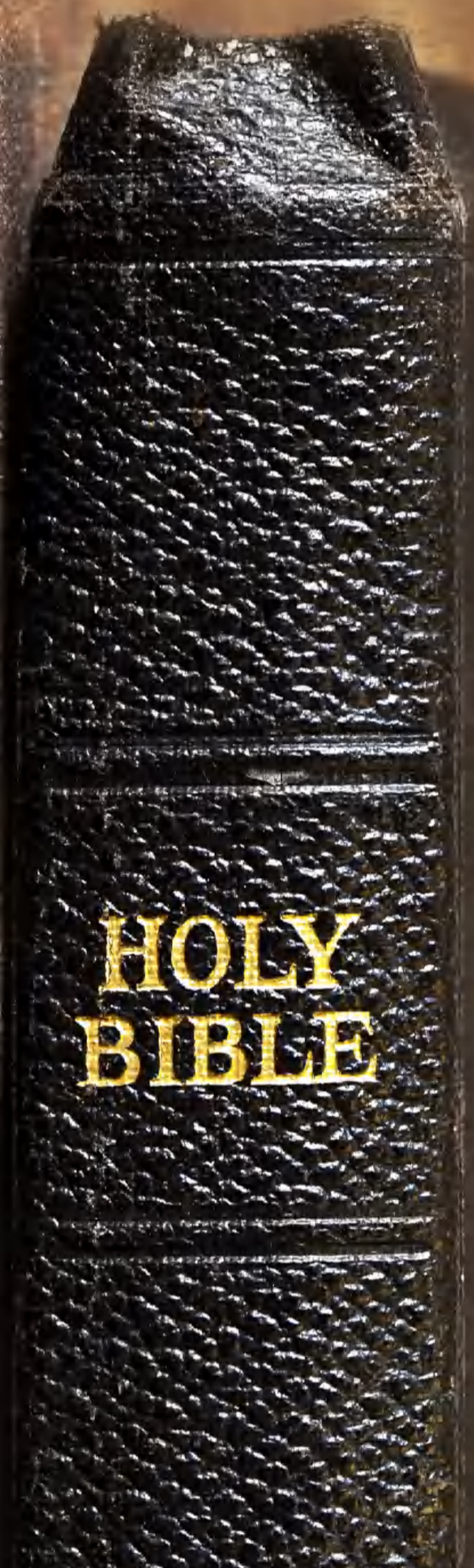

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Art. 71.

Canadian Cases.

overhanging trees liable to fall upon the road and cause damage to passers-by (*Gilchrist* v. *Corporation of Carden*, 26 U. C. C. P. 1).

"We cannot lay it down as matter of law that a person walking along a street loses all remedy for injuries if she or he happen to be looking away at the moment" (*Boyle* v. *Corporation of Dundas*, 27 U. C. C. P. 133—Hagarty, C.J.).

"The liability of a corporation, whether to answer in damages or to be convicted of a misdemeanour, for suffering a highway to be in an impassable or dangerous condition, arises not merely because the road is impassable or dangerous, for that state of things may exist without blame to the corporation, but because there has been neglect of the duty to keep the road in such a state of repair as is reasonably safe and sufficient for the ordinary travel of the locality" (*Lucas* v. *Moore*, 3 Tupper in App. 608—Patterson, J.A.; *Walton* v. *Corporation of York*, 6 Tupper's Reps. in App. 181) and *ante*, p. 356, and *post*, p. 360.

In an action against defendants for damage sustained by the plaintiff through the breaking down of a bridge some six feet wide, built on three sleepers over a culvert, on a road in defendants' township, over which the plaintiff was attempting to drive with a buggy and a pair of horses, it appeared from an examination after the accident, that the centre sleeper to two-thirds of its diameter and on the outside was quite rotten, and that its condition was not either ascertained by the persons whose duty it was to repair the bridge, or if ascertained, it was not repaired, and that the bridge broke down in consequence of this centre sleeper giving way by the mere entry of the plaintiff's horses, without the buggy,

Canadian Cases.

on the side of the bridge. The jury having found for the plaintiff, their verdict was upheld (*Macdonald* v. *The Corporation of the Township of S. Dorchester*, 29 U. C. C. P. 249).

"It is obvious that in cases of this kind the question of neglect or no neglect upon the part of the defendants is one which must always be considered relatively to the particular subject in respect of which the neglect is charged, to the purpose which it has to discharge, and to the gravity of the consequences probably attendant upon the neglect charged. For example, a greater degree of care and inspection is necessary in attending to the condition and state of repair of a bridge than of a plank sidewalk, and in proportion as the defect may be more likely to take place in a hidden part than in a place exposed to view, so that it is more necessary that particular inspection of the hidden part should be made from time to time in the manner best calculated to ascertain any defect not openly apparent, and by so much as a loose or defective plank, timber, or sleeper in a bridge is calculated to be attended with more serious consequences than a loose or defective plank or sleeper in a sidewalk, by just so much are greater care and attention necessary to be displayed in looking after the condition and state of repair of a bridge than of a sidewalk" (*Ibid.*, Gwynne J., 254).

"The other inquiry, and the important one is, whether there was neglect on the part of the defendants to keep the road in repair, by having and maintaining a ditch of the kind and at the part of the road before described, without guard or railing, or without slanting the roadway to the

Art. 71.

Canadian Cases.

bottom of the ditch. The canon of municipal law I take to be that the road shall be reasonably safe and fit for public use and travel. That reasonable safety and fitness must depend on circumstances. It is plain that a ditch of this kind would not do in a city or town in its thoroughfare, where people have constantly to drive up to the sidewalks. And yet such a ditch may well answer in a township where it is for drainage only, and where people have no occasion to drive to it. And my opinion is, so far as the court is to determine the question, that the defendants were not and are not guilty of neglect in not fencing the ditch complained of from the travelled road. In other words, the highway was not out of repair by reason of there being such a ditch as the one in question, running alongside such a roadway" (*Walton* v. *Corporation of York*, 30 U. C. C. P. 222—Wilson, C.J.).

It is always a question of fact for the jury whether, having regard to all the circumstances, the road or bridge was in a state reasonably fit for ordinary travel (*Steinhoff* v. *Corporation of Kent*, 14 O. A. R. 12; *Toms* v. *Corporation of Whitby*, 37 U. C. R. 104; *Sherwood* v. *City of Hamilton*, 37 U. C. R. 410; *Walton* v. *Corporation of York*, 6 O. A. R. 181).

Kennedy v. *Portage La Prairie*, 12 M. R. 634; *Caswell* v. *St. Mary's Road Co.*, 28 U. C. R. 247, followed.

Adair v. *Corporation of Kingston*, 27 U. C. C. P. 126; *The Township of Ellice* v. *Hills*, 23 S. C. R. 429; *Ayre* v. *Corporation of Toronto*, 30 U. C. C. P. 225; *Copeland* v. *The Corporation of the Village of Blenheim*, 9 O. R. 19; *Bliss* v. *Boeckh*, 8 O. R. 451; *Howard* v. *Corporation of St. Thomas*, 19 O. R. 719;

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Art. 71.

Canadian Cases.

along the highway under the bridge, was struck on the head by the girders and knocked off the load and injured. The bridge when constructed was built at a height greater than that required by the 185th section of the Railway Act, 51 Vict. c. 29 (D.), but the municipality and their predecessors, owners of the road, subsequently so raised its level as to leave less than the statutory space between the road and the bridge. *Held*, that the section must be construed as compelling the railway company to construct their bridges in the first place so as to leave the required space below them to the highway and to maintain them at, at least, that height from the original surface of the highway, and not as obliging them to conform from time to time to new conditions created by the persons having control of the highway. *Gray* v. *Borough of Danbury* (1887), 54 Conn. 574, specially referred to (*Carson* v. *Village of Weston et al*, 1 O. L. R. 15).

The plaintiff, whose eyesight was defective, was walking in a city street when, stepping towards a doorway leading into a tavern, he stubbed his toe against the step or door-sill, and stumbling back, fell into an area in the sidewalk used by the tavern-keeper, by the permission of the municipality, for the purpose of putting beer into his cellar, and then open and being used for such purpose. A keg had been placed at each of the outside corners of the opening as a warning to passers-by. *Held*, that the municipality were liable for negligence in leaving the opening without an adequate guard; that contributory negligence could not be imputed to the plaintiff; and that the tavern-keeper was liable over to

Art. 71.

Canadian Cases.

the defendants (*Homewood* v. *City of Hamilton*, 1 O. L. R. 266.

A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the side-walk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it, nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the side-walk, and there has been opportunity and time to repair it (*Madill* v. *The Corporation of the Township of Caledon*, 3 O. L. R. 66). The judgment of Meredith, J., was affirmed on appeal 3 O. L. R. 555.

The plaintiff, in crossing at night on foot a busy street, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage-way. There was a hole or depression in the asphalte pavement from $1\frac{1}{2}$ to $1\frac{7}{8}$ inches deep at its deepest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles: and assessed damages to the plaintiff. *Held*, Falconbridge, C.J., dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair

Art. 71.

Canadian Cases.

than would render the way reasonably safe for vehicles; and the last finding of the judge put the plaintiff out of court. *Boss* v. *Litton* (1832), 4 C. & P. 407, explained and distinguished.

Semble, *per* Street, J.: That the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it.

Per Falconbridge, C.J.: That the judgment ought to be upheld, as it was a question of fact not of law, whether the depression was an actionable defect in the highway (*Belling* v. *City of Hamilton* (1902), 3 O. L. R. 318).

Where a sidewalk on one of the principal streets of a town on which there was considerable traffic, and which had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them, its condition is such as to impose on the corporation a constant care and supervision over it; so that where one of the boards was missing for a week, leaving a hole some six or eight inches deep, into which a person fell and was injured, notice to the corporation of such defect in the sidewalk was assumed, and liability for the damage occasioned by the accident imposed on them, MacLennan, J.A., dissenting.

The damages assessed at the trial, $1,500, were reduced to $900, the Court being of opinion that the latter was the more reasonable amount for the damages sustained—a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date (*McGarr* v.

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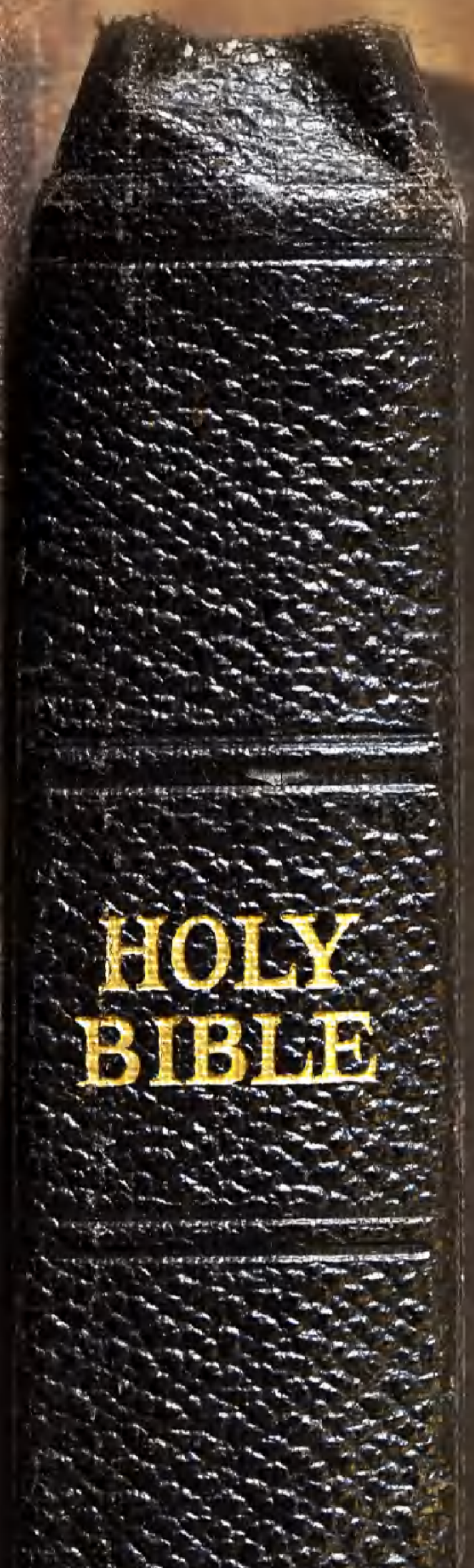

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Art. 71.

Canadian Cases.

the highway, and which was safe while the frost lasted and the snow was hard. The pathmaster of the defendants was aware of the condition of the road, but no steps were taken to open it up. A thaw which had commenced three days before, was in progress at the time of the accident, and when those in the waggon sought to use the track the horses broke through and the waggon was in danger of being upset. Plaintiff got out, and in assisting the horses was injured by one of them. It was held that, under the circumstances, it was the duty of the defendants to have opened up a way through the drift sufficient to enable a vehicle such as plaintiff's waggon to have passed in safety along the highway: that the defendants had notice that the highway was out of repair, and that the plaintiff was entitled to recover (*Hogg* v. *The Corporation of the Township of Brooke*, 7 O. L. R. 273).

It is probable that the above decision pushes to the extreme limit the liability of townships in regard to the repair of emergency roads.

Way—Non-repair—Negligence of Municipal Corporation—Notice of Accident—Reasonable Excuse for Want of—Knowledge of Corporation—Prejudice—Appeal from Ruling of Trial Judge— 3 *Edw.* 7, *c.* 19, *sect.* 606 (*O.*).

In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the judge at the trial, as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been

Canadian Cases.

prejudiced in their defence under sect. 606 of the Municipal Act, 3 Edw. 7, c. 19 (O.), is subject to appeal. A servant of the defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well-travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken, and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident. *Held*, Meredith, J., dissenting, reversing the judgment of Meredith, C.J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of Meredith, C.J., that the defendants had not thereby been prejudiced in their defence. *Armstrong* v. *Canada Atlantic R. W. Co.*, 2 O. L. R. 219, 4 O. L. R. 560, applied and followed (*O'Connor* v. *City of Hamilton*, 8 O. L. R. 391).

The defendants were taking up an old and putting down a new board sidewalk on a street, and had completed the work up to a point somewhere in front of plaintiff's shop, when the workmen were taken away to perform some urgent work in another part of the town and were away about a day and a half. Plaintiff, who was aware of what was being done and of the incomplete state in which the work was left, in the daylight drove up in a cart, and in alighting slipped off the unfinished end of the sidewalk and was injured. *Held*, that the defendants were not liable for the injury (*Belleisle* v. *The Corporation of the Town of Hawkesbury*, 8 O. L. R. 694).

Art. 72.

ART. 72.—*Contributory negligence.*[92]

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would

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Canadian Cases.

[92] "The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover" (*Campbell* v. *Great Western Railway Co.*, 15 U. C. R. 505—McLean, J.; *Robertson* v. *Halifax Coal Co.*, 22 N. S. R. 84).

Cattle Straying upon a Railway.

If the horse was lawfully on the road at the point of intersection, and had strayed from there upon the railway because the cattle guard was defective, his owner would have been in as favourable a position as he would have been if his horse had escaped from his own field upon the railway track for want of a fence between such field and the railway, which it was the duty of the company to keep up; but being in the road and unattended at the point of intersection, in direct violation of an Act of Parliament, and straying from thence upon the railway over the insufficient cattle guard, his owner is in no more favourable position than he would have been if the horse had broken into his neighbour's farm, and had wandered from thence upon the railway by reason of there being no fence kept up by the company between their track and that neighbour's farm.

"For all that appears the railway was well enclosed from the adjacent lands. It is clear that the horse strayed upon the track from the highway,

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Art. 72.

(2) But where the plaintiff's own negligence is only remotely connected with the accident, and the defendant might by the exercise of

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Canadian Cases.

courts of Ontario it has been held that the mere fact of an animal being on a highway within the prescribed distance from a railway crossing without being in charge of some person, as required by the statute, apart from all consideration of how it got there, constitutes being *at large* within the meaning of the statute, and that the statute takes away the right of action not only where an animal so at large is killed or injured at the very point of intersection of the railway with the highway, but also in case of its being killed or injured on the railway outside of the limits of the highway, to which place it had gotten by reason of the insufficiency of the cattle guards of the defendants at the crossing" (Gwynne, J.—*ibid.*).

A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse, and where cattle went through the culvert into a field and thence to the highway and straying on to the railway were killed, it was *held* the company was not liable to their owner (*Grand Trunk Railway Company* v. *James*, 31 S. C. R. 420; and see *Palmer* v. *Michigan Central R. W. Co.*, 7 O. L. R. 87; *Fensom* v. *The Canadian Pacific R. W. Co.*, 7 O. L. R. 254).

The plaintiff was the owner of a field, bounded on one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway which was crossed by both tracks. Owing to a defect in the fence

ordinary care have avoided the accident, the plaintiff will be entitled to recover. **Art. 72.**

(1) This rule is well illustrated by two cases, in each of which the damnum was the same. In *Fordham* v. Illustrations. General illustrations.

Canadian Cases.

between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed, and going over the land of a private owner, which was not fenced off from the switch, and then along a lane, she went on to the highway and then proceeded along it to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train. *Held*, that the defendants were liable therefor (*James* v. *The Grand Trunk Railway Co.*, 31 S. C. R. 420, distinguished; *Davidson* v. *The Grand Trunk Railway Company*, 5 O. L. R. 574).

The Railway Act, 51 Vict. c. 29, sect. 194 (D.), as amended by 53 Vict. c. 28, sect. 2 (D.), enacts that, if in consequence of the omission of the railway company to erect and maintain a fence, "any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damage in respect of it caused by any of the company's trains or engines," and that "no animal allowed by law to run at large shall be held to be trespassing on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there." The plaintiff's cattle running at large in a municipality, as by one of the bye-laws they were permitted to do, got upon Crown lands, and from the Crown lands on to the railway, and were killed on the track by one of the

Art. 72.

London, Brighton and South Coast Rail. Co. (L. R. 4 C. P. 619), the facts were these: The guard of one of defendants'

Canadian Cases.

defendants' trains. *Held*, that notwithstanding the bye-law permitting running at large, the cattle were not properly on the Crown lands; yet the defendants could not defend themselves by saying that they were trespassing there, but were liable under the above enactments. The authority of a municipal council under R. S. O., 1897, c. 223, sect. 546 (2), extends no further than to allow the running at large upon the roads and highways of the municipality (*Fensom* v. *Canadian Pacific R. W. Company*, 8 O. L. R. 688).

The company maintained along its line of railway a barbed wire boundary fence, without any pole, board, or other capping connecting the posts. The plaintiffs' horse, picketed in their field adjoining, became frightened from some cause unexplained and ran into the fence, receiving injuries on account of which it had to be killed. It was *held* that the fence was not inherently dangerous, and, therefore, the company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse (*Plath and Ballard* v. *The Grand Forks and Kettle River Valley Railway Co.*, 10 B. C. Reports, 299).

The plaintiff's horses, which were in a field on one side of the defendants' line of railway, passed to a field on the other side through an unfenced culvert over which the line ran, and, the fence in that field being broken, wandered to the highway, and then at a crossing went on the line of railway and were killed. *Held*, that the defendants were

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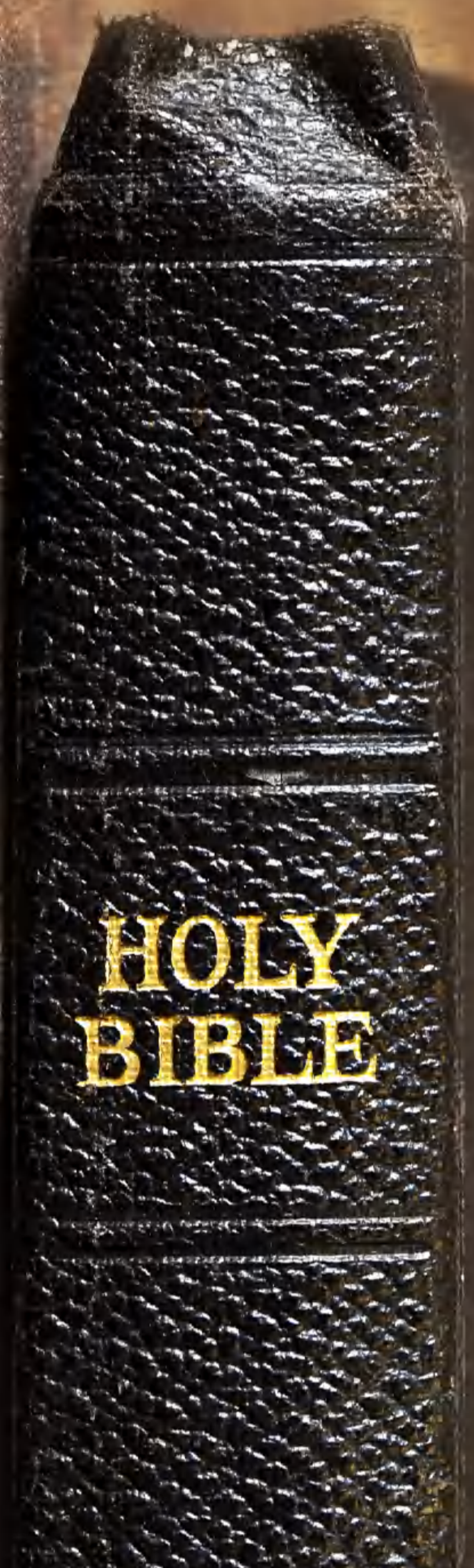

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Art. 72. plaintiff, *who was entering* the carriage, was crushed. It was held that the jury were justified in finding that the

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Canadian Cases.

showing that the person injured thereby was drunk at the time of the accident (*Ridley* v. *Lamb*, 10 U. C. R. 354).

"It cannot be permitted to a person to place any obstruction that he pleases in the highway and to consider himself responsible for no injury that may happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no right to expect to find there. A man might as well dig a ditch across the highway and leave it open and hold himself free from all liability for the consequences, if the person injured by it happened at the time to be talking to a friend and not looking straight before him. The principle that the accident must have happened from no fault of the plaintiff cannot, in our opinion, be carried so far" (*Ibid.*—Robinson, C.J.).

"The general rule is that where a nuisance is created by a stranger on the land of another the owner of the land is not responsible for its continuance, unless he in some manner adopts the act of the wrongdoer" (*Castor* v. *Corporation of Uxbridge*, 39 U. C. R. 118—Harrison, C.J.).

"It is, however, the duty of everyone travelling along a highway to use caution and prudence adapted to the circumstances in which he is placed. The driver knew that the telegraph poles were placed on and along the highway at short distances from each other. Having used proper care he passed many of them in perfect safety.

guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff. Art. 72.

Canadian Cases.

And yet knowing of their existence he all at once ceases to pay any attention whatever to the highway, and while in this careless state he, in broad daylight, at eight o'clock in the morning, drove against a particular pole, which caused the sulky to upset. Had he been using *any* care at the time the accident would not have occurred" (*Ibid.*—Harrison, C.J., 129).

The jury were directed that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff. This was *held* to be a misdirection, for if the driver by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed (*Rastrick* v. *The Great Western Railway Co.*, 27 U. C. R. 396; and see *City of Halifax* v. *Lordly*, 20 S. C. R. 505, *ante*, p. 357).

"There is a duty incumbent on all persons driving or walking on a road crossed by a railway, and it is dictated by common sense and prudence, that on approaching a railway crossing they should do so with care and caution, both with a view to their own safety as well as the safety of passengers travelling by rail" (*Nicholls* v. *The Great Western Railway Co.*, 27 U. C. R. 382—Morrison, J.; and see *Hutton* v. *Corporation of Windsor*, 34 U. C. R. 487; *Vicary* v. *Keith*, 34 U. C. R. 212).

It is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is

Art. 72.

(2) Where, however, the plaintiff, on entering a railway carriage, *left his hand on the edge* of the door

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Canadian Cases.

contributory negligence (*Johnston* v. *Northern Railway Co.*, 34 U. C. R. 432).

The plaintiff, on a dark night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left, intending to go along the track to the station, when he fell into the cattle guard, which was within the limits of the highway, and was injured. *Held*, that he could not recover, for assuming that the encroachment on the highway by the cattle guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment (*Thompson* v. *The Grand Trunk R. W. Co.*, 37 U. C. R. 40; and see *Craig* v. *G. W. R.*, 24 U. C. R. 504; *Briggs* v. *G. T. R. Co.*, *ibid.* 510; *Fairbanks* v. *G. W. R. Co.*, 35 U. C. R. 523).

In an action against the railway company for negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's, it was shown that the railway fence, in which the fire originated, was a bush fence, the line having recently been built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under C. S. C. c. 66, sect. 4, and he had felled them lengthwise with the track and left them there. The jury having found

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Art. 72. act was attributable to the plaintiff's contributory negligence, in leaving his hand carelessly upon a door

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Canadian Cases.

should be acquitted of accountability to their passengers, whose limbs and lives are in their keeping, for damages done to them, because some other company or person was just two seconds too late in doing something which would have cured all their neglect. If it had been an obvious case of misconduct by the other company, in which the neglect of the defendants could not fairly be said to have led to the accident, the defendants would, in my opinion, be excused from liability to the plaintiff. But I am not able entirely to remove from my mind the impression that the neglect of the defendants to stop for the required time before crossing the track was, so far as the plaintiff is concerned, part of the cause of his injury, and it is sufficiently proximate to form an actionable ground for damages" (*Ibid.*—Wilson, J., pp. 330, 331).

"This is one of a class of cases which it is not very easy satisfactorily to deal with. It is certain the defendants were guilty of serious negligence by having an open unguarded trap in the floor of their public office, to which customers were invited, and in the situation in which it was, about four feet from the west counter or wicket to which all persons doing business there must go, and so very close to the north end of the east counter. That the trap was a dangerous one cannot be doubted; accidents had upon two or three occasions nearly happened there before, and on this occasion Denny lost his life by falling into it. . . . It is not, therefore, the least evidence of negligence against Denny that he did not happen to see it too.

which he must have known would be immediately shut. But for that fact no accident would have happened

Art. 72.

Canadian Cases.

It was undoubtedly his misfortune, but I cannot say it was his fault. He had no more reason to look for a hole in the floor than to look for a load of bricks over his head. In such a case I should require strong evidence to relieve the defendants from their very great neglect, and to cast the whole of the blame upon the deceased, or so much of it as would make him contributory to his own death. That the learned judge 'could hardly conceive how anyone could walk into the hole' while there was so much light in the office at the time of the accident, and when the trap was so plainly seen when the office was entered, does not convince me that the deceased was guilty of contributory negligence because he did not see the trap. The answer is, this man did walk into the hole, and he did not mean to do it, and he did not know he was doing it, and he did not see it; and why? Because he believed, and he was led to believe by the defendants, he was in a place of security, and that he need not look out for traps or anything dangerous to life; and he therefore did not look out for them, and was not obliged to do it" (*Denny* v. *Montreal Telegraph Co.*, 42 U. C. R. 586 *et seq.*—Wilson, J.; and see *M'Adam* v. *Ross*, 22 N. S. R. 264; *Drake* v. *Town of Dartmouth*, 25 N. S. R. 177).

Headford v. *The McClary Manufacturing Company*, 24 S. C. R. 291.

The plaintiff was going from I. to M. by train in charge of cattle. At T. the train on which he had come from I. was partly broken up to be re-made

Art. 72. (*Richardson* v. *Metropolitan Rail. Co.*, L. R. 3 C. P. 374 n; *Drury* v. *North Eastern Rail. Co.*, [1901] 2 K. B. 322).

Canadian Cases.

with some cars which were standing on another track. While there the plaintiff, unknown to the defendants, went into the caboose at the end of the cars which were to be added to the cars from I., and when the connection was about to be made, deliberately stood up and was washing his hands, when the shock of the connection caused the injury, for damages for which this action was brought. *Held*, affirming the decision of Rose, J., that there was no evidence of negligence on the defendants' part, and the mere fact of the accident happening to the plaintiff was not in itself sufficient evidence of negligence. *Held*, also, that there was evidence of contributory negligence, in that the plaintiff knew that he was in a freight train, where there would not be so much care shown, and yet stood up, instead of sitting down, as he might have done, while the connection was being made, especially as he entered the caboose before the train was made up, and had no reason to think the defendants knew he was there (*Hutchinson* v. *The Canadian Pacific R. W. Co.*, 17 O. R. 347; *McGinney* v. *Canadian Pacific Ry. Co.*, 7 M. L. R. 151; *Bedford* v. *City of Halifax*, 25 N. S. R. 90).

Where the land adjoining the railway is unoccupied, the company is not bound to fence at that part of their line (*McFie* v. *Canadian Pacific Ry. Co.*, 2 M. L. R. 10).

"A plaintiff's own negligence, which contributed to the injury, does not defeat his right of action, if the defendants might or could, by exercise of ordinary care, have avoided it" (*Ibid.*—Ardagh, J.).

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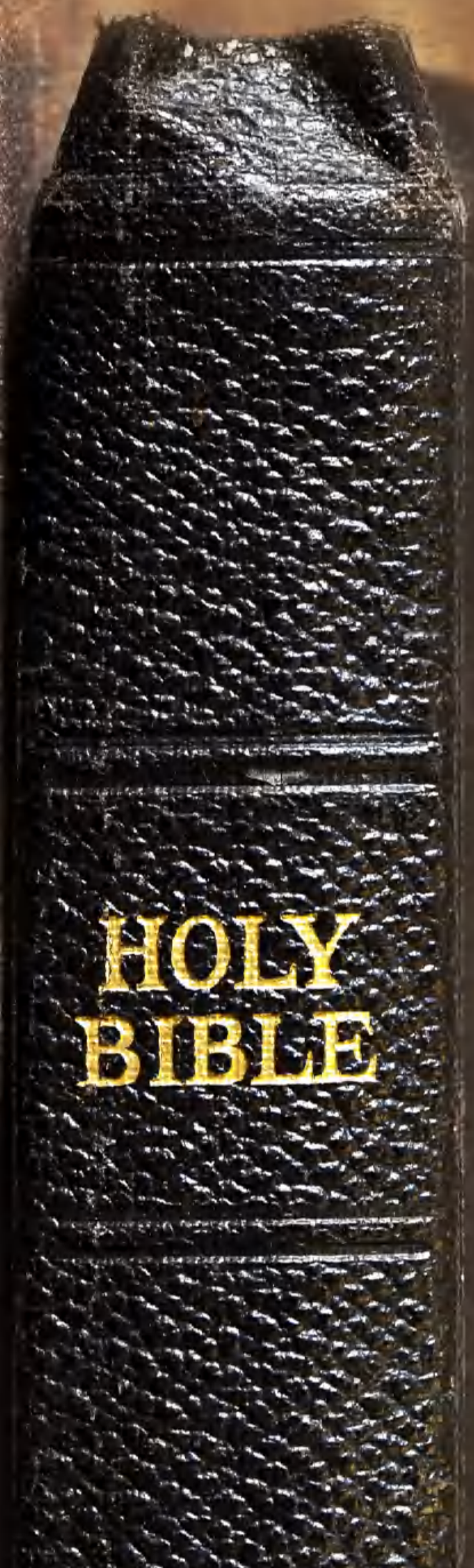

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Art. 72.

by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the

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Canadian Cases.

happens to him in consequence, it is absurd to say he has an action against anyone whose vehicle he came into collision with. The jury must necessarily find that the fault was all his own" (Sedgwick, J.—*ibid.*).

In the above case the jury found, in answer to questions submitted, (1) that the accident was due to the carelessness of the deceased in attempting to get out when he did, and (2) that the boy in charge of the elevator could not, at the time, have done more than he did to prevent the accident.

A question, as to whether defendant was guilty of negligence in the operation of the elevator was left unanswered.

It was *held*, (1) that a case would not be sent back for new trial because an important question had not been answered, if the court find, from the answers to questions that have been returned, that it would be impossible for the plaintiff to recover, even if the unanswered question had been answered entirely in his favour.

(2) That the jury having found, under proper directions from the trial judge, that the accident was due to the carelessness of deceased, in attempting to get out when he did, and the question being peculiarly for the jury, plaintiff could not recover, even assuming that negligence in the operation of the elevator was proved.

(3) That the question as to whether deceased, at the time of the accident, was in the elevator on business, or merely for his own pleasure, and

disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, Art. 72.

Canadian Cases.

as to whether the elevator was or was not a proper place for him to await the arrival of the person he wished to see, was also for the jury, but that the answer to this question was immaterial in view of the answer to the question respecting the negligence of deceased.

(4) That where counsel on either side intends to make the refusal of the trial judge to put a question, or to put a question in a particular way, one of the grounds for a new trial, he must submit the question in writing, and in the form in which he desires to have it put.

(5) That as the accident could not have happened if the rule which required the door of the elevator cage to be closed before starting had been adhered to, the accident was due solely to the carelessness of defendant's servant, and defendant was liable.

(6) That the burden of proving contributory negligence rested on defendant.

(7) That the passenger might reasonably rely on the elevator cage not starting until the door was closed.

(8) That in view of all that took place, defendant could not treat deceased as a loiterer, in the absence of distinct notice to leave the cage.

(9) That the finding that deceased was loitering, was consistent with his being lawfully present for business purposes.

(10) That, so long as it was left undecided whether defendant was guilty of negligence, any decision as to contributory negligence was inchoate.

(11) Also that, there being an admission on the record that deceased was there on business,

Art. 72.

the disaster would not have happened. In the former case he recovers, in the latter not (*Tuff* v. *Warman*, 27 L. J. C. P. 322).

Canadian Cases.

the question as to whether he was there merely for his own pleasure should not have been submitted to the jury (*Hawley Administrator* v. *Wright*, 34 N. S. L. R. 365).

The fact of a passenger getting off a train while it is in motion is not necessarily negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances. Where a train, scheduled to stop at a named station, did not on arriving there stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started again, fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the court declined to interfere with the finding (*Keith* v. *The Ottawa and New York Railway Co.* (1902), 5 O. L. R. 116).

Defendant's horse was on the highway, having escaped from a field which was fenced in, when a boy of twelve years of age tried to catch him by taking hold of a rope then around his neck, and in doing so he was kicked and injured. There was no evidence either that the defendant knew the horse was accustomed to stray or had any vicious propensity, or had any such fault, and there was evidence that it had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence, and fully understood the risk he ran. In an action for the injury by

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Art. 72.

Wicklow and Wexford Rail. Co. v. *Slattery*, 3 App. Cas. 1155). The law on this point was thus summarised by WILLES, J.: "If both the parties were

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Canadian Cases.

his presence was unobjected to by the conductor in charge, in any way contributed to the injury?" (*Watson* v. *The Northern Railway Co.*, 24 U. C. R. 104—Hagarty, J.).

"We do not feel satisfied they were right in holding the plaintiff free from some blame, but however that may be, he would not be disqualified from recovering if, notwithstanding any failure upon his part, the defendants could, by the exercise of reasonable care upon their part, have avoided doing the injury which is complained of" (*Bender* v. *The Canada Southern R. W. Co.*, 37 U. C. R. 39—Wilson, J.).

"The plaintiff and his fellow-workmen choose for their own convenience, and in no way as a part of any bargain, express or implied, with the defendants, to sit or stand on an open platform carriage, on a railway. The risk thus taken by them, standing on an open unprotected surface, was far greater than it would have been had they been in any passenger carriage in the case of a sudden check or collision. The fact that the defendants' engine-driver or conductor allowed them to get on the platform does not, in my view, alter the case. I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber to a house he is building. A workman either with the driver's assent, or without any objection from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp-post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such a case be held to

equally to blame, and the accident *the result* of their joint negligence, the plaintiff could not be entitled to recover. If the negligence and default of the plaintiff

Art. 72.

Canadian Cases.

incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend, or a person doing work at his house, drive in the cart, make any difference. If the owner in such a case be liable, the step would be very short to making the owner of a vehicle liable to any street boy who, even with the driver's knowledge, should be holding on behind. The law ought to stand on some intelligible footing in these cases, and men should not be held liable except on some clear principle" (*Graham* v. *Toronto, G. & B. R. W. Co.*, 23 U. C. C. P. 552—Hagarty, C.J.).

A mere licence, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, makes no obligation on the owner to guard the licensee against danger (*Spence* v. *Grand Trunk R. W. Co.*, 27 O. R. 303).

R. owned a barn situated about 200 feet from the New Brunswick Railway Company's line, and the barn was destroyed by fire caused, as was alleged, by sparks from the defendant's engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found

Art. 72.

was in any degree the *proximate cause* of the damage he could not recover, however great may have been

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Canadian Cases.

that the defendants did not use reasonable care in running the engine. *Held*, reversing the decision of the Supreme Court of New Brunswick, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that there should be a new trial (*New Brunswick R. W. Co.* v. *Robinson*, 11 S. C. R. 688).

"No doubt plaintiff has the right to use his barn as he pleases, but knowing that the legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks and the prevention of accidents, and an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the legislature having permitted the use of a dangerous agent, and the question is: Have the defendants used all reasonable precautions and appliances to prevent accidents? It cannot be supposed that the best appliances will absolutely avoid all danger from the emission of sparks, and therefore it behoves parties through whose premises the railway runs, to understand the risk to which the sanction of the legislature, in the public and general interests of the country, to the running of locomotives, has subjected them. And, if they choose to have their property unnecessarily exposed, as in this

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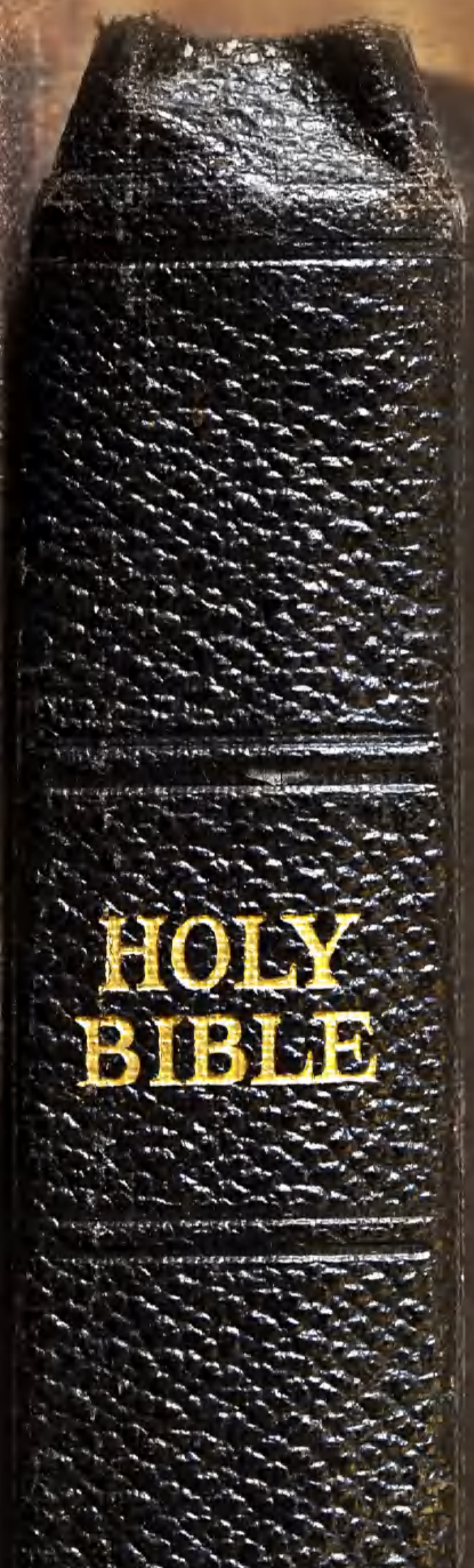

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Art. 72.

accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided

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Canadian Cases.

reasonably clear from combustible matter, &c., likely to be thus set on fire. But it was *held*, under the circumstances of the case—the railway having recently been built through the forest, and the plaintiff's land being in a state of nature—that there was not sufficient evidence of negligence on the defendants' part (*Jaffrey* v. *Toronto, Grey and Bruce R. W. Co.*, 23 U. C. C. P. 553, and 24 U. C. C. P. 271; *Peers* v. *Elliott*, 21 S. C. R. 19; *McLaren* v. *Canada Central R. Way Co.*, *ante*, pp. 10 and 389; *The North Shore R. W. Co.* v. *McWillie*, 17 S. C. R. 511; *Holmes* v. *Midland*, *post*, p. 397; *New Brunswick R. W. Co.* v. *Robinson*, *post*, p. 397; and *Rainville* v. *G. T. R. Co.*, *ante*, p. 389).

Fire was discovered on S.'s farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines, one having a long and the other a short or medium smoke-box. In an action against the company for damages, it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men experienced in the construction of engines swore that a larger smoke-box would have been unsuited to the size of the engine. The jury found that the fire was caused by the sparks from one engine, and they believed it was from that with the short smoke-box; and that the use of said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks. It was *held*, affirming the judgment of the Court of Appeal (2 O. L. R. 689), that the latter finding was not justified by the evidence, and the verdict

it" (*Tuff* v. *Warman*, 27 L. J. C. P. 322). Therefore, where the plaintiff left his ass with his legs tied in a **Art. 72.**

Canadian Cases.

for the plaintiff at the trial was properly set aside (*Jackson* v. *Grand Trunk Railway Co.*, 32 S. C. R. 245).

"As to the law which governs the liability of railway corporations in cases of this kind, there is not much dispute. In the case of the *Port Glasgow and Newark Sailcloth Co.* v. *The Caledonian Railway Co.* (20 Ct. of Sess., 4 Ser. 35), Lord Herschell on appeal to the House of Lords said: 'It is now well-settled law that in order to establish a case of liability against a railway company under such circumstances it is essential to the pursuers to establish negligence. The railway company having the statutory powers of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because the sparks emitted by an engine have set fire to an adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to be this. They are aware that locomotive engines running along the lines are apt to emit sparks. Knowing this, they are bound to use the best practical means according to the then state of knowledge to avoid the emission of sparks which may be dangerous to adjoining property, and if they, knowing that the engines are thus liable to discharge sparks, do not adopt that reasonable precaution, they are guilty of negligence.' This may be taken as a sufficiently clear and comprehensive statement of the law in respect to the appeal now before us" (Davies, J., *ibid.*).

In an action against a railway company, carrying

Art. 72. public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive

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Canadian Cases.

on business under legislative sanction, to recover damages resulting from a fire alleged to have been caused by a spark from an engine, the plaintiff must, in addition to giving evidence from which it may reasonably be inferred that the fire was caused as alleged, also give some evidence of negligence on the part of the defendants, *e.g.*, in the construction or management, or want of repair, of the engine, and the onus is not upon the defendants to prove that they have adopted and used with due care reasonable contrivances to avoid the danger of fire. Judgment of Armour, C.J., reversed (*Oatman* v. *Michigan Central Railway Company* (1901), 1 O. L. R. 145).

In an action against a railway company to recover damages because of fire caused by sparks from an engine, two witnesses called on behalf of the plaintiff, men without much practical experience, testified that, in their opinion, the engine in question was defective constructively in a certain particular, while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff. *Held*, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony, and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed. Judgment of Falconbridge, J., reversed, Armour, C.J.O., dissenting (*Jackson* v. *Grand Trunk Railway Company* (1901), 2 O. L. R. 689).

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Art. 72.

Contrary illustration.

(5) But where the defendant negligently and wrongfully left a pole across a highway, and the plaintiff, by riding

Canadian Cases.

cannot see how its position can be affected by any antecedent events whatever; but the plaintiff could not have recovered, because it would have been the driver's own mismanagement which contributed and led to the accident" (*Toms et ux.* v. *Corporation of Whitby*, 35 U. C. R. 214 *et seq.*—Wilson, J.).

The decision in this case, reported in 35 U. C. R. 195, was affirmed, and the defendants *held* liable for the want of a railing protection along the sides of an embankment leading to a bridge, in consequence of which the plaintiff's horse, being frightened, backed the waggon over it (*Toms et ux.* v. *The Township of Whitby*, 37 U. C. R. 100).

"A plaintiff, in order to recover in an action of this kind must, however, not only establish the default of the corporation, but that such default was the cause of the injury in respect of which he sues. If it be shown that there was contributory negligence on the plaintiff's part, directly, not remotely, contributing to the injury of which he complains, he cannot of course recover. But if it be shown that, without fault or negligence on his part, his horses escaped from his control, and ran away or became unmanageable, so that no care could be exercised by him in respect to them, and this condition of things is not produced by a defect in the highway, the question is whether the plaintiff can recover. In the State of New Hampshire, under a statute also like ours, the contrary is held. It is there held that where two causes combine to produce the injury, both of which were in their nature proximate, the one being the defect in the highway, and the other

negligently, ran against it and was hurt, it was held that as, if he had used ordinary care, he might have seen the

Art. 72.

Canadian Cases.

some occurrence for which neither party is responsible, that the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. I must say, contrary to the opinion which I held when counsel in *Toms et ux.* v. *Whitby* (35 U. C. R. 195), that the weight of authority now appears to be in favour of the law as propounded in the New Hampshire Courts; and as this is in accordance with the opinions expressed by the majority of the judges of this court as constituted when *Toms et ux.* v. *Whitby* was decided—opinions not in any manner dissented from by the judges of the Court of Appeal, I have the less hesitation in coming to the conclusion that in this case the rule must be made absolute to set aside the nonsuit and for a new trial" (*Sherwood* v. *The Corporation of Hamilton*, 37 U. C. R. 416 *et seq.*—Harrison, C.J.).

"The proximate and immediate cause of the injuries was the voluntary act of the plaintiff in returning into the burning carriage from a place of safety. The injuries he received were not owing to the negligence of the defendants, and, that being the case, he was disentitled from recovering any damages. It is not without some doubt that I have arrived at a conclusion unfavourable to the plaintiff, but I have done so after much consideration, and because I think there are insuperable reasons against a different conclusion. I have not overlooked the rule that the want of ordinary caution is a question of degree, and where that point is contested and arises it is one for the jury; and as *held* in *Tuff* v. *Warman* (5 C. B. N. S. 573), that mere want of

Art. 72. pole and avoided it, the accident was entirely due to his own negligence, and the defendant was not liable (*Butterfield* v. *Forrester*, 11 East, 60).

Canadian Cases.

ordinary care and caution will not disentitle a plaintiff to recover unless it was such that but for the want of ordinary care and caution the misfortune would not have happened. Here, as I have said, the immediate and proximate cause of the misfortune was the returning of the plaintiff into the burning carriage, and to that voluntary act of his are attributable the injuries he has received" (*Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 466 *et seq.*—Morrison, J.).

In an action for negligence against the owner of a steamboat for injuries sustained by the plaintiff in consequence of one of the fenders having broken loose from the steamboat while in the act of leaving a wharf, and striking and injuring the plaintiff who was standing on the wharf, and it appearing that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff and granted a new trial (*Grieve* v. *The Ontario and St. Lawrence Steamboat Co.*, 4 U. C. C. P. 387; and see *Hewitt* v. *Ontario, Simcoe, and Huron Railway Union Co.*, 11 U. C. R. 605; and *Thatcher* v. *The Great Western R. W. Co.*, 4 U. C. C. P. 543).

"It cannot be asserted that a man is not at liberty to use his own land to its utmost limit, in such way and manner as he pleases, and he is not bound to take more care of his property or to alter it by reason of its proximity to a railway. Contributory negligence exists where a person injured has wrongfully done or omitted to do an act which it was his duty to do or not to do, by

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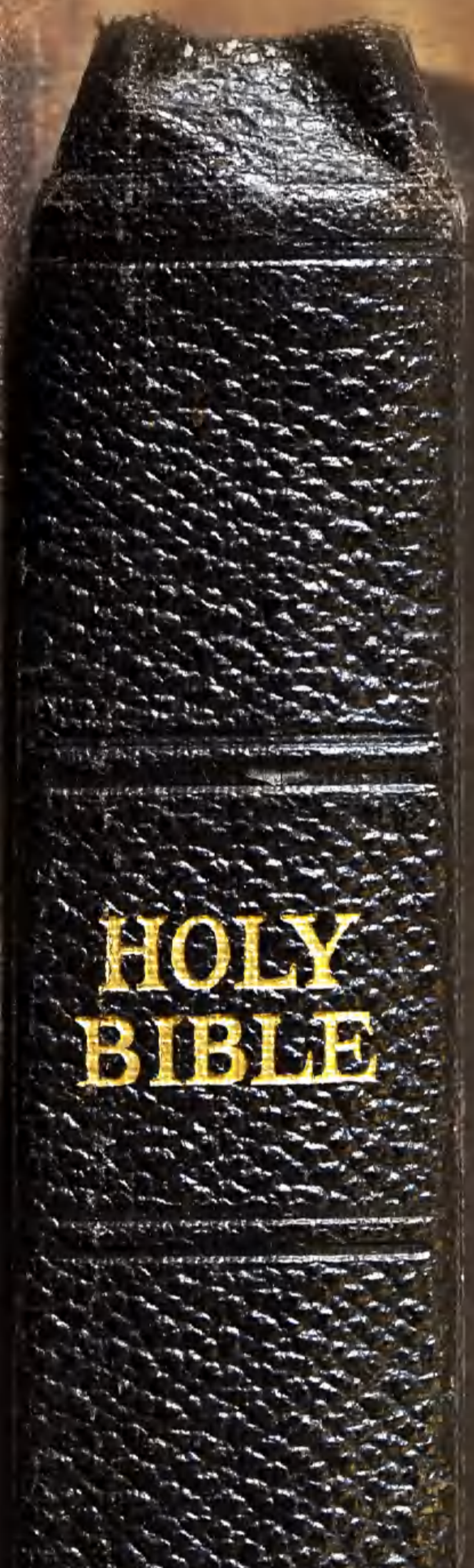

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Art. 72.

13 App. Cas. 1, and there is no longer any rule of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the master of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*Matthews* v. *London Tramways Co.*, 58 L. J. Q. B. 12).

Contributory negligence in infants.

(7) It was decided many years ago that, where the plaintiff is a child of tender years, it is not necessarily a good defence to an action of negligence to prove that he himself contributed to his injury. In that case the defendant left a cart unattended in the street. The plaintiff, a boy of seven, climbed into the cart to play, another boy led on the horse, and the plaintiff fell and was hurt. If he had been a grown man it would have been a good defence that the proximate cause of the accident was his own wrongdoing—but the court held that as much care cannot be expected of a boy as of a grown person—and the act of the plaintiff, considering his age, was not such as to disentitle him from recovering (*Lynch* v. *Nurdin*,[96] 1 Q. B. 29). And, notwithstanding several cases to the contrary (*Hughes* v. *Macfie*, 2 H. & C. 744; *Mangan* v. *Atterton*, L. R. 1 Ex. 239), this seems to be still the law. Thus, in the recent case of *Harrold* v. *Watney*), [1898] 2 Q. B. 320; see also *Jewson* v. *Gatti*, 2 T. L. R. 441), it was held by the Court

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Canadian Cases.

Sherwood v. *City of Hamilton*, 37 U. C. R. 410, followed.

[96] The doctrine of contributory negligence does not apply to an infant of tender age (*Merritt* v. *Hepenstal*, 25 S. C. R. 150).

Eaton v. *Sangster*, 24 S. C. R. 708, judgment of Court of Appeal for Ontario affirmed; *McIntyre* v. *Buchanan*, 14 U. C. R. 581; *Vars* v. *Grand Trunk R. W. Co.*, 23 U. C. C. P. 143.

of Appeal that the owner of a rotten fence adjoining a highway was liable to a boy who, in attempting to climb it (which he had no right to do), was crushed and otherwise injured. Anyhow, it appears that what would amount to contributory negligence in a grown-up person, may not be so in a child of tender years (*per* KELLY, C.B., *Lay* v. *Midland Rail. Co.*,[97] 34 L. T. 30) (*a*). **Art. 72.**

Persons in charge of infants.

(8) It has been held that where an infant is incapable of taking care of himself, he cannot recover if the person in whose charge he was, was guilty of contributory negligence (*Waite* v. *North Eastern Rail. Co.*, El. B. & E. 719). But whether this is consistent with principle seems questionable. For the person in charge is not the agent of the child, but of its parent or guardian; and in other respects the case of *The Bernina* (*supra*, p. 397) would seem to apply.

ART. 73.—*Proximate Cause.*

The negligence of the defendant must be the proximate cause of the damage.

General principle.

As we have seen (*supra*, Art. 5, p. 41) wherever damage is a part of the cause of action, it must be shown that the damage complained of was the natural and probable result of the wrongful act. Illustrations will be found at pp. 43 and 161—165, many of which are cases of negligence.

Combined negligence of defendant and third party.

It sometimes happens that though the defendant was negligent, the real effective cause of the damage was

(*a*) It will be noticed, however, that *Harrold* v. *Watney* and *Jewson* v. *Gatti* were nuisance cases, and in the former VAUGHAN WILLIAMS, L.J., expressly decided the case on that ground.

Canadian Cases.

[97] *Sangster* v. *T. Eaton Co.*, 25 O. R. 78.

Art. 73.

either the negligence of the plaintiff or the negligence of a third person. The former is dealt with as one aspect of contributory negligence. It is well illustrated by *Butterfield* v. *Forrester* (*supra*, Art. 72, Illustration (5)). When the immediate cause of the damage is the interference of a third party, it does not necessarily follow that the defendant is not liable. If the defendant's negligence is *an* effective cause of the damage, he is liable, although the damage would not have occurred but for the interference of a stranger (*Englehart* v. *Farrant*, [1897] 1 Q. B. 243).

Illustrations.

(1) Thus, if a driver of a van leave his cart unattended in the street, he (or his master) may be liable for the damage caused by some third person wrongfully interfering with the cart and causing the horse to move on. For the wrongful interference of a stranger is, in such circumstances, a natural and probable result of the cart being left unattended (*Illidge* v. *Goodwin*, 5 C. & P. 190; *Lynch* v. *Nurdin*, 1 Q. B. 29). It is, in every case, a question of fact whether the negligence of the defendant was an effective cause of the damage or merely a remote cause.

(2) So where a van was left on the defendants' premises in a place where it was perfectly safe unless interfered with by strangers, and there was no reason to foresee the interference of strangers, the defendants were not liable for damage resulting from boys wrongfully breaking in and mischievously starting the van to run down an incline. In this case the Court of Appeal held (1) that there was no evidence of negligence on the part of the defendants, and (2) that even assuming there was, the negligence was not an effective cause of the damage (*McDowall* v. *Great Western Rail. Co.*, [1903] 2 K. B. 331).

(3) So where the defendant had taken the plaintiff's horse under an agreement for agistment and put it into

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Art. 74.

on the defendant (*Dublin, Wicklow, etc. Rail. Co.* v. *Slattery*, 3 App. Cas. 1169).[99]

(2) But where a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things, and using proper care, it affords *primâ facie* evidence of negligence (*Scott* v. *London, etc. Dock Co.* 34 L. J. Ex. 220; *Byrne* v. *Boadle*, 2 H. & C. 722).

Runaway horse.

(1) Thus, where a horse of the defendant suddenly bolted without any explainable cause, and, swerving on

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Canadian Cases.

such a breach of a duty which they owed to the public as subjected them to conviction on an indictment as for a public nuisance, from which breach of duty the plaintiff suffered the peculiar private damage complained of, without any negligence on her own part contributing to the happening of the injury. Now, in this case, the mere happening of the accident not being even *primâ facie* evidence of negligence, nor indeed of the alleged defect being of that nature and magnitude to constitute a public nuisance, it was necessary for the plaintiff to have given affirmative evidence upon both of these particulars. This she did not attempt to do" (*Ibid.*—Gwynne, J., at pp. 341 and 344).

McMillan v. *Western Dredging Co.*, 4 B. C. Reps. 122.

[99] *Green* v. *Toronto R. W. Co.*, 26 O. R. 319; *Bennett* v. *Grand Trunk R. W. Co.*, 7 O. A. R. 470; *Maw* v. *Townships of King and Albion*, 8 O. A. R. 248; *Jones* v. *Grand Trunk R. W. Co.*, 16 O. A. R. 37.

to the footpath, collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*Manzoni* v. *Douglas*,[100] 6 Q. B. D. 145). Art. 74.

(2) So where the dead body of a man was found on the defendants' railway near to a level crossing, the man having been killed by a train which bore the usual head-lights, but did not whistle, it was held, in an action by the widow, that there was no evidence of negligence on the defendants' part. For, as Lord HALSBURY said, "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" (*Wakelin* v. *London and South Western Rail. Co.*, 12 App. Cas. 41. See also *Davey* v. *London and South Western Rail. Co.*,[101] 12 Q. B. D. 70). Accident capable of two explanations.

Canadian Cases.

[100] *Crawford* v. *Upper*, 16 O. A. R. 440, and *ante*, p. 28.

[101] Where the manner in which the accident happened is mere conjecture, the action is not maintainable (*Lydia Farmer* v. *Grand Trunk R. W. Co.*, 21 O. R. 299).

Finlay v. *Miscampble*, 20 O. R. 29; *Follet* v. *Toronto Street R. W. Co.*, 15 O. A. R. 346.

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded

Art. 74.

Accident *primâ facie* due to negligence.

(3) On the other hand, where a person was walking in a public street and a barrel of flour fell upon him from a window of the defendant's house, it was held

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Canadian Cases.

at another crossing three-fifths of a mile off but was not continued; and that deceased was not guilty of contributory negligence. The Common Pleas Division refused to disturb this verdict, which was affirmed in the Court of Appeal, and on appeal to the Privy Council the appeal was dismissed (*Peart* v. *The Grand Trunk R. W. Co.*, 10 O. A. R. 191, and Wheeler's Privy Council Law, 1876—1891, 308, and *ante*, p. 338).

"If the law laid down in *Davey* v. *London and South Western R. W. Co.* went the length, to which I do not understand it to go, of casting on a plaintiff who sues for an injury caused by the negligence of the defendant, the burden of affirmatively proving that he took all precautions to avoid the accident, or in other words of negativing contributory negligence, as a part of his case, it would not necessarily govern us in this country. In England there is no such statutory provision as that of our law, which requires a warning to be given when approaching a level crossing, by ringing the bell or sounding the whistle. If that precaution is neglected, there is no escape for the railway company from the imputation of negligence. If no warning is given and a person crossing the track is struck by the train, there is evidence enough in the proof of those facts to convince a jury, if nothing else is shown, that the accident was caused by the neglect to give warning. To hold that the plaintiff must show affirmatively that he looked up and down the track or took other precautions which might have averted the danger arising from the defendants'

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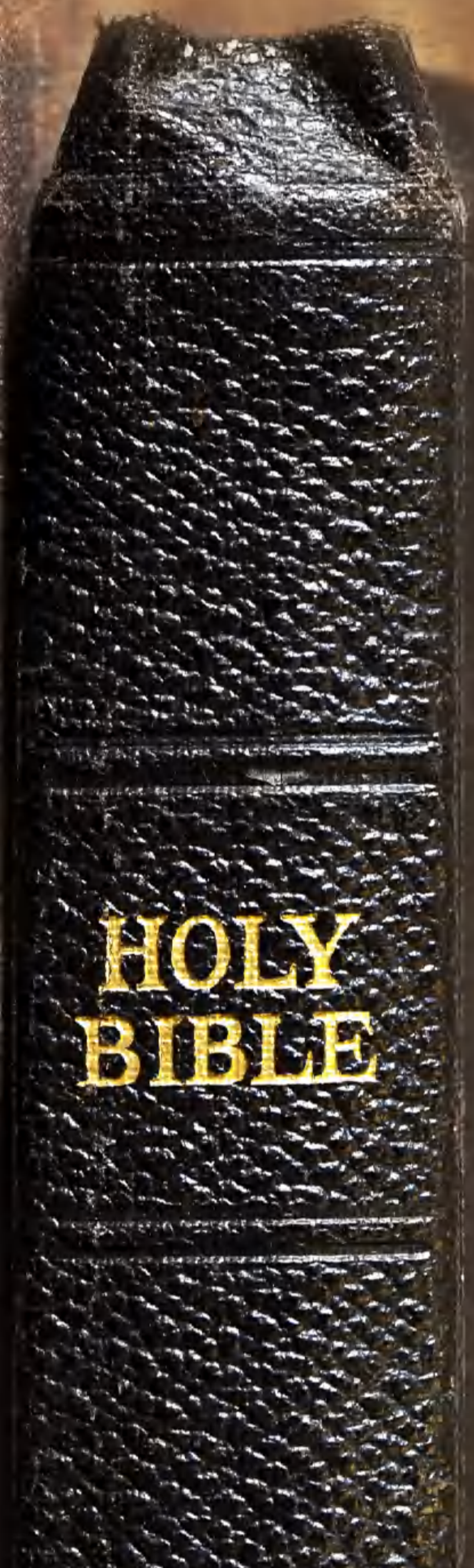

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Art. 74.

usually fall out of windows in the absence of want of care (*Byrne* v. *Boadle*, 33 L. J. Ex. 13; *Scott* v. *London, etc. Dock Co.*, *supra*).[102] But where the defendant was gratuitously driving the plaintiff, and the kingbolt of the carriage broke and the horses consequently bolted, and the plaintiff was injured, it was held that there was not sufficient evidence of negligence to render the defendant liable. For, as Lord CHELMSFORD, referring to cases such as that last cited, said: "This case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver" (*Moffatt* v. *Bateman*,[103] L. R. 3 P. C. 115). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must give

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Canadian Cases.

is purely a matter of speculation or conjecture (*The Canada Paint Co.* v. *Trainor*, 28 S. C. R. 352).

Forwood v. *The City of Toronto*, 22 O. R. 351; *Shoebrink* v. *The Canada Atlantic R. W. Co.*, 16 O. R. 515; *Kerwin* v. *The Canadian Coloured Cotton Co.*, 28 O. R. 73; *Gilmour* v. *Bay of Quinté Bridge Co.*, 20 O. A. R. 281; *Shannahan* v. *Ryan*, 20 N. S. R. 142.

[102] *Jones* v. *The Grand Trunk R. Co.*, 18 S. C. R. 696.

[103] "I think the result of the authorities undoubtedly is, that if the deceased was a mere licensee, who entered the car not as a passenger, but for the purpose of plying his trade there, and whose presence was simply tolerated, the plaintiff has no right to complain because the safety of the car was not improved by the addition of a step" (*Blackmore* v. *Toronto Street Railway Co.*, 38 U. C. R. 216—Moss, J.).

some evidence of want of care. But where the probability is that the accident could only have had a negligent origin, the presumption will be reversed. Art. 74.

Art. 75.—*Duties of Judge and Jury.*

Whether there is any evidence, to be left to the jury, from which negligence causing the injury complained of may be reasonably inferred, is a question for the judge. It is for the jury to say whether, and how far, the evidence is to be believed (*Metropolitan Rail. Co.* v. *Jackson*,[104] 3 App. Cas. 193).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is any evidence from which negligence *may be reasonably* inferred, and then leave it to the jury to find whether upon that evidence negligence *ought* to be inferred. The law is thus summarised in *Metropolitan Rail. Co.* v. *Jackson* (3 App. Cas. 193, 197): "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have

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Canadian Cases.

[104] Where the evidence is consistent with the existence or non-existence of negligence, the question is for the jury (*Henderson* v. *Barnes*, 32 U. C. R. 176; see also *Jackson* v. *Hyde*, 28 U. C. R. 294).

Jones v. *Grand Trunk R. W. Co.*, 45 U. C. R. 193; *Fields* v. *Rutherford*, 29 U. C. C. P. 113; *McGibbon* v. *Northern & N. W. R. Co.*, 11 O. R. 307; *Barrett* v. *Suttis*, 5 N. S. (Russell & Geldert), 262.

Art. 75.

been established by evidence from which negligence *may* be reasonably inferred: the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred. It is, in my opinion, of the greatest importance, in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury, upon the ground that in his opinion negligence ought not to be inferred. And it would place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in banco, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial. And on a second trial, and even on subsequent trials, the same thing might happen again."

Art. 76.—*Limitation.*

An action for damage incurred by another's negligence must be commenced within six years.

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Art. 77. entitled the party injured to maintain an action in respect thereof, then the wrongdoer is liable to an

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Canadian Cases.

the Intercolonial Railway for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. Between the verdict and a judgment ordering a new trial *P.* died. *Held*, that under Lord Campbell's Act or the equivalent statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived (*White* v. *Parker*, 16 S. C. R. 699).

"No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord Campbell's Act (9 & 10 Vict. c. 93) there was in *England* no right of action for the recovery of damages in respect of an injury causing death, nor until R. S. O., 1877, c. 128 [now R. S. O., 1897, c. 166], in Ontario" (*Monaghan* v. *Horn*, 7 S. C. R. 420—Ritchie, C.J.).

Canadian Pacific R. W. Co. v. *Robinson*, 19 S. C. R. 292.

Lord Campbell's Act, R. S. M. c. 26; compensation in respect of death; measure of damages (*Davidson* v. *Stuart*, 14 Manitoba L. R. 74).

A woman claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them with her two children as co-plaintiffs to recover damages. Subsequently another action was brought by another woman, also claiming to be the deceased's

action, even although the circumstances amount in law to a felony (9 & 10 Vict. c. 93, s. 1). Art. 77.

Canadian Cases.

widow, to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff. *Held*, that only one action would lie under the Act, that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, that action should be allowed to proceed and the rights of all parties worked out in it, the second action being stayed; the plaintiff in the second action to be represented by counsel at the trial if desired. Judgment of Falconbridge, C.J., reversed (*Amie F. Morton et al.* v. *Grand Trunk Railway Co.*; *Maud Morton* v. *Grand Trunk Railway Co.*, 8 O. L. R. 372).

An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained as widow, *pendente lite*, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial judge found against the plaintiff's status and in the defendants' favour on the facts as to the obtaining of the release. The jury found negligence, and assessed the damages at $1,500, apportioning the sum equally between the plaintiff and the mother. *Held*,

Art. 77.

(2) Every such action must be for the benefit of the wife, husband, parent and child of the deceased, and must be brought by and in the name of the executor or administrator of the deceased

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Canadian Cases.

that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; Meredith, J., dissenting, and being of the opinion that there should be a new trial upon the whole case.

2. That the release given by the plaintiff should not, on the evidence, be held binding on her.

3. That, on the evidence, the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750.

4. That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to show that the plaintiff was the true widow.

5. That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action.

Trice v. *Robinson* (1888), 16 O. R. 433, and *Murphy* v. *Grand Trunk R. W. Co.*, unreported decision of a Divisional Court, 27th May, 1889, applied and followed. Judgment of Idington, J., 7 O. L. R. 747, reversed (*Doyle* v. *Diamond Flint Glass Co.*, 8 O. L. R. 499).

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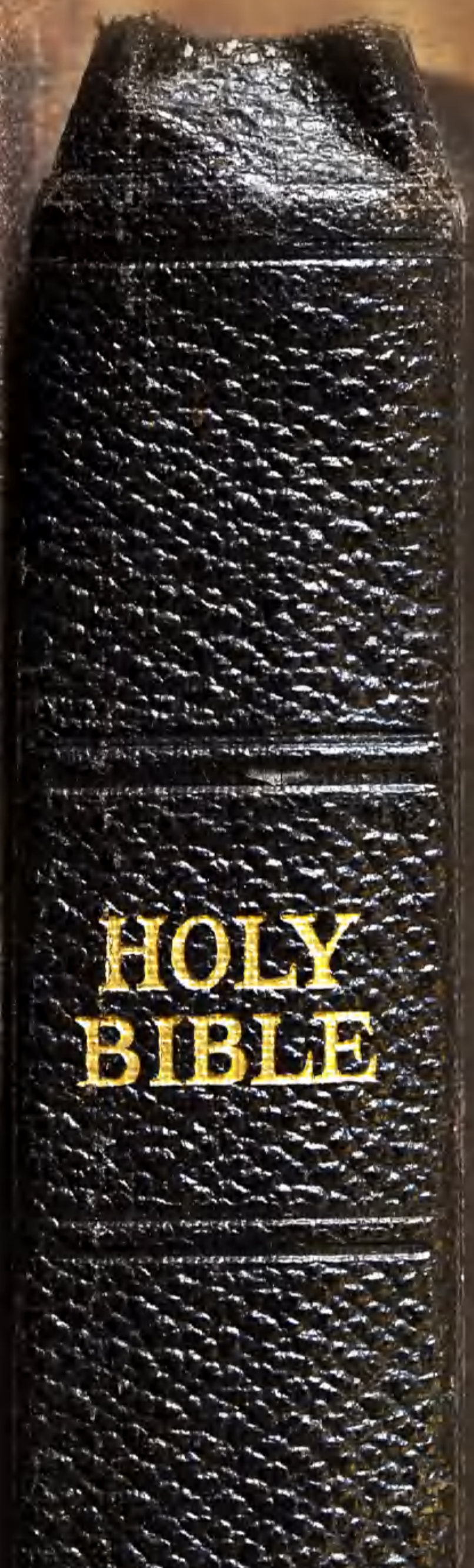

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Art. 77.

which establishes a statutory exception to the common law maxim "*actio personalis moritur cum personâ*," the following points must be remembered—

(1) The personal representatives (or should they not sue, the parties mentioned in the last clause of the rule) can only maintain the action in those cases in which, had the deceased lived, he himself could have done. So that, if the deceased were guilty of such contributory negligence as would have barred him from succeeding, those claiming as his representatives can stand in no better position (*Pym* v. *Great Northern Rail. Co.*,[107] 4 B. & S. 396).

Canadian Cases.

to show that the plaintiff had a reasonable expectation of pecuniary or material benefit from the life of the person killed (*Mason* v. *Bertram*, 18. O. R. 1).

An action for damages by reason of the death of a person can be maintained under R. S. O. c. 135, sect. 7 [now R. S. O., 1897, c. 166, sect. 8], by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased (*Lampman* v. *Corporation of Gainsborough*, 17 O. R. 193).

"The 7th section of the R. S. O. c. 135 [now sect. 8, R. S. O., 1897, c. 166], follows the Imperial Act, 27 & 28 Vict. c. 95, sect. 1, which forms an amendment to Lord Campbell's Act" (Rose, J., *ibid.*).

[107] Although on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss, for which damages may be recovered, as is also

Art. 77.

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased. *Parent* includes a grand-parent and a step-parent. The word *child*, a grand-child and a step-child, and a child *en ventre sa mère* (*The George and Richard*, L. R. 3 Adm. 466; 24 L. T. 717) (*a*), but not a bastard (*Dickinson* v. *North Eastern Rail. Co.*,[108] 2 H. & C. 735). The jury apportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is brought must have suffered some pecuniary loss by the death of the deceased (*Franklin* v. *South Eastern Rail. Co.*, 3 H. & N. 211). "*Pecuniary* loss" means "some substantial detriment in a worldly point of view." Thus, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*Pym* v. *Great Northern Rail. Co.*, *supra*; *Franklin* v. *South Eastern Rail. Co.*, *supra*); as where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*Hetherington* v. *North Eastern Rail. Co.*, 9 Q. B. D. 160). Even loss of mere gratuitous liberality (*Dalton* v. *South Eastern Rail. Co.*, 27 L. J. C. P. 227), or loss to the personal property of the deceased by medical expenses is sufficient (*Bradshaw* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 10 C. P. 189; but see *Leggott* v. *Great*

(*a*) The reader must not be misled by this case into concluding that an action *in rem* against a ship may be maintained under the Act. See *Seward* v. *The Vera Cruz*, 10 App. Cas. 59.

Canadian Cases.

the loss to the children of the care and moral training of their mother (*The St. Lawrence and Ottawa R. W. Co.* v. *Lett*, 11 S. C. R. 422. Leave to appeal to the Judicial Committee was refused; see also *Canadian Pacific R. W. Co.* v. *Robinson*, 14 S. C. R. 105).

[108] *Gibson* v. *Midland R. W. Co.*, 2 O. R. 658.

Art. 77.

Northern Rail. Co., 1 Q. B. D. 599). Grief, mourning, and funeral expenses, however, cannot be taken into account (*per* BRAMWELL, *Osborn* v. *Gillett*, L. R. 8 Ex. 88); nor can a person recover compensation where the pecuniary advantage he has lost arose from a contract between himself and the deceased, and not from his relationship to him (*Sykes* v. *North Eastern Rail. Co.*, 44 L. J. C. P. 191).

(4) If the deceased obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*Read* v. *Great Eastern Rail. Co.*, L. R. 3 Q. B. 555. But see *Daly* v. *Dublin, etc. Rail. Co.*, 30 L. R. Ir. 514, where the Irish courts decided *contra*).

(5) The death must be actually caused by the wrongful act for which compensation is sought.

(6) The action must be brought within twelve calendar months after the death of the deceased.

(7) Where a deceased has made provision for his wife, by insuring his life in her favour, then, inasmuch as she is benefited by *the accelerated receipt* of the amount of the policy, the jury ought, in estimating the widow's loss, to deduct from the future earnings of the deceased not the amount of the policy moneys, but the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy (*Grand Trunk Rail. Co.* v. *Jennings*, 13 App. Cas. 800).

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Art. 78.

(5) A person suffering damage from a private nuisance has a remedy by action for damages or injunction or both.

(6) Liability for nuisance is independent of negligence.

(7) No use of property which would be legal if due to a proper motive, can be a nuisance merely because it is prompted by a motive which is improper or even malicious (*Bradford Corporation* v. *Pickles*, [1895] A. C. 587).

Illustrations.

(1) Thus the storing of water on a man's own land in large quantities, and allowing it, either with or without negligence, to escape on to the land of his neighbour, is a private nuisance.

(2) So setting up a noisy or a noisome factory in a residential neighbourhood may be a public or private nuisance according to the number of people annoyed.

(3) Again, to dig a hole in a highway is an unauthorised interference with the public right of using the highway which constitutes a public nuisance; and

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Canadian Cases.

made by the horses are a source of annoyance and inconvenience to the neighbouring residents the proprietor is liable in damages for the injury caused thereby (*Drysdale* v. *Dugas*, 26 S. C. R. 20).

"The doctrine seems well established that where a man suffers a particular injury by a nuisance he may maintain an action, the injury being direct and not consequential" (*Fairbanks* v. *G. W. Rail. Co.*, 35 U. C. R. 531—Richards, C.J.).

Fuller v. *Pearson*, 23 N. S. R. 263; *Park* v. *White*, 23 O. R. 611.

Art. 78.

so it is to allow rubbish or filth to be deposited on your land so as to be injurious to the inhabitants of the neighbourhood (*Att.-Gen.* v. *Heatley*, [1897] 1 Ch. 560).

(4) So, also, traders who keep vans in a street for an unreasonable time for the purpose of loading and unloading, cause an unreasonable obstruction which may amount to a public nuisance (*Att.-Gen.* v. *Brighton Supply Association*, [1900] 1 Ch. 276).

(5) The law with regard to private nuisances mainly depends upon the maxim *sic utere tuo ut alienum non lædas*. Not that that maxim can receive a literal interpretation, for a man may do many acts which may injure others (*ex. gr.*, build a house which may shut out a fine view theretofore enjoyed by a neighbour); but such acts are necessarily incidental to the ownership of property. The acts referred to in the maxim are acts which go beyond the recognised legal rights of a proprietor—acts, so to speak, *ultra vires*, which are an abuse of those legal rights.

Lawful act done with malicious motive.

(6) The owner of land containing underground water which percolates by undefined channels, and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land, so as to deprive his neighbour of it (*Chasemore* v. *Richards*, 7 H. L. Cas. 349). An owner diverted underground water percolating in undefined channels, not to improve his own land, but maliciously in order to injure his neighbours by depriving them of their water supply and to compel them to buy him out. This unneighbourly conduct, however, was held to be lawful, because it was an act rightful in itself, and therefore not wrongful because done maliciously (*Bradford Corporation* v. *Pickles* [1895] A. C. 587).

Art. 79.

SECTION I.—OF PRIVATE DAMAGE FROM PUBLIC NUISANCE.

ART. 79.—*General Rule.*

No action can be brought for a public nuisance by a private person unless he has suffered some substantial particular damage beyond that suffered by the public generally.

General principle.

A public nuisance is a misdemeanor. If anyone could bring an action in respect of a public nuisance without proof of damage peculiar to himself, the person committing the nuisance would be liable to be sued by every member of the public. Hence the proper procedure is by indictment or by action brought by the Attorney-General as representing the public (see *supra*, p. 13).

But a private person who has suffered some particular damage beyond that suffered by the public generally—some damage different in kind from that suffered by the public generally—can sue for damages in respect thereof. Thus obstructing a highway is a public nuisance.[116] A person who is merely prevented from using the highway suffers only the same damage as any other member of the public (*Winterbottom* v. *Lord Derby*,[117] L. R. 2 Ex. 316).

Canadian Cases.

[116] *Rounds* v. *Corporation of Stratford*, 25 U. C. C. P. 123.

[117] A person who, with the knowledge of and without objection by a municipal corporation, constructs across a ditch between the sidewalk and the crown of the highway an approach therefrom to enable vehicles to pass to and from his property adjacent to the highway, is liable for injuries sustained through want of repair of the approach,

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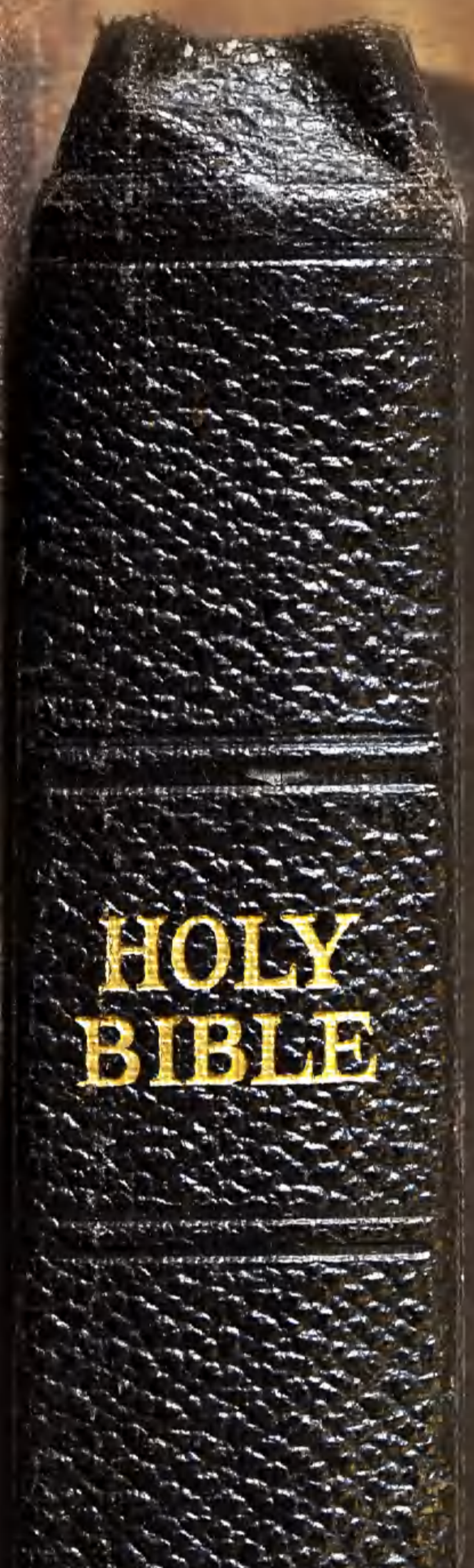

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Art. 79.

Nuisances to highways.

Nuisances to highways consist in any obstruction of the highway or anything which renders the use of the highway unsafe or incommodious for the public, as by physically stopping it up, or making excavations on or immediately adjoining it, or by maintaining ruinous fences or buildings immediately adjoining it.[118]

Canadian Cases.

to a full stop, and the plaintiff, who had purchased a ticket for that station, received injuries on alighting there, it was *held*, that there was evidence of an invitation to alight, and the jury having found in favour of the plaintiff the verdict was upheld (*Edgar et ux.* v. *The Northern R. W. Co.*, 11 O. A. R. 452).

"In an action of this nature the judge must say whether, upon the whole facts in evidence, negligence can legitimately be inferred; the jury have to say, in case the judge rules that there is evidence from which it may be so inferred, whether it ought to be inferred" (*Ibid.*—Burton, J.A., at p. 453).

McGibbon v. *Northern R. W. Co.*, 14 O. A. R. 91.

[118] Anything which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway. A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff in endeavouring to pass under the branch on the top of a load of hay was brushed off by it and injured. It was *held* that defendants were liable (*Ferguson* v. *Township of Southwold*, 27 O. R. 66).

Where an object is left overnight on the highway unlighted and unguarded (in this case

(1) Thus, where a man makes an excavation adjoining a building in process of removal), which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice, have taken no precaution to warn travellers, the municipality is liable, in the absence of contributory negligence, but is entitled to be indemnified by the person who placed the obstruction on the highway (*Rice* v. *Corporation of Whitby*, 28 O. R. 598). See R. S. O., 1897, c. 223, s. 609, and *ante*, p. 376; *McMullin* v. *Archibald*, 22 N. S. R. 146; *Shannahan* v. *Ryan*, 20 N. S. R. 142; *Robertson* v. *Halifax Coal Co.*, 20 N. S. R. 517; *York et al.* v. *Canada Atlantic S.S. Co.*, 24 N. S. R. 436.

Art. 79.

Examples.
Excavations.

Canadian Cases.

The word "repair" as used in the municipal act with reference to a highway is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied (*Foley* v. *Township of East Flamborough*, 29 O. R. 139; *Ewing* v. *City of Toronto*, *ibid.* 197; *Macdonald* v. *Corporation of the Township of Yarmouth*, *ibid.* 259; *Atkinson* v. *City of Chatham*, *ibid.* 525).

The defendants' sewer emptied into navigable water at the end of one of their streets, in which water the plaintiffs' vessel was lawfully moored for the winter. The defendants, although notified of similar consequences having previously happened, allowed a factory to send hot water down the sewer which melted the ice on the easterly side of the vessel, causing her to fall away on that side, so that the oakum packing in her seams, remaining frozen to the ice on the west side, was

Art. 79. a highway, and keeps it unfenced, he commits a public [118a] nuisance and is liable for any injury occasioned to a person falling into it (*Barnes* v. *Ward*, 9 C. B. 392).

Canadian Cases.

torn away, the seams opened, and water was let in, whence the damage resulted. *Held*, that the defendants were liable, as the plaintiffs were lawfully using the waters, and the discharge of the hot water was, under the circumstances, a public nuisance; and the plaintiffs having suffered special damage therefrom were entitled to recover against the defendants (*Mathews* v. *The Corporation of the City of Hamilton*, 6 O. L. R. 198).

By the provisions of a municipal bye-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street. *Held*, that the company had not discharged their obligation, and that they were liable to indemnify the city against damages recovered against the city by a person who had in consequence of the bank been upset while driving along the street. Judgment of Rose, J., affirmed (*Mitchell* v. *City of Hamilton*, 2. O. L. R. 58).

[118a] The defendant company made an excavation across a sidewalk on a public street, in the city of Halifax, for the purpose of laying cables underground. The excavation was protected after working hours by a number of barrels with planks laid

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Art. 79.

spikes whilst using the highway (*Fenna* v. *Clare*, [1895] 1 Q. B. 199). And, similarly, where a boy attempted wrongfully to climb a rotten fence adjoining a highway, and the fence fell upon and injured him, he was held to be entitled to recover, because the fence was a nuisance, and he only did what might have been expected of a boy (*Harrold* v. *Watney*, [1898] 2 Q. B. 320). It is probable that in the last two cases the plaintiffs would not have succeeded if they had not been children. In the last case, at any rate, the boy was a trespasser. He had no right to climb the fence, and the fence was not like an excavation immediately adjoining a highway, which anyone lawfully using the highway might by accident fall into.

Excavations. not adjacent to roads.

(4) An excavation on land not immediately adjoining a highway is not a nuisance, and a trespasser has no right of action if he falls into it, unless it amount to a trap (see *Hounsell* v. *Smythe*,[120] *supra*, p. 336).

Liability of highway authorities.

(5) A highway authority is not liable for damage caused to an individual by mere *non-feasance*. The only remedy is by indictment for non-repair. But for particular damage caused to an individual by a public nuisance due to *misfeasance*, a highway authority is liable like any other person committing a nuisance (see *Russell* v. *Men of Devon*, 2 T. R. 667; *Thompson* v. *Brighton Corporation*, [1894] 1 Q. B. 332; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345). Thus, a highway authority is liable for damage to an individual caused by his falling over a heap of stones left in a street unlighted, for that is misfeasance (*Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214), but not to a person who is injured by reason of the highway being allowed to fall

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Canadian Cases.

[120] *Howarth* v. *McGregan*, 23 O. R. 396.

into disrepair, for that is mere non-feasance (*Russell* v. *Men of Devon*, *ubi supra*; *Thompson* v. *Brighton Corporation*, *ubi supra*). Art. 79.

SECTION II.—OF PRIVATE NUISANCES TO CORPOREAL HEREDITAMENTS.

Art. 80.—*General Liability.*[121]

Any private nuisance whereby sensible injury is caused to the property of another, or, whereby the ordinary physical comfort of human existence in such property is *materially* interfered with, is actionable.

Illustrations.

Fumes.

(1) Thus, in the case of *Tipping* v. *St. Helens Smelting Co.* (L. R. 1 Ch. 66), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

Noisy and noisome trades.

(2) So, too, it was said, in *Crump* v. *Lambert* (L. R. 3 Eq. 409), that smoke unaccompanied with noise, or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence in the plaintiff's property.

Inconvenience must be substantial.

(3) But the damage must be substantial. In *Walter*

Canadian Cases.

[121] The Municipal Act, R. S. O., 1897, c. 223, s. 586, empowers the councils of municipalities to pass bye-laws for the purpose of preventing and abating public nuisances.

Art. 80.

v. *Selfe*[122] (4 De G. & Sm. 322), KNIGHT BRUCE, V.-C., said: "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?"

Noisy entertainments.

(4) The collection of a crowd of noisy and disorderly people outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*Walker* v. *Brewster*, L. R. 5 Eq. 25. See also *Inchbald* v. *Robinson*, L. R. 4 Ch. 388).

(5) A proprietary club was established for pugilistic encounters, which caused the collection of large and

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Canadian Cases.

[122] The plaintiff claimed damages in an action against the defendants for injuries caused to his land and crops by the negligence and wrongful construction of a ditch by the corporation, in consequence of which water diverted from its natural course and collected in the ditch overflowed upon plaintiff's land. This work had been done under a bye-law simply authorising the expenditure of money upon the ditch, which was dug wholly upon land under defendants' control. *Held*, that such a bye-law could not make lawful an act causing damage by flooding private lands (*Rayleigh* v. *Williams*, distinguished; *Foster* v. *Municipality of Lansdown*, 12 M. R. 416).

Church of St. Margaret v. *Stephens*, 29 O. R. 185.

Barlow v. *Kinnear*, N. B. R. 2 Kerr. 94.

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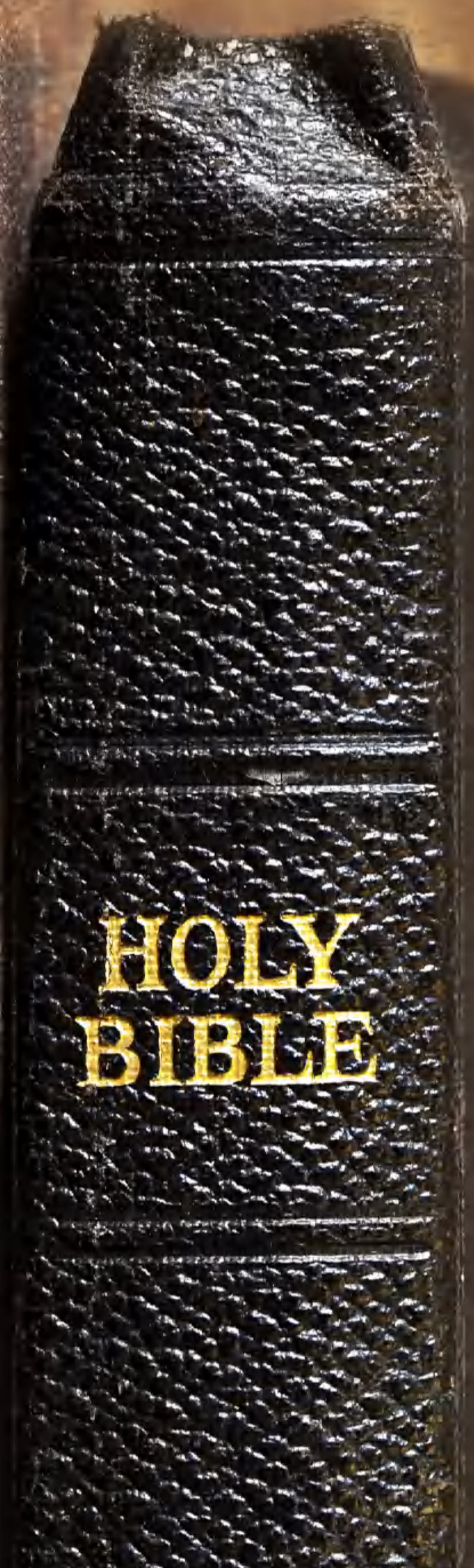

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Art. 80.

property by shaking it or otherwise (*Harrison* v. *Southwark Water Co.*, [1891] 2 Ch. 409; *Colwell* v. *St. Pancras Borough Council*,[123] [1904] 1 Ch. 707).

Dangerous substances.

(9) If a person allows substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence. Thus, as we have seen (*supra*, pp. 27—36), one who brings or collects water upon his land, does so at his peril; and if it escape and injure his neighbour, he is liable, however careful he may have been (*Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Fletcher* v. *Smith*, 2 App. Cas. 781; *Buckley* v. *B.*,[124] [1898] 2 Q. B. 608), unless the escape was caused by something

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Canadian Cases.

[123] "It is clear that by English law the lessee or vendee continuing previously existing nuisances is liable, though the original creator may also be liable" (*Sibbald* v. *Grand Trunk R. W. Co.*, 18 O. A. R. 194—Hagarty, C.J.O.).

Both the landlord and tenant are liable for damages arising from a nuisance erected by the landlord of a house, and continued to be used by the tenant in occupation (*McCallum* v. *Hutchison and Another*, 7 U. C. C. P. 508).

"But if the premises are let to a tenant, unless they are let with a nuisance upon them, the landlord is not liable for anything done by the tenant unless expressly authorised, or in the nature of a nuisance which he permitted. But in no case can the landlord be made liable for the negligence of his tenant, and the principle must be the same in the case of a person in possession under a licence" (*Ward* v. *Caledon*, 19 O. A. R. 76—Burton, J.A.; and see *Smith* v. *Humbert*, N. B. R. 2 Kerr, 602, *ante*, p. 167, and *Castor* v. *Uxbridge*, *ante*, p. 374).

[124] O. and S. were adjoining proprietors of land in the village of Frankfort, Ont., that of O. being

Art. 80.

quite beyond the possibility of his control, as the act of God, or of a third party whose acts he could not foresee or control (*Nichols* v. *Marsland*, 2 Ex. Div. 1; *Box* v. *Jubb*, 4 Ex. Div. 77). And the same principle has recently been held to apply to the storing of large quantities of electricity, the escape of which may do injury to life, limb, and property (*Eastern, etc. Telegraph Co.* v. *Capetown Tramways Co.*, [1902] A. C. 381). But where water is naturally upon the land, the owner is

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Canadian Cases.

situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887 S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed upon the land of O., who brought an action against S. for the damage caused thereby. *Held*, that S., having a right to cut off the part of the culvert which projected over his land, was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain (*Ostrom* v. *Sills et al.*, 28 S. C. R. 485, and *post*, p. 472).

"A charge of negligence in the construction of highways, producing injury by flooding someone's land, is not by any means a novelty with us. We find the right of action sustained by a series of decisions reaching back for over thirty years" (*Derinzy* v. *Corporation of Ottawa*, 15 O. A. R. 720—Hagarty, C.J.O.).

Ward v. *Caledon*, 19 O. A. R. 69; *The Chandler Electric Co.* v. *Fuller*, 21 S. C. R. 337; *Shaw* v. *McCreary*, 19 O. R. 39.

Art. 80.

only liable for negligence in keeping it. Nor is a mine owner liable because, by reason of his operations, water naturally percolates into the mines of his neighbours (*Wilson* v. *Waddell*, 2 App. Cas. 95). On the same ground, a landowner is not liable because the seed of thistles, permitted to grow on his land, is blown by the wind on to the land of his neighbour (*Giles* v. *Walker*,[125] 24 Q. B. D. 656). And so, also, where water is brought upon land, or into a house, by the defendant, but for the joint use of himself and the plaintiff, the latter cannot complain of any damage (not attributable to the defendant's negligence) which its escape may cause to him (*Anderson* v. *Oppenheimer*, 5 Q. B. D. 602).

Shifting danger from self to neighbour.

(10) It has been held in a recent case (*Whalley* v. *Lancashire and Yorkshire Rail. Co.*, 13 Q. B. D. 131) that even if a person has not brought the dangerous substance on to his land, he is liable if he takes *active means* to shift the danger from himself to his neighbour. In that case, by reason of an unprecedented rainfall, a quantity of water accumulated against one of the sides of the defendants' enbankment so as to endanger its stability. To prevent this the defendants cut trenches in the embankment, and so let the water flow on to the plaintiff's land, and injured it. It was held that although the defendants had not brought the water on to their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff. They would have been entitled, no doubt, to *prevent* the water getting against their embankment, but they had no right, when once it was there, to transfer it to their neighbour, any more than the owner of a natural lake could drain it on to his neighbour's lands.

Canadian Cases.

[125] *Osborne* v. *The Corporation of Kingston*, 23 O. R. 382.

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Art. 80. on to another's property (*Bathishill* v. *Reed*, 25 L. J. C. P. 290), or overhanging trees (*Lemmon* v. *Webb*, [1895] A. C. 1; *Smith* v. *Giddy*, [1904] 2 K. B. 448); or pigstys creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are nuisances, if the jury find that serious discomfort is caused; although, where the jury find that no serious discomfort has arisen, the court will not interfere (*Street* v. *Gugwell*, Selwyn's N. P., 13th ed. 1090). So, also a small-pox hospital, so conducted as to spread infection to adjoining lands, is a nuisance (*Hill* v. *Metropolitan Asylums Board*, 6 App. Cas. 193).

Art. 81.—*Reasonableness of Place.*[127]

Where an act is proved to interfere with the enjoyment of property, so as to be *primâ facie* a nuisance, it cannot be justified by the fact that it

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Canadian Cases.

dangerous nuisance created by it on a highway within the limits of its control, and the misconduct will be treated as a misfeasance and not mere non-feasance, if the injury arises from a combination of acts and omissions on the part of the corporation (*Patterson* v. *City of Victoria*, 5 B. C. Reps. 628).

[127] On 5th October, 1903, defendant hired rooms in Sparks Street, a business part of Ottawa, and gave lessons in music to a large number of pupils, between the hours of 9 a.m. and 10 p.m. The plaintiff, on the 10th November following, became the occupant of rooms on the opposite side of the hall in the same building. *Held*, on the evidence, on a motion for injunction, that the noise made in giving music lessons, to which objection was taken

Art. 81.

was done in a proper and convenient spot and was a reasonable use of the defendant's land (*Bamford* v. *Turnley*, 31 L. J. Q. B. 286). But acts which would be a nuisance in one locality may not be so in another (*St. Helens Smelting Co.* v. *Tipping*, 11 H. L. Cas. 650).

Illustrations.

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it. Thus, where the defendant used his land for burning bricks and so caused substantial annoyance to his neighbour, it was held that it was no defence that it was done in a proper and convenient spot, and was a reasonable use of the land (*Bamford* v. *Turnley*, *ubi supra*). At the same time a person is entitled to use his land or house in the ordinary way in which property of the like character is used, and an adjacent owner must put up with such

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Canadian Cases.

by plaintiff, was reasonably connected with and incidental to the teaching, and the defendant's use of the premises was not an unreasonable one: that teaching music in such premises must, in order to afford ground for granting an injunction, be done in a manner which, beyond fair controversy, ought to be regarded as unreasonable, and that an injunction would break up the defendant's business, while the plaintiff could be compensated in damages if entitled to recover (*Pope* v. *Peate*, 7 O. L. R. 207).

Art. 81.

noises and inconveniences as may reasonably be expected from his neighbours, such as the noise of a pianoforte, or the noise of children in their nursery, which are noises which we must reasonably expect, and must, to a large extent, put up with (see *Ball* v. *Ray*, L. R. 8 Ch. 471; *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; and *Christie* v. *Davey*, [1893] 1 Ch. 316).

(2) In *St. Helens Smelting Co.* v. *Tipping*, *supra*, Lord WESTBURY said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or

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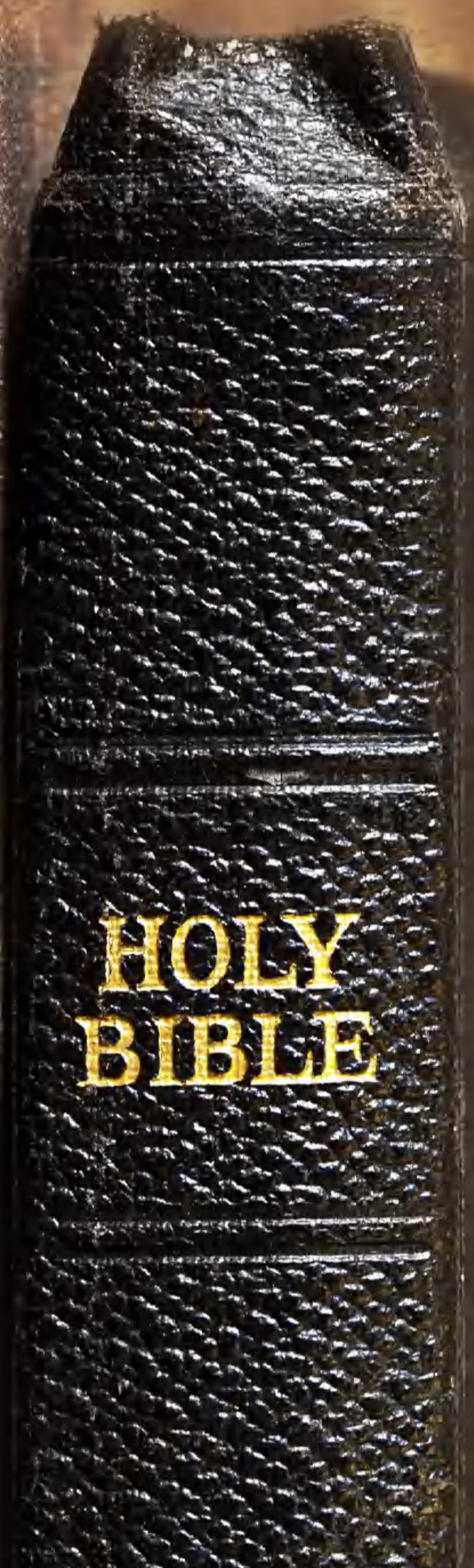

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Art. 82. however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house.

Art. 83.—*How far Right to commit a Nuisance can be acquired.*

The right to commit a private nuisance may be gained by statute, custom, grant, or prescription (as to prescription, see *post*, Arts. 86 and 87). The right to commit a public nuisance can only be acquired by clear statutory authority (see *Wright* v. *Williams*, 1 M. & W. 77, and *Crossley* v. *Lightowler*, L. R. 2 Ch. 478).

Illustrations.

London and Brighton Rail. Co. v. *Truman.*

(1) Thus, a railway company were by their Act authorised, among other things, to carry cattle, and also to purchase by agreement any lands not exceeding in the whole fifty acres, *in such places as* should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences, for receiving, loading, or keeping any cattle, goods, or things, conveyed, or intended to be conveyed, by the railway. Under this power, the railway company bought land adjoining one of their stations, and used it as a yard for their cattle traffic. The noise of the cattle and drovers was a nuisance to the owners of houses near to the station, which, but for the Act, would clearly have entitled them to maintain an action. It was, however, held, that the purpose for which the land was acquired, being expressly authorised by the Act, and *being incidental and necessary* to the

Art. 83.

authorised use of the railway for the cattle traffic, the company were entitled to do what they did, and were not bound to choose a site more convenient to other persons. In giving judgment, Lord HALSBURY said: "It cannot now be doubted, that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of those functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law." His Lordship, on the construction of the particular Act, came to the conclusion that the powers of the Act did necessarily involve the creation of a nuisance by the company somewhere along their line, and gave to the company the absolute discretion as to the locality, and accordingly held that the parties injured had no remedy (*London and Brighton Rail. Co.* v. *Truman*, 11 App. Cas. 45). The same principle has been applied in the case of an Electric Tramway Co. whose electricity caused disturbance in adjacent telephone wires (*National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186).

Metropolitan Asylum District Board v. *Hill.*

(2) The last-mentioned cases, must, however, be carefully distinguished from that of *Metropolitan Asylum District Board* v. *Hill*[129] (6 App. Cas. 193) (*a*). There it

(*a*) As to the evidence necessary to sustain a *quia timet* action for an injunction to prohibit a proposed small-pox hospital, see *Att.-Gen.* v. *Mayor of Manchester*, [1893] 2 Ch. 87.

Canadian Cases.

[129] Section 72 of the Public Health Act, R. S. O., 1897, c. 248, which prohibits, under a penalty, the establishment, without the consent of the municipality, of "any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or," setting out a number of similar trades, "or any other noxious or offensive trade, business or manufacture or such as may become offensive," etc.,

Art. 83.

appeared, that by their Act the Metropolitan Asylum District Board were authorised to purchase lands and erect buildings, to be used as hospitals. But it did not by direct or imperative provision order these things to be done. The Board erected a small-pox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held, that the Board could not set up the statute as a defence. Lord BLACKBURN, in the course of his judgment, laid it down, that on those who seek to establish that the legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or *necessary implication*. And Lord WATSON affirmed that where the terms of a statute are *not imperative* but *permissive*, the fair inference is that the legislature intended that the general powers thereby conferred, should be exercised in strict conformity with private rights; but that where they are imperative, the legislature intends that the powers should be exercised with impunity although, and apart from the statutory authority, their exercise would be wrongful. This distinction was affirmed and acted upon by the Judicial Committee of the Privy Council in *Canadian Pacific Rail. Co.* v. *Parke* ([1899] A. C. 535, 545). The distinction between the *two cases* was pointed out by Lord SELBORNE (11 App. Cas. 57) as follows: "In that case (*Metropolitan*

Canadian Cases.

does not apply to a house or hospital for consumptive patients, for not only is it excluded under the doctrine of *ejusdem generis*, but also by virtue of the legislative grouping of the sections of the Act, sect. 72 being under the subdivision dealing with nuisances, while infectious diseases and hospitals are dealt with in a distinct subdivision, commencing with sect. 81. Conviction quashed (*Regina* v. *Playter* (1901), 1 O. L. R. 360).

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Art. 83. by the statute. Its powers, if exercised at all, must be exercised with care. In the absence of contrary intention, its duties and liabilities are the same as those imposed upon a private person doing the same thing (*Sanitary Commissioners of Gibraltar* v. *Orfila*,[131] 15 App. Cas. 400).

ART. 84.—*Liability for Nuisances created by Ruinous Premises.*

(1) As regards liability to persons injured by reason of ruinous premises adjoining a highway, or by ruinous premises being a nuisance to adjoining owners, the person in occupation is *primâ facie* liable (*Russell* v. *Shenton*, 3 Q. B. 449; *per* LOPES, J., in *Nelson* v. *Liverpool Brewery Co.*, 2

Canadian Cases.

[131] *Pictou* v. *Geldert*, [1893] A. C. 524.

The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove, whereby he was injured. In an action by the owner against the company it appeared that the rail at the place where the accident occurred was above the level of the roadway. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorised by statute, and therefore a nuisance, and the company was liable for the injury to the horse caused thereby (*The Halifax Street Ry. Co.* v. *Joyce*, 22 S. C. R. 258).

C. P. D. 313). But if the premises are let to a tenant by a landlord who covenants with the tenant to do repairs, the landlord alone is responsible (*Payne* v. *Rogers*, 2 H. Bl. 350; *Rich* v. *Basterfield*, 4 C. B. 783). And if the landlord has caused or authorised the continuance of the nuisance as by letting premises in a ruinous condition, without any covenant to repair, it seems that both the landlord and the tenant are responsible (*Todd* v. *Flight*, 9 C. B. (N.S.) 377; *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658). Art. 84.

(2) When premises are let on a weekly tenancy there is not a re-letting at the end of such week so as to make the landlord liable for nuisances arising since the original letting. In such a case the tenant and not the landlord is liable (*Bowen* v. *Anderson*, [1894] 1 Q. B. 164).

Illustrations.

(1) The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, *at the time of the demise*, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured:—*Held*, that the obligation to repair being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And KEATING, J., said, "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance of this coal shoot, in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he

Art. 84.

authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair."

(2) And in *Todd* v. *Flight*, 9 C. B. (N.S.) 377, where the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, that he *kept and maintained them in that state, and that the tenant was under no obligation to repair*, and the case was tried on demurrer, and the allegation was therefore assumed to be true, it was held that the landlord was liable.

(3) But the above rules only apply to liability for nuisances by the keeping of ruinous premises (a) adjoining a highway, or (b) to the damage of adjoining premises. They have no application as between landlord and tenant, or landlord and the guests of the tenant. Apart from contract, a landlord is not bound to keep the demised premises in repair as regards either his tenant (*Keates* v. *Cadogan*, 20 L. J. C. P. 76), or the guests of his tenant (*Lane* v. *Cox*, [1897] 1 Q. B. 415). As regards the duty of a landlord of flats to keep in repair those portions of the buildings which are not let to tenants (see *Miller* v. *Hancock*, [1893] 2 Q. B. 177, and *Hargroves Aronson & Co.* v. *Hartopp*, [1905] 1 K. B. 472; *supra*, p. 334).

SECTION IV.—NUISANCES TO INCORPOREAL HEREDITAMENTS.[131a]

Introductory.

A servitude is a duty or service which one piece of land is bound to render, either to another piece of land, or to some person other than its owner. Property to

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Canadian Cases.

[131a] Plaintiff's predecessor in title built two houses on a lot with a passage-way between them,

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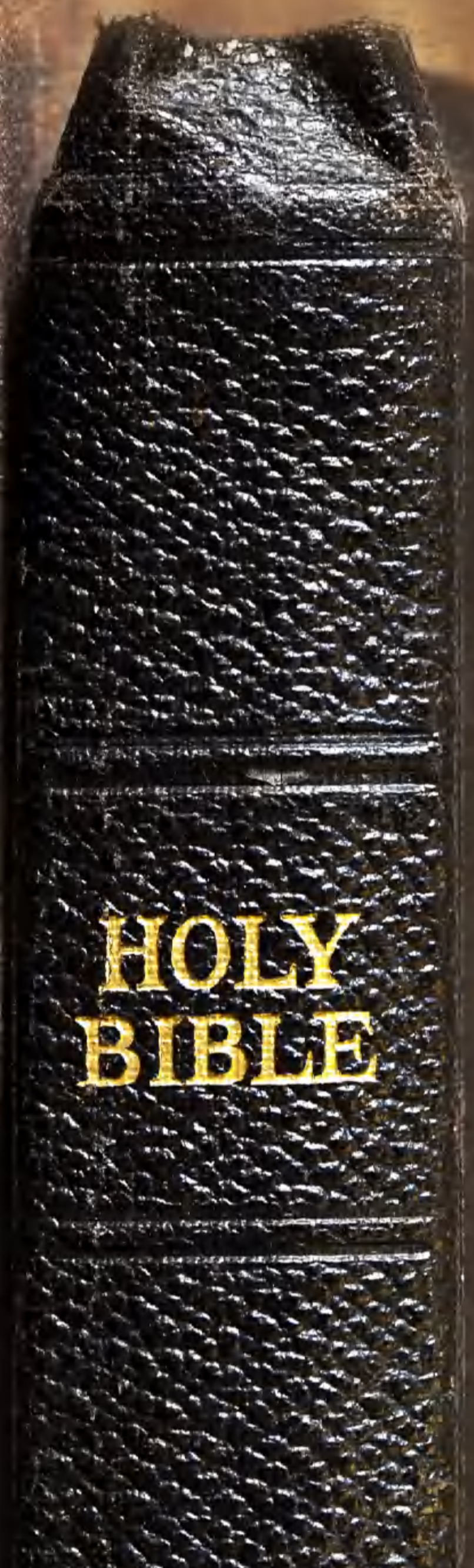

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Art. 84.

Where the right is annexed to a dominant tenement it is said to be appurtenant if it arises by prescription or grant, and appendant if it arises by manorial custom. Where it is annexed merely to a person it is said to be a right in gross.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription, or express or implied grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre in alieno solo*, according as the right is merely a right of user or a right to enter another's land and take something from it, as game, fish, minerals, gravel, turf, or the like.[132]

a

Canadian Cases.

rivers and streams is not a paramount right but an easement, which must be enjoyed with such care, skill, and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to build a bridge or otherwise make use of such watercourse (*Ward* v. *Township of Grenville*, 32 S. C. R. 510).

[132] The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement, and the fact that the burthen has been imposed for over forty

Art. 84.

The easements known to our law are numerous, Mr. Gale, in his excellent treatise on Easements, gives a list of no less than twenty-five "amongst other"

Canadian Cases.

years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O., 1887, c. 111, sect. 35 [now R. S. O., 1897, c. 133, sect. 35] (*Olliver* v. *Lockie*, 26 O. R. 28).

The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the front room having a chimney but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stove pipe through a hole in the partition between his and the south part and thence into the chimney in that part. The owner subsequently leased the south part to the defendant, who at the time he became tenant was aware of the existence of the stove pipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff on coming in put up a pipe of his own, with the consent of, or, at least, without any objection by, defendant. The defendant having afterwards taken down the pipe and stopped up the hole, it was *held* that he was a wrong-doer in doing so, as he only held the south part subject to the user or easement of the plaintiff of the stove pipe and hole (*Culverwell* v. *Lockington*, 24 U. C. C. P. 611).

The nature of the enjoyment of an easement at the time of the grant is the proper measure of enjoyment during the continuance of the grant (*Howard* v. *Jackson*, 21 Grant, 263).

Art. 84. instances. In an elementary work such as this, however, it is only possible to treat of those torts which most often occur in practice, viz.: (1) rights of support for land, (2) rights of support for buildings, (3) rights to the free access of light, and possibly air, (4) rights to the use of water, and (5) rights of way. With regards to *profits à prendre*, only the following torts will be noticed, viz.: disturbances—(1) of rights of common, and (2) of fisheries. Reference will also be made to disturbance of the peculiar incorporeal right called a ferry.

Art. 85.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of mineral matter necessary to retain such neighbour's land in its natural and unencumbered state (*Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Birmingham Corporation* v. *Allen*,[133] 6 Ch. D. 284). A man may not pump

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Canadian Cases.

[133] The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged. *Held*, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose and that they continued to maintain the plaintiff's land in its proper position (*Snarr* v. *Granite Curling and Skating Co.*, 1 O. R. 102, and *post*, p. 457).

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Art. 85.

to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the mines belong to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which he is entitled from the adjoining surface close, it cannot be securely enjoyed as property, and under certain circumstances (as where the mineral strata approach the surface and are of great thickness) it might be entirely destroyed. We likewise think, that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface, and the minerals."

and cannot be extended to remote owners by reason of adjacent owner weakening the support.

(2) A servitude cannot be created by the act of a third party in cases where, but for that act, no servitude would have existed. Between the land of the plaintiffs and that of the defendants, who were the owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity was, that when the defendants worked their coal, subsidence was caused in

Art. 85.

the surface of the plaintiff's land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings:—*Held*, that the plaintiffs had no right of action against the defendants. And Sir G. JESSEL, M.R., said: "It appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiff's land, should have that liability thrown upon him, without any default of his own" (*Corporation of Birmingham* v. *Allen*, 6 Ch. D. 290).

Subterranean water.

(3) But although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there would seem to be nothing at common law to prevent him draining that soil, if for any reason it becomes necessary or convenient for him to do so. It has therefore been held that he is not liable if the result of his drainage operations is to cause a subsidence of his neighbour's land (*Popplewell* v. *Hodgkinson*, L. R. 4 Ex. 248; but see the observations on this case made by LINDLEY, M.R., and LINDLEY, L.J., in *Jordeson* v. *Sutton*, *etc.*, *Gas Co.*, [1899] 2 Ch. at pp. 239, 243). But whatever may be true of percolating waters themselves, if a man withdraws, along with that water, quicksand or water-logged soil, and in consequence thereof his neighbour's land settles and cracks, he will be liable. And the same remark applies *à fortiori* to the withdrawal of pitch or other liquid mineral, and (it is submitted) to mineral oil (*Jordeson* v. *Sutton*, *etc. Gas Co.*, [1899] 2 Ch. 217; *Trinidad Asphalt Co.* v. *Ambard*, *ib.*, 260, and [1899] A. C. 594).

Pecuniary loss not essential.

(4) At one time it was thought, on the authority of *Smith* v. *Thackerah* (L. R. 1 C. P. 564), that actual *loss* must have been suffered in order to give rise to an action for withdrawal of support. However, in *Attorney-*

Art. 85.

General v. *Conduit Colliery Co.* ([1895] 1 Q. B., at p. 311), Collins, J., made the following observations: "I have no doubt whatever that such an action would lie without proof of pecuniary loss. I think the principle at the root of the matter is, that the owner is entitled to have his land 'remain in its natural state unaffected by any act done in the neighbouring land' (see, *per* Willes, J., delivering the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse* (E. B. & E. 622, at p. 657)), and that as soon as the condition of the plaintiff's land has been in fact changed to a substantial extent by the withdrawal of the lateral support, the plaintiff has sustained an *injuria* for which he may maintain an action without proof of pecuniary loss."

Exception.

Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support, by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity in the ordinary way (*Great Western Rail. Co.* v. *Bennett*, L. R. 2 H. L. 29; *Ruabon Brick Co.* v. *Great Western Rail. Co.*, [1893] 1 Ch. 427). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the Act (see *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 42).

Art. 86.—*Disturbance of Support of Buildings.*

(1) A tort is not committed by one, who so deals with his own property, as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has been gained by grant, express or implied (*Partridge* v. *Scott*, 3 M. & W. 220; *Brown* v. *Robins*, 4 H. & N. 186;

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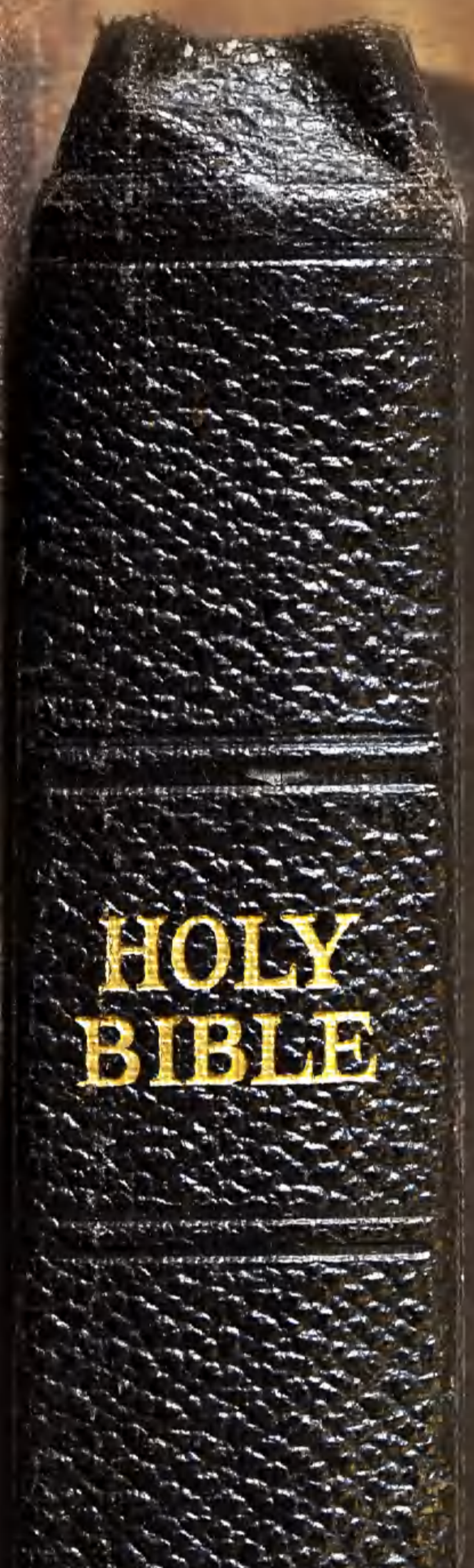

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Art. 86.

(2) But the owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (*Brown* v. *Robins*, 4 H. & N. 186; *Stroyan* v. *Knowles*, 6 *ib.* 454).

Right not *ex jure naturæ*.

(1) Thus, in *Partridge* v. *Scott* (*ubi supra*), it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect." So, again, as between adjoining houses, there is no

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Canadian Cases.

also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E.H., from whom H. derived title. There was no evidence to show that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in the ordinary way. It was *held*, that owing to the unity of seisin of S., there had not been twenty years' continuous enjoyment of the support as an easement, and that even if there had been, no such acquiescence in the use of the servient tenement had been shown as to justify the presumption that an easement had been acquired by grant. *Held* also, that when S. sold H.'s lot there was no implied reservation of the right of support for the house (*Backus* v. *Smith*, 5 O. A. R. 341; and see also *Walker* v. *McMillan*, 6 S. C. R. 241, and *Ross* v. *Hunter*, 7 S. C. R. 289, reversing decision of S. C., N. S.).

obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*Chandler* v. *Robinson*, 4 Ex. 163). Art. 86.

(2) But where houses are built by the same owner, adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists, by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards* v. *Rose*, 9 Ex. 218). And it is apprehended that the same rule would apply where the owner of a detached house sold it, while retaining the adjacent land.[134] Implied grant.

(3) So, again, a grant of a right of support for buildings is gained by uninterrupted user for twenty years, if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the plaintiff's building (*Dalton* v. *Angus*,[134a] 6 App. Cas. 740). This case, which was twice argued before the House of Lords sitting with Right acquired by twenty years' user.

Canadian Cases.

[134] Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass (*Culverwell* v. *Lockington*, 24 U. C. C. P. 611; *Wray* v. *Morrison*, 9 O. R. 183).

[134a] "It was secondly urged that the dam had been erected upwards of twenty years. For the purpose of establishing an easement affecting the private property of others, this would be sufficient,

Art. 86.

the judges as assessors, is the leading authority on the question of support to houses, and the student should carefully study the various judgments. Whether, however, the right rests upon the doctrine of a lost grant (*a*), or upon prescription at common law, or upon the provisions of the Prescription Act, is a question upon which the learned judges and law lords differed; but the law lords all agreed that, even if the right is founded on the presumption of a lost grant, the presumption is absolute, and cannot be rebutted by showing that no grant has in fact been made.

(4) The right established in *Dalton* v. *Angus* to a right of support for an ancient building by the adjacent land, equally applies to support enjoyed from an adjacent building, even although the buildings were erected by different owners (*Lemaitre* v. *Davis*, 19 Ch. D. 281, where HALL, V.-C., considered that the right arose under the Prescription Act).

Where natural right to support of site infringed, the consequent damage to a modern house may be recoverable.

(5) Even although no right of support for a building has been gained, yet if the act of the defendant would

(*a*) As to the theory of "lost grant," which is a presumption of law that an easement or profit enjoyed for a long period must have had a lawful origin, or else it would have been stopped by the owner of the servient tenement, the reader is referred to the opinion of BOWEN, J., in *Dalton* v. *Angus*, 6 App. Cas., at p. 777. At one time the doctrine was restricted to cases in which a grant (in the strict technical sense) would have been possible, but of late years the courts have extended the doctrine to all cases in which the right might have lawfully arisen, either at law *or in equity*, *e.g.*, under a condition, or even under a lost charitable trust in favour of a fluctuating body such as the inhabitants of a town. See *Phillips* v. *Halliday*, [1891] A. C. 231; *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633; *Att.-Gen.* v *Wright*, [1897] 2 Q. B. 318; *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. 214.

Canadian Cases.

generally speaking, but it is not so, where the consequences of this act are *ad commune nocumentum*" (*R.* v. *Brewster*, 8 U. C. C. P. 212—Draper, C.J.), *ante*, p. 433.

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Art. 87. right may be acquired by (a) express or implied grant from the contiguous proprietors; (b) by reservation (express or implied) on the sale of the servient tenement; or (c) by actual enjoyment of

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Canadian Cases.

light and air to the bedrooms in the attic. These windows overlooked the house which B. had erected. A. began to live in the house about December, 1854. The windows remained where they were placed and unobstructed until August, 1874, when the defendant by raising his house and putting a mansard roof upon it, caused the obstruction complained of by closing up the lower half of the windows. There was no evidence of an express grant, the plaintiff relying upon the fact of twenty years' uninterrupted enjoyment. The learned Chief Justice of New Brunswick, before whom the case was tried, directed the jury that "if S., the owner of the land, did not occupy the land himself, but it was occupied by his tenants, then he would not be bound by the user, unless he knew of the windows being there; if he knew and did not obstruct them within twenty years, he would be bound, and the tenancy had nothing to do with the question. On appeal to the Supreme Court of Canada it was *held*, reversing the decision of the Court below, that the duration of Mrs. Ranney's tenancy was a proper question for the jury, and it should have been left to them without the qualification that it made no difference if S. had knowledge of the existence of the windows; for if the tenancy continued subsequently to August, 1854, there was manifestly no user for twenty years with the consent or acquiescence of the defendant and those through whom he claimed, for S., the then owner of the fee, would have had no right to enter upon the possession of his tenant for the

such light for the full period of twenty years without interruption submitted to or acquiesced in for one year after the owner of the dominant tenement shall have had notice thereof, and of the person making or authorising such interruption (2 & 3 Will. IV. c. 71, ss. 3, 4).

(2) Whether a right to the free access of air to land or buildings at large can be gained, except by express grant, seems doubtful (*Bryant* v. *Lefever*, 4 C. P. D. 172; *Chastey* v. *Ackland*, [1895] 2 Ch. 389; see *S. C.*, [1897] A. C. 155). But (*semble*) a a right to the free access of air through a particular defined channel, or through a particular aperture, may be acquired by implied lost grant, or by immemorial user (*Bass* v. *Gregory*, 25 Q. B. D. 481; *Hall* v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655; *Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238; *Chastey* v. *Ackland*, *supra*; but see *contra per* COTTON, L.J., in *Bryant* v. *Lefever*, *supra*).

(3) Where the owner of a house has acquired a right to light in respect of any windows in that house, he is entitled to prevent any person from building so close to those windows as to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the

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Canadian Cases.

purpose of obstructing the lights" (*Pugsley* v. *Ring*, Cassell's Supreme Court Digest, 139, and 2 Pugs. & Burb. (N. B. R.), 303).

Art. 87.

case of business premises) as to render it impossible to carry on business therein as beneficially as before (*Colls* v. *Home and Colonial Stores, Limited*, [1904] A. C. 179).

(4) Where a new building has been erected on the site of one in respect of which a right to the access of light had been gained, then, in order to entitle the owner of the new building to access of light, it must be shown that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window (*Pendarves* v. *Munro*, [1892] 1 Ch. 611; *Scott* v. *Pape*, 31 Ch. D. 554).

Illustrations.

Implied grants of right.

(1) Implied grants of easements are generally founded on the maxim, "A man cannot derogate from his own grant." In other words, the grantor of land which is to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made (*Aldin* v. *Latimer, Clark & Co.*, [1894] 2 Ch. 437). Therefore, if A. grants a house to B., and keeps the land adjoining the house in his own hands, he cannot build upon that land so as to cause a nuisance by depriving the windows of the house of their light, unless he has expressly reserved the right to do so (*Haynes* v. *King*, [1893] 3 Ch. 439; *Broomfield* v. *Williams*, [1897] 1 Ch. 602). And if he grant the house to B. and the land to C., C. has no right to build so as to cause a nuisance by obstructing the light of the house, for A. cannot grant to C. any greater right than he himself possesses (*Allen* v. *Taylor*, 16 Ch. D. 355; *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522).

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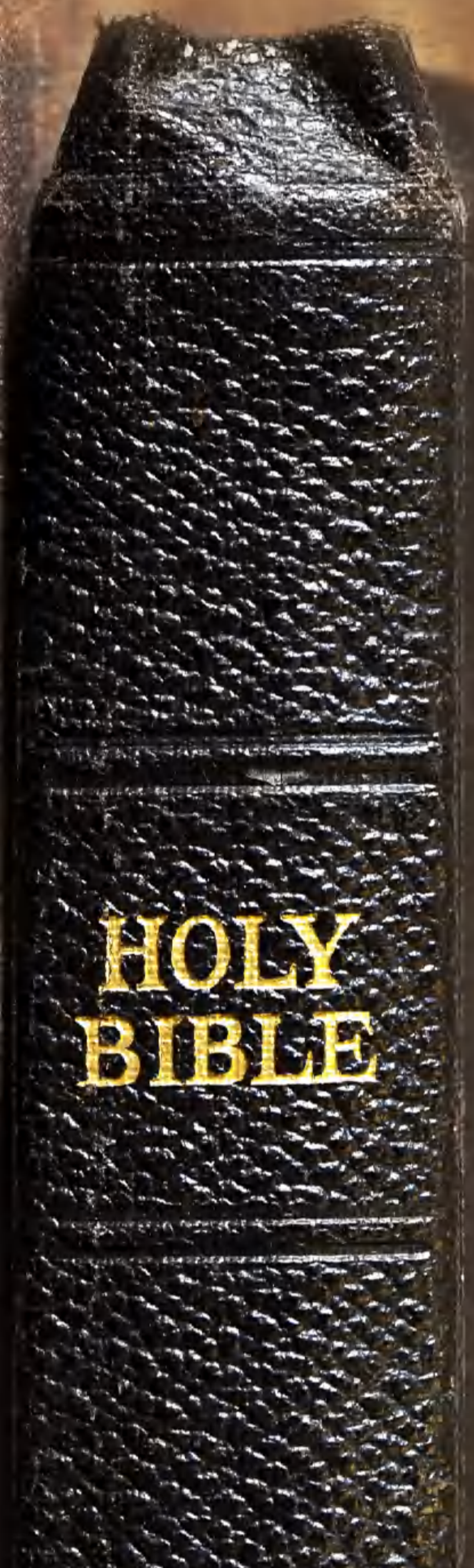

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Art. 87.

Right gained by prescription.

(5) To gain a right by prescription under s. 3 of the Prescription Act,[137] 1832 (2 & 3 Will. IV. c. 71), there must be an uninterrupted user for twenty years without the written consent of the owner of the servient tenement from the time when window spaces are complete and the building is roofed in (*Collis* v. *Laugher*, [1894] 3 Ch. 659). As, however, by s. 4, nothing is to be deemed an interruption unless submitted to for a year after notice, it has been held that enjoyment for nineteen years and

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Canadian Cases.

1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it, the said lot 9 being then open, and not built upon. In 1873, the trustees sold lot 9 to P., who sold it to T., who erected a house thereon. T. sold to G., under whom defendant claimed. At the time *P.* acquired lot 9 he did so subject to a mortgage thereon, and the trustees sold to *P.* subject to such mortgage, which was subsequently discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right of both light and air to the said windows, and that the same had been infringed upon by the erection of T.'s house. In an action therefor the jury found that the right to light had been infringed, but not injuriously. *Held*, that by payment of the mortgage and registration of the discharge, G. did not acquire a new estate such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors. *Held* also, that the finding of the jury was too uncertain to support a judgment for the defendant (*Carter* v. *Grasett*, 11 O. R. 331; 14 O. A. R. 685).

[137] *Burnham* v. *Garvey*, 27 Grant, 80.

330 days, followed by an interruption of thirty-five days just before the action was commenced, was sufficient to establish the right (*Flight* v. *Thomas*, 11 A. & E. 688). However, for the purposes of commencing an action an inchoate title of nineteen years and a fraction is not sufficient, and no injunction will be granted until the twenty years have expired (*Lord Battersea* v. *Commissioners of Sewers*, [1895] 2 Ch. 708). Art. 87.

(6) The interruption, to defeat the right, must be the interruption of the defendant, and not a voluntary deprivation by the plaintiff himself of the access of light. Thus, the owner of a building having windows with movable shutters, which are opened at his pleasure for the admission of light, acquires a prescriptive right to light, under s. 3 of the Prescription Act, at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of light over the neighbouring land as is contemplated by s. 4 (*Cooper* v. *Straker*, 40 Ch. D. 21).

(7) The acquisition of a right to light under the Prescription Act by twenty years' user is absolute, and binds even remaindermen and reversioners. But as ss. 3 and 4 of the Act do not expressly mention the Crown, no prescriptive right to light against the Crown or its tenants can be gained under it (*Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48; *Perry* v. *Eames*, [1891] 1 Ch. 658).

Right to access of air.

(8) Actions to prevent, or to claim damages for, interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on, as a right to the access of "light and air."[138] But this is inaccurate.

Canadian Cases.

[138] In an action for damages by trespass by McI. on M.'s land, and by closing ancient lights, defendant claimed title in himself, and pleaded that a

Art. 87. The cases, as a rule, relate solely to the interference with the access of light, and it has been said that a right to the access of air over the general unlimited surface of

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Canadian Cases.

conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and try the question of boundary only. *Held*, affirming the judgment of the court below (19 N. S. Reps. 419), that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years (*Mooney* v. *McIntosh*, 14 S. C. R. 740).

Defendant in 1855 or 1856 built a house on his lot adjoining the plaintiff's, having three windows looking out upon the plaintiff's land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was thus entirely changed. It was *held*, that he had acquired no right under the statute C. S. U. C., c. 88, sect. 38 [the right to access and use of light by prescription is now abolished by R. S. O., 1897, c. 133, sect. 36], for that he had not enjoyed the access or use of the light at the same place for the statutory period (*Hall* v. *Evans*, 42 U. C. R. 190).

No person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building, but this section shall not apply to any such right which has been acquired by twenty years' use before the 5th day of March, 1880 (R. S. O., 1897, c. 133, sect. 36).

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Art. 87.

light has been so far infringed as to give rise to an action is whether the obstruction is so great as to amount to a nuisance (*Ibid.*, *per* Lord DAVEY, at p. 204). It follows, therefore, that the use of an extraordinary amount of light for twenty years will not give rise to a right to receive that amount of light always, because the question whether an obstruction of light is so great as to be a nuisance cannot be affected by any considerations of what the light has been used for (*Ambler* v. *Gordon*, [1905] 1 K. B. 417). Very generally speaking an obstruction of the light which flows to a window will not be considered a nuisance if the light which remains can still flow to the window at an angle of forty-five degrees with the horizontal, especially if there is good light from other directions as well (*per* Lord LINDLEY in *Colls* v. *Home and Colonial Stores*, [1904] A. C. at p. 210; and see *Kine* v. *Jolly*, [1905] 1 Ch. 480).

Plaintiff contributing to nuisance.

(10) And so, where ancient lights are obstructed, the fact that the owner of the building to which the ancient rights belong has himself contributed to the diminution of the light, will not of itself preclude him from obtaining an injunction or damages (*Tapling* v. *Jones*, 11 H. L. Cas. 290; *Arcedeckne* v. *Kelk*, 2 Gif. 683; *Straight* v. *Burn*, L. R. 5 Ch. 163).

Enlargement of ancient lights.

(11) Nor will an enlargement of an ancient light (although it will not enlarge the right) (*Cooper* v. *Hubbuck*, 31 L. J. Ch. 123) diminish or extinguish it. And therefore, where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights (*Aynsley* v. *Glover*, L. R. 18 Eq. 544).

Right to light exclusively confined to buildings.

(12) The dominant tenement must be a building; and, therefore, a person who grants a lease of a house and garden is not precluded (under the doctrine of not derogating from his own grant) from building on open

ground retained by him adjacent to the house and garden, though, by so doing, the enjoyment of the garden, as pleasure ground, is interfered with, there being no obstruction of light and air to the house (*Potts* v. *Smith*, L. R. 6 Eq. 311). It has, however, been recently held by KEKEWICH, J., that a greenhouse is a building within the meaning of the Prescription Act, and capable of gaining a right to light (*Clifford* v. *Holt*, [1899] 1 Ch. 698). Art. 87.

ART. 88.—*Disturbance of Water Rights.*

(1) Every owner of land on the banks of a natural stream has a right *ex jure naturæ* to the ordinary use of the water which flows past his land (*e.g.*, for irrigation, feeding cattle, domestic purposes, etc.). Such an owner may also make use of the water for other purposes than ordinary ones, provided that, in so doing, he does not interfere with the similar rights of other riparian owners lower down the stream (*Miner* v. *Gilmour*, 12 Moo. P. C. 131; *Embrey* v. *Owen*, 6 Ex. 353).

(2) An artificial watercourse may have been originally made under such circumstances, and have been so used as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream (*Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136; *Baily & Co.* v. *Clark, Son and Morland*, [1902] 1 Ch. 649).

(3) There is, however, no right to the continued flow of water which runs through natural

Art. 88.

underground channels, which are undefined or unknown, and can only be ascertained by excavation (*Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655).

(4) No one has a right to pollute the water percolating under his own land and flowing thence by underground channels into another's land so as to poison the water which that other has a right to use (*Ballard* v. *Tomlinson*,[138a] 29 Ch. D. 115).

Illustrations. Rights of riparian owners.

(1) Every riparian owner may reasonably use the stream for drinking, watering his cattle, or turning his

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Canadian Cases.

[138a] An Act for protecting the public interest in rivers, streams, and creeks, R. S. O., 1897, c. 142. Where both parties have equal rights in a navigable river, it must be shown in order to maintain an action that one party has exercised his rights in such a manner as to unreasonably impede or delay the other (*Crandell* v. *Mooney*, 23 U. C. C. P. 212; *Rolston* v. *Red River Bridge Co.*, 1 M. L. R. 235; *North West Navigation Co.* v. *Walker*, 3 M. L. R. 25, and 4 M. L. R. 406).

Without legislative power there can be no power to obstruct or prevent the user of navigable tidal waters, or where the tide ebbs and flows in harbours (*Wood* v. *Esson*, 9 S. C. R. 239; *McEwan* v. *Anderson*, 1 B. C. Reps. 308; *Rowe* v. *Titus*, N. B. R. 1 All. 326; *Wallace* v. *G. T. Rway. Co.*, 16 U. C. R. 551; *Vanhorn* v. *The G. T. Rway. Co.*, 18 U. C. R. 356).

"The erection which the plaintiffs allege the defendant interfered with, and which is the

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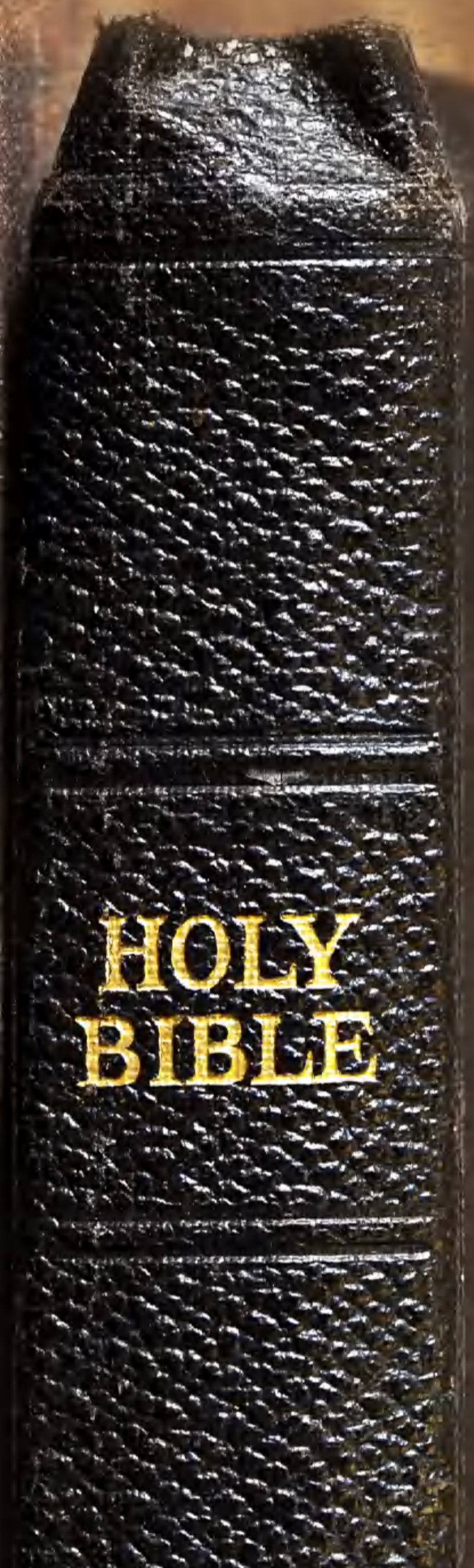

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Art. 88.

right to divert the water to a place outside his tenement, and there consume it for purposes unconnected with the tenement (*McCartney* v. *Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301).

Disturbance of riparian rights.

(2) If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, he may maintain an action against the wrongdoer for violation of the right, even though he may not be able to prove that he has suffered any actual loss (*Wood* v. *Waud*, 3 Ex. 748; *Embrey* v. *Owen*, 6 Ex. 353; *Crossley* v. *Lightowler*, 2 Ch. App. 478). So if one erects a weir which affects the flow of water to riparian owners lower down the river, an injunction will be granted (*Belfast Ropeworks* v. *Boyd*,[139] 21 L. R. Ir. 560).

(3) But where a riparian owner takes water from a river, and after using it for cooling certain apparatus

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Canadian Cases.

formed the boundary of the said water lots. It was *held*, affirming the judgment of the Court of Appeal (12 O. A. R. 327), that such lease gave W. a right to build as he chose upon the said lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water. It was *held* also, that the said waters being navigable parts of Toronto Bay, no private easement by prescription could be acquired therein while they remained open for navigation (*London and Canadian Loan and Agency Co., Limited* v. *Warin*, 14 S. C. R. 232).

[139] The proprietors of logs being floated down a river floatable but not navigable is liable for negligence on account of the careless manner in which the driving of the logs was carried on (*Ward* v. *Township of Grenville*, 32 S. C. R. 510; see also *Neely* v. *Peter*, 4 O. L. R. 293).

returns it undiminished in quantity and unpolluted in quality, a lower riparian owner has no right of action. For his only right is to have the water abundant and undefiled, and that right is not infringed (*Kensit* v. *Great Eastern Rail. Co.*,[140] 27 Ch. D. 122) (*a*). Art. 88.

(4) The owner of land containing underground water, which percolates by undefined channels, or by defined Abstracting underground water.

(*a*) In that case the water was abstracted by a non-riparian owner under a license from a riparian owner. The license, however, could not confer any right, as a riparian owner clearly cannot confer on others such rights as he has as riparian owner. But, as the action failed against the non-riparian owner, *à fortiori* it would against a riparian owner taking away water and returning it undiminished and unpolluted.

Canadian Cases.

[140] A watercourse consists of bed, banks, and water, and, while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground (*Wilton* v. *Murray*, 12 M. R. 35).

An occupant or owner of land has no right to drain into his neighbour's lands the surface water from his own land not flowing in a defined channel, and the rule of the civil law, that the lower of two adjoining estates owes a servitude to the upper to receive the natural drainage, does not apply in Manitoba (*Ibid.*; *Bur* v. *Stroud*, 19 O. R. 10, and *Bunting* v. *Hicks*, 7 R. 53).

"As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturæ*, and that as long as surface water is not found flowing in a defined channel, with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to

Art. 88.

but unascertained channels, and flows to the land of a neighbour, has the right to divert or appropriate the water within his own land so as to deprive his neighbour of it (*Chasemore* v. *Richards*, 7 H. L. Cas. 749; *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655). And his right is the same whatever his motive may be, whether *bonâ fide* to improve his own land, or maliciously to his neighbour, or to induce his neighbour to buy him out (*Mayor of Bradford* v. *Pickles*, [1895] A. C. 587; see *supra*, Art. 78, Illus. (6), p. 419). The same rule applies to common surface water rising out of springy or boggy ground and flowing in no defined channel (*Rawstron* v. *Taylor*, 11 Ex. 369).

Fouling underground water.

(5) But although there can be no *property* in water running through underground undefined channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard* v. *Tomlinson* (29 Ch. D. 115), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by the Court of Appeal that an action lay; for there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other. The one merely deprives a man of something in which he has no property, the other causes an active nuisance.

Canadian Cases.

receive the natural drainage" (*Ostrom* v. *Sills*, 24 O. A. R. 526—Moss, J.A.; 28 S. C. R. 485, and *ante*, p. 431).

Where damages are claimed for an obstruction to a watercourse, to entitle the plaintiff to recover he must show that the whole damage resulted from the act of the defendant (*Foster* v. *Fowler*, 2 N. S. Reps. 425).

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Art. 89.

(2) A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free user of it.

Canadian Cases.

servient tenement be wrongful and without the privity of the true owner (*Innes et al.* v. *Ferguson*, 21 O. A. R. 323; 24 S. C. R. 703).

One piece of land cannot be said to be burdened by an easement in favour of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do; and if the title to different parcels comes to be vested in the same owner, there is an extinction of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact, or *quasi* easements. If the *quasi* servient easement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor pass by implication (*Attrill* v. *Platt*, 10 S. C. R. 425; judgment of Court of Appeal, Ontario, reversed).

Art. 89.

Right restricted by the terms of the grant or the extent of the user.

(1) Rights of way are susceptible of almost infinite variety. Thus there may be a right of way to church, which can only be lawfully used for the inhabitants of a parish for going to and from the church (see *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344); or the right may be limited by the grant (or if it depends on prescription, may be limited by the nature of the user) to a footway, a horseway, or carriageway, and the like. Indeed, grants are somewhat strictly construed, and a grant of a right of carriageway will not necessarily authorise the grantee to drive cattle over the way (see judgments in *Ballard* v. *Dyson*, 1 Taunt. 279). So, again, proof of user for farming purposes does not necessarily prove a right of way for the purpose of conveying coal from a mine (*Cowling* v. *Higginson*, 4 M. & W. 245); nor does the finding by a jury of a right of way for carting timber prove a right for all carts, carriages, horses, or on foot, or for any of such rights (*Higham* v. *Rabett*, 5 Bing. N. C. 622; and see also *Wimbledon Conservators* v. *Dixon*, 1 Ch. D. 362; and *Bradburn* v. *Morris*, 3 *ibid.* 812).

Rights of way of necessity.

(2) Where one grants land to another, and there is no access to the land sold except through other land of the grantor, or no access to the land retained except through the land sold, the law implies a grant or reservation (as the case may be) of a private right of way limited to such purposes as will enable the owner of the dominant tenement to enjoy it in the condition it was in at the time when the severance took place; *ex. gr.*, if it was then farm land the right of way will be limited to farming purposes, and so on (*Corporation of London* v. *Riggs*, 13 Ch. D. 798). In ways of necessity, however, the owner of the dominant tenement cannot range across the servient tenement between the points most convenient for himself, but is obliged to pursue the track selected by the owner of the servient tenement (*Bolton* v. *Bolton*, 11 Ch. D. 968). It must also be pointed out that when the necessity ceases (for instance, if the owner of the dominant tenement

Art. 89.

buys a field intervening between it and the highway, the right ceases also; but, on the other hand, it appears to revive again when the necessity arrives (*Holmes* v. *Goring*, 2 Bing. 76; *Pearson* v. *Spencer*, 1 B. & S. 584).

Implied grant of particular way.

(3) Rights of way of necessity must, however, be carefully distinguished from a right of using a particular made road, which is sometimes implied in a conveyance. Thus, where a lessee of two adjacent plots builds a house on each, and makes a passage partly on plot A. and partly on plot B., forming a back road to the gardens of each, and then assigns plot A. to X., and plot B. to Z., without mentioning any right of way, both X. and Z. will have the right of using the road not as a way of necessity (although it may be the only method of getting into their respective gardens except through their houses), but by implied grant as being in the nature of a continuous and apparent easement (see *Brown* v. *Alabaster*, 37 Ch. D. 490, where the doctrine of continuous or apparent easements is discussed.

Prescriptive rights of way.

(4) Under s. 2 of the Prescription Act (2 & 3 Will. 4, c. 71), a prescriptive right of way is gained by twenty years' uninterrupted user as of right. It seems, however, that this section only applies where the user is practically a continuous one. Thus, where the right claimed was a right of way for removing timber as it was cut, and it appeared that the right had only been exercised at intervals of several years, it was held that the Act did not apply to so discontinuous an easement, and that no prescriptive right was gained by the fact that more than twenty years had elapsed since the first user of the alleged way (*Hollins* v. *Verney*,[143] 13 Q. B. D. 304).

Canadian Cases.

[143] The owner of land on a sea shore, or on a navigable river, is entitled to free ingress and egress (*Collins* v. *Barrs*, 2 N. S. Reps. 281).

In an action for obstructing a right of way, the

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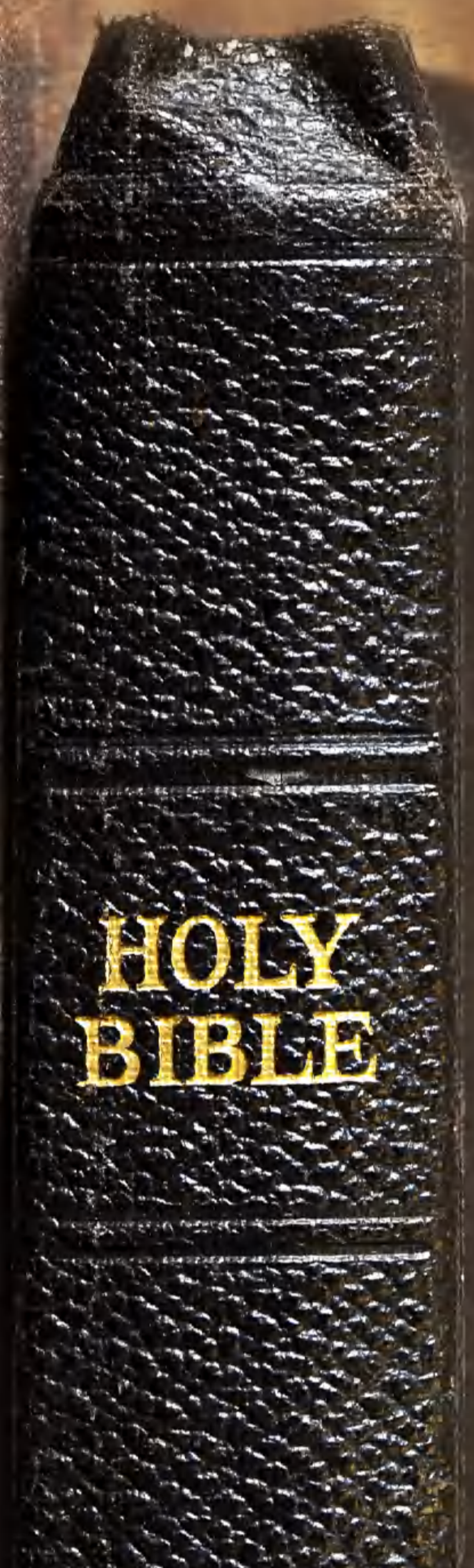

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Art. 89.

v. *Moor*, 9 C. B. 364), or permitting carts or waggons to remain stationary on the road in the course of loading

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Canadian Cases.

his father, the adjoining owner, which license was revoked by his father's death; but, affirming the judgment of the court below, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement, not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor (*Rogers* v. *Duncan*, 18 S. C. R. 710).

E. and B. owned adjoining lots, each deriving his title from S. *E.* brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots. The fee in this right of way was in S., but *E.* founded his claim to an user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots. It was *held*, affirming the judgment of the Supreme Court of Nova Scotia (18 N. S. R. 222), that as *E.* had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action (*Ells* v. *Black*, 14 S. C. R. 740).

K. owned lands in the county of Lunenberg, N.S., over which he had for years utilised a road-way for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a

and unloading, in such a way as to obstruct the passage Art. 89.

Canadian Cases.

dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute R. S. N. S. (5 series), c. 112, sect. 27, which in terms follows the provisions of the English Act, 2 & 3 Will. 4, c. 71, provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment unless submitted to or acquiesced in for one year after notice thereof, and of the person making the same. It was *held*, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. It was also *held*, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication upon the severance of the tenements (*Knock* v. *Knock*, 27 S. C. R. 664).

Art. 89. over the road will give rise to an action (*Thorpe* v. *Brumfitt*,[144] L. R. 8 Ch. 650).

Canadian Cases.

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription, the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right. *Held*, that even if an act of this kind could in any event affect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority (*Ker* v. *Little*, 25 O. A. R. 387).

The abandonment of an easement may be shown not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property, for the benefit of which a right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was *held* that the owner of the dominant tenement could not then have the right of way opened (*Bell* v. *Golding*, 23 O. A. R. 485; and see *Mykel* v. *Doyle*, 45 U. C. R. 65, and *McKay* v. *Bruce*, 20 O. R. 709).

[144] As to damage for obstruction to a highway see *Messenger* v. *Town of Bridgetown*, 33 N. S. R. 291.

Public work; navigation of river; negligence; repair of channel (*Hamburg American Packet Co.* v. *The King*, 33 S. C. R. 252).

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Art. 90.

part of the common without leaving sufficient land for the full enjoyment of the commoners' rights, and without having obtained the leave of the Board of Agriculture and Fisheries (56 & 57 Vict. c. 57 ; 3 Edw. 7, c. 31).

Turning uncommonable cattle on to the common.

(1) The lord may by *prescription* put a stranger's cattle on to the common, and also, by a like prescription for common appurtenant, cattle that are not commonable may be put on to the common ; but unless such prescription exists, the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.

Surcharging.

(2) Surcharging generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant on the estate ; or where it is appurtenant, that is to say, where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land, in respect of which the common is appurtenant, is capable of supporting through the winter if cultivated for that purpose (*Carr* v. *Lambert*, L. R. 1 Ex. 168). A common in gross can only arise from grant to a particular person and his heirs, or by prescriptive personal enjoyment by a man and his ancestors, and, having no connection with his land, the number of commonable beasts is usually expressly limited by the grant or prescription. Common appendant and appurtenant being limitable by law, a commoner surcharging the common commits a tort for which the lord may distrain the beasts surcharged, or bring an action ; and any commoner may also bring an action, whether the surcharger be the lord or a fellow commoner (Stephen's Commentaries, Bk. V., Chap. 8).

Art. 90.

Approvement.

(3) The common being free and open to all having commonable rights over it, it follows that when the owner of the land (or some other person) so encloses or obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*City Commissioners of Sewers* v. *Glasse*, L. R. 19 Eq. 134). Thus, if the owner ploughs it up, or drives off the commoner's beasts, or stocks it with rabbits to such an extent that all the herbage is eaten by them, he commits a tort, although the owner may make a warren, provided the rabbits be kept under so as not to occasion injury to the commoners (*Bullew* v. *Langdon*, Cro. Eliz. 876). However, most modern actions respecting commons have arisen out of what is called approvement by the owners of the soil, that is to say, the enclosure of part of the common. Before 1894 this was legal, under the provisions of the Statute of Merton, so long as the owners left sufficient common for the full enjoyment of the commoners' rights, although the onus of proving this lay on the owner, and not on the commoners (*Betts* v. *Thompson*, 6 Ch. App. 732; *Robinson* v. *Duleep Singh*, 11 Ch. D. 798). If, however, the approvement diminished the common to such an extent as to obstruct the rights of the commoners, then an action would lie against the owner of the soil. Thus, in an action brought on behalf of all the tenants of a manor to prevent the lord from enclosing parts of the waste, and from digging or removing any part of the soil of the waste so as to interfere with their right of common, it was shown that the tenants had rights of common of pasturage appendant over the waste for sheep, and that certain landowners, not tenants of the manor, had rights of common appurtenant over it for sheep, and that such rights appendant and appurtenant entitled the commoners to turn out a greater number of sheep than the waste would carry. It was, however, proved that, having regard to the average number of sheep that had actually been

Art. 90.

turned out for many years past, it was highly improbable that nearly as many sheep as the waste could carry would ever be turned out again. It was, nevertheless, held that this made no difference, and that the question of sufficiency of common must be determined according to the theoretical number of sheep which the commoners were *entitled* to turn out, and consequently the lord was restrained from doing any acts which would diminish the amount of pasturage (*Robertson* v. *Hartopp*, 43 Ch. D. 484).

Law of Commons Amendment Act, 1893.

(4) However, the old law has been greatly modified by the statute 56 & 57 Vict. c. 57, by which, in future, the consent of the Board of Agriculture and Fisheries is made a condition precedent to inclosures and approvements of common. With regard to inclosures of commons the reader is also referred to the Metropolitan Commons Acts, 1866 and 1869, and the Commons Act, 1876. It is conceived that the Act of 1893 does not alter the lord's right of digging for gravel, mould, loam, and subsoil in the waste, so long as he does not infringe on the rights of the commoners, as such acts stand on a different basis to approvements (see *Hall* v. *Byron*, 4 Ch. D. 667).

Art. 91.—*Disturbance of Rights of Fishery.*[145]

(1) A right of fishery may be exclusive or in common. An exclusive right of fishery (called a several fishery) may arise from the exclusive

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Canadian Cases.

[145] "According to the common law of England, which applies in all the provinces constituting the Dominion, except the province of Quebec, riparian proprietors undoubtedly have an exclusive right of fishing in non-navigable lakes, rivers, streams, and

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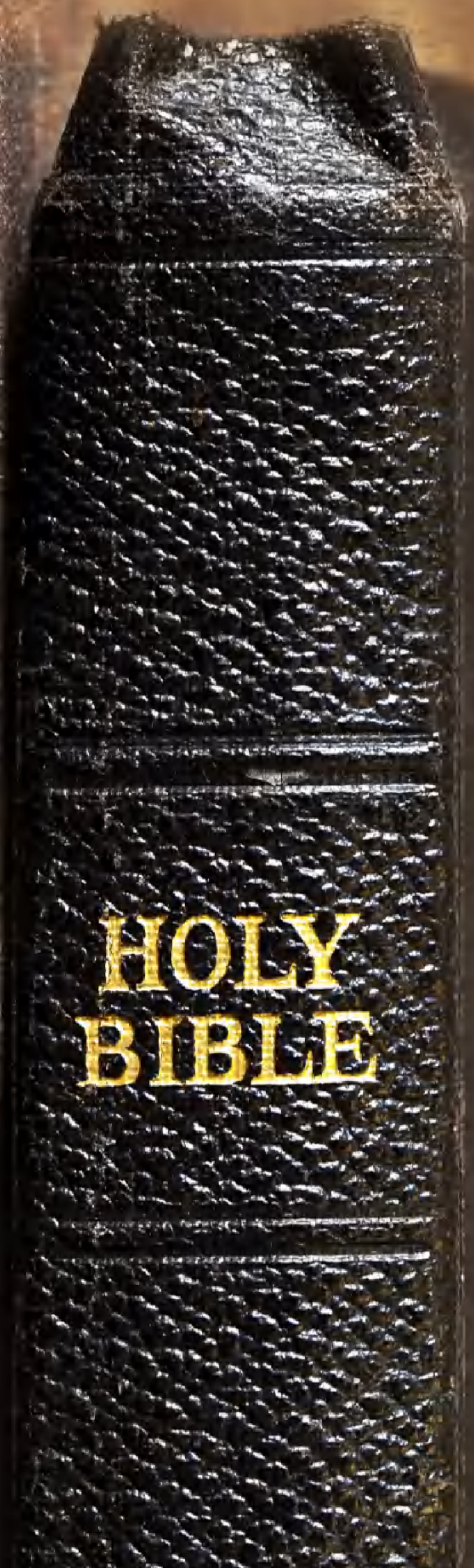

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Art. 91.

called, is a right to fish in common with the owner of the fishery, or with others, and always depends on grant, either express, or implied by long user.

(2) A person commits a tort when he fishes in another's fishery, whether he takes fish or not; or when he disturbs, or drives away, or destroys the fish in a fishery; or diverts the water to an unreasonable extent.

Origin of exclusive piscatorial rights.

(1) The person who is the owner of the bed of the non-tidal river, pond, or lake in which a fishery is situate, has, *primâ facie*, the exclusive right to fish therein. Such a right is called a "several territorial fishery," and the right of fishing arises from the ownership of the soil entitling the owner to the profits arising within it (*Lord Fitzwalter's Case*, 1 Mod. 105; *Gibbs* v. *Woolliscott*, 3 Salk. 290; *Cooper* v. *Phibbs*, L. R. 2 H. L. 165). A manorial fishery is generally of this character when the river is non-tidal. The river and the fishery in it form a separate close parcel of the manor (*Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 265).

(2) But a person may be the owner of a fishery although he is not owner of the soil, in which case his title must have originally been derived by a grant from the owner of the soil, and is sometimes, although inaccurately, described as a "free fishery"; such a fishery is an incorporeal hereditament (*Duke of Somerset* v. *Fogwell*, 5 B. & C. 875).

(3) A person may also be owner of a fishery by reason of his being owner of the riparian land abutting on a non-tidal river, and, in the absence of evidence to the contrary, is presumed to be such owner (*Partheriche* v. *Mason*, 2 Chit. 658). But this presumption may be rebutted by showing that when the riparian land was

granted, the fishery in the water was in the possession of another person (*Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 265; *Bloomfield* v. *Johnston*, 8 Ir. C. L. R. 97, 104), or by showing user of the fishery by another, and absence of user by the riparian owner. Art. 91.

(4) A person may have a right to fish from his land although he is not owner of the fishery. This is a "common of fishery" or a "common of free fishery," and arises by grant from the owner of the fishery of a right to fish in common with the owner, or in common with the owner and other grantees. Common of piscary.

(5) A person may also have a right to fish in common with others throughout a fishery, irrespective of any ownership of the soil of the river or of the riparian land. This is also "common of fishery" arising by grant from the owner of the fishery (Bracton, Lib. iv. c. 28, s. 4).

(6) The public have no right to fish in a non-tidal river (*Pearce* v. *Scotcher*, 9 Q. B. D. 162; *Blount* v. *Layard*, [1891] 2 Ch. 681 n; and *Smith* v. *Andrews*, [1891] 2 Ch. 678, and cases there cited); but they have a *primâ facie* right to fish in tidal water. This claim may, however, be rebutted by showing evidence of the ownership of a several fishery in another of such antiquity as to presume a legal origin (*Malcomson* v. *O'Dea*, 10 H. L. Cas. 293). And if this be once proved, the exercise of fishing by the public, even for a long period, will not take the several right away, or confer any right on the public. For the public cannot, in law, prescribe for a *profit à prendre in alieno solo*, nor acquire any right adversely to the owner under any statute of limitations; and an incorporeal hereditament, such as a several fishery, which can only pass by deed, cannot be abandoned (*Neill* v. *Duke of Devonshire*, 8 App. Cas. 135). The existence of a several fishery in tidal waters rebuts the *primâ facie* claim of the Crown to the soil of the foreshore (*Att.-Gen.* v. *Emerson*, [1891] App. Cas. 649). Piscatorial rights of the public.

Art. 91.

Meanings of "free fishery" and "several fishery."

(7) There is much confusion in books with regard to the meaning of the expression "several fishery" and "free fishery," and it has been attempted to draw a distinction between them, viz., that a fishery is said to be "several" when accompanied by ownership of the soil, and said to be "free" when existing apart from the soil; but this is not accurate. The words "several" and "free" are only alternative expressions for the same thing (*Gipps* v. *Woollicott*, Holt, 323; Stuart-Moore on Foreshore, p. 740; *Holford* v. *Bailey*, 13 Q. B. 426). The confusion has arisen from a mis-print in the text of Co. Litt. 122 a.

Several fisheries in tidal waters.

(8) A several fishery in tidal waters may exist as an incorporeal right arising from a grant by the Crown apart from the ownership of the soil. Thus, where the free inhabitants of ancient tenements in a borough had, from time immemorial, exercised the exclusive privilege of dredging for oysters in tidal waters, it was held that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn as reasonable in law and probable in fact was, that there was a grant to the corporation of the borough, subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough (*Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633). However, a several right of fishery in tidal waters usually arises from the ownership of the soil of the foreshore, which again depends on express grant from the Crown, or grant implied from long user (see *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; *Att.-Gen.* v. *Emerson*, *supra*; and Moore on Foreshore, pp. 658, 734). It should be observed that a several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel (*Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361).

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Art. 92.

sea. It is a franchise which can only arise by royal grant or by statute. A lost grant may, however, be presumed from immemorial or even long user (see *Trotter* v. *Harris*, 2 Y. & J. 285).

(2) A person commits a tort who disturbs a legal ferry, either by refusing to pay a reasonable toll, or by setting up a new ferry or passage to the diminution of the custom of the legal ferry.

Owner of ferry must keep sufficient boats.

(1) Since the granting of ferries is a royal franchise and is in derogation of the common law, it is incumbent on the owner of a ferry to keep sufficient boats and men to carry over the public and their goods at all times, and to charge no more than a reasonable toll for so doing. The demand, therefore, of an unreasonable toll would justify the passenger in refusing to pay. But it would seem that the neglect to keep sufficient boats is no answer to an action for disturbance of the ferry (*Peter* v. *Kendal*, 6 B. & C. 703).

What amounts to disturbance of ferry.

(2) A ferry is the connecting link between two highways or two towns, and the carrying of passengers in boats belonging to other people to and from places so near these highways or towns as to allow the passengers to rejoin these highways almost immediately, will be a disturbance of the ferry, and the persons so conveying

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Canadian Cases.

1897, c. 139, sect. 10), as well as the common law, authorizes a person to use his own boat within the limits of a ferry, in the pursuit of his business or pleasure, freely, and without any necessity of showing the particular motives or occasions he may have for allowing any individual to pass in his boat, provided that such person be not a traveller and provided nothing be charged for carrying (*Ives* v. *Calvin*, 3 U. C. R. 464).

Art. 92.

over will be committing a tort (*Blissett* v. *Hart*, Willes, 508). On the other hand, the ferrying over of persons to places near these highways or towns will not be construed as an interference with the ferry, provided it is shown that it is not done fraudulently, or as a pretence for avoiding the regular ferry (*Tripp* v. *Frank*, 4 T. R. 666). The plea that the legal ferry is not sufficient for the public convenience owing to the altered condition of the neighbourhood will not avail (*Newton* v. *Cubitt*,[146] 5 C. B. (N.S.) 627).

Canadian Cases.

[146] The plaintiffs were authorized to build and maintain a toll bridge, and if the bridge should be destroyed by accident to maintain a ferry until it was replaced. The bridge was accidentally destroyed and during its reconstruction plaintiffs maintained a ferry. Defendant built a temporary bridge within the limits of the plaintiffs' franchise. It was *held* that the exclusive statutory privilege extended to the ferry and while maintained by the plaintiffs the defendant had no right to build the temporary bridge (*Galarneau* v. *Guilbault*, 16 S. C. R. 579).

A club or partnership styled "The Edmonton Ferry Company," was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The

Art. 92. Other disturbances.

There are several other kinds of disturbance of incorporeal rights which it is impossible to treat of in an

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Canadian Cases.

club supplied their ferryman with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights. *Held*, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement (*Dinner* v. *Humberstone*, 26 S. C. R. 252, affirming the decision of the Supreme Court of the N. W. Territories).

The Crown granted a license to the town of Belleville giving the right to ferry "between the town of Belleville to Ameliasburg." This was *held* to be a sufficient grant of a right of ferry to and from the two places named. Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side to a point across the Bay of Quinté, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the Bay of Quinté, between the township of Ameliasburg and a place in the township of Sidney, which adjoins Belleville, the termini being on the one side two miles from the

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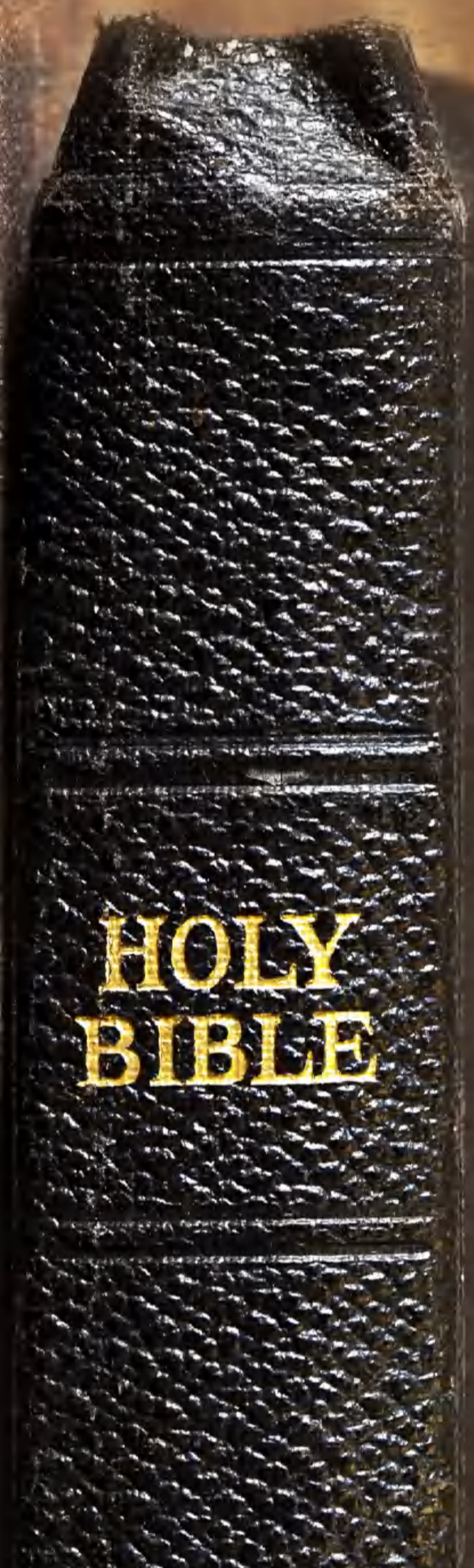

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Art. 93.

abatement, and consists in the removal of the nuisance.

(2) A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions any damage beyond what the removal of the inconvenience necessarily requires (Stephen's Commentaries, Bk. V., Chap. 1) (*a*).

(3) Where there are alternative ways of abating a nuisance the less mischievous must be chosen (*per* BLACKBURN, J., in *Roberts* v. *Rose*, L. R. 1 Ex. at p. 89).

(4) A person cannot justify doing a wrong to an innocent third party or to the public in abating a nuisance. So it seems that entry on the lands of an innocent third party cannot be justified (*Ibid.*).

(5) If a nuisance can be abated without committing a trespass no notice is required (*Lemmon* v. *Webb*, [1895] A. C. 1).

(*a*) It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

Canadian Cases.

property beyond what was necessary for the purpose of removing the public inconvenience (*Truesdale* v. *McDonald*, Taylor's King's Bench Reps. (U. C.) 121; and see the Municipal Act, R. S. O., 1897, c. 223, sect. 586).

The right of a private individual to prevent infringement of municipal bye-law is referred to in *McBean* v. *Wyllie*, 14 M. L. R. 135.

Art. 93.

(6) In order to abate a nuisance a man may enter on the lands of the person committing the nuisance, provided he has first given notice requesting such person to remove the nuisance.

(7) An entry on another's land to prevent an apprehended nuisance cannot be justified.

Notice.

It must be observed that notice is necessary (1) when abatement consists in pulling down an inhabited house, (2) before entry on the lands of another—even though that other is the person committing the nuisance. It seems also that notice is dispensed with even though lands are entered to abate the nuisance in three cases, viz., (a) where the owner of the land was the original wrongdoer, by placing the nuisance there; (b) where the nuisance arises by default in performance of some duty cast on him by law; and (c) when the nuisance is immediately dangerous to life or health (see *Jones* v. *Williams*, 11 M. & W. 176).

Examples.

(1) Thus, if my neighbour built a wall and obstruct my ancient lights, I may after notice and request to him to remove it, enter and pull it down (*R.* v. *Rosewell*,[149] 2 Salk. 459); but where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris* v. *Baker*, 1 Roll. R. 393, fol. 15).

Canadian Cases.

[149] "That a party injured thereby may abate a private nuisance as well as a public one, though in the soil of another, seems a well-settled rule" (*Little* v. *Ince*, 3 U. C. C. P. 545—Macaulay, C.J.).

Art. 93.

(2) Branches of trees overhanging a man's land may be cut to abate the nuisance without notice, provided this can be done without committing a trespass (*Lemmon* v. *Webb*, [1895] A. C. 1).

(3) A commoner may abate an encroachment on his common by pulling down a house or a fence obstructing his right (*Mason* v. *Cæsar*, 2 Mod. 66); so also may one whose right of way is obstructed (*Lane* v. *Capsey*, [1891] 3 Ch. 411); but he cannot abate a warren, however great a nuisance, but must appeal to a court of justice (*Cooper* v. *Marshall*, 1 Burr. 259).

Pulling down inhabited house.

(4) Before pulling down a house to abate a nuisance, notice and request to remove must be given *if the house is actually inhabited*, although it may not be nccessary to commit a trespass in pulling it down (*Davies* v. *Williams*, 16 Q. B. 556; *Lane* v. *Capsey*, [1891] 3 Ch. 411). Whether where a person has failed to obtain a mandatory injunction to remove a nuisance he can himself abate it, seems to be a moot point (see *per* CHITTY, J.: *Lane* v. *Capsey*, *supra*).

Public nuisance.

(5) A private individual may not, however, abate a *public* nuisance such as an obstruction on a highway unless it does him a particular injury; and even then only so far as may be necessary to enable him to exercise the right interfered with, as, for instance, to pass along the highway (*Davies* v. *Petley*, 15 Q. B. 276).[150]

Canadian Cases.

[150] Where a defendant undertook to abate a nuisance but in doing so did more than was necessary he is liable (*Adamson* v. *McNab*, 6 U. C. R. 113).

"The defendants would not be justified in destroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a

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Art. 94. | Ex. 265; *Simpson* v. *Savage*, 26 L. J. C. P. 50). Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant (*Kidgill* v. *Moor*, *supra*).

Art. 95.—*Limitation.*

Actions for injuries caused by nuisances must be brought within the period of six years next after the cause of action arose.

CHAPTER IX.

OF TORTS FOUNDED ON THE DIRECT INFRINGEMENT OF PRIVATE RIGHTS.

Introductory.

In the case of most of the torts which we have hitherto considered, there was a wrongful act distinct from the damage to the plaintiff, and which would, if it had not been followed by damage, have given no right of action. But in the torts about to be considered, the wrongful act and the damage resulting from it are practically indivisible. These are what are spoken of in many text books as *injuriæ*. They require no proof of damage resulting from the wrongful act. The mere fact that a private right has been infringed *without lawful excuse*, constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated.

These torts consist in (a) infringements of the right of safety and freedom of the person (trespass to the person); (b) infringements of rights of real property (trespass to land and dispossession); and (c) infringements of rights to goods (trespass to goods and conversion).

Art. 96.

SECTION I.—TRESPASS TO THE PERSON.

ART. 96.—*General Liability for Trespass to the Person.*[151]

(1) Trespass to the person may be by assault, battery, or false imprisonment.

Ancient classification.

(2) Any person who commits a trespass to the person whether by assault, battery, or imprisonment without lawful authority commits a tort.

The older writers speak of six kinds of trespasses to the person: threats, assault, battery, wounding, mayhem (or maiming) and false imprisonment. But at the present time it is sufficient to distinguish the three groups above-mentioned.

Onus of proof.

Primâ facie every hostile interference with the person or liberty of another is wrongful without proof of damage; but as we shall see, acts which are *primâ facie* trespasses may often be justified. The burden of proof of justification always lies on the defendant. The

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Canadian Cases.

[151] The evidence in this case showed that the defendant, having obtained the issue of the warrant, interfered personally in the arrest, telling the constable to have the plaintiff taken away, or right away. This was *held* sufficient to support a verdict on the second count, in trespass (*Stephens* v. *Stephens*, 24 U. C. C. P. 424; *Hubley* v. *Boak*, 4 N. S. R. 82; *Martyr* v. *Pryor*, 4 N. S. R. 498; *Lutts* v. *Nott*, 4 N. S. R. 129; *Oakes* v. *Blois*, 22 N. S. R. 167; *Bank of Upper Canada* v. *Lewis*, 3 U. C. R. 325; and *Acland* v. *Adams*, 7 U. C. R. 139).

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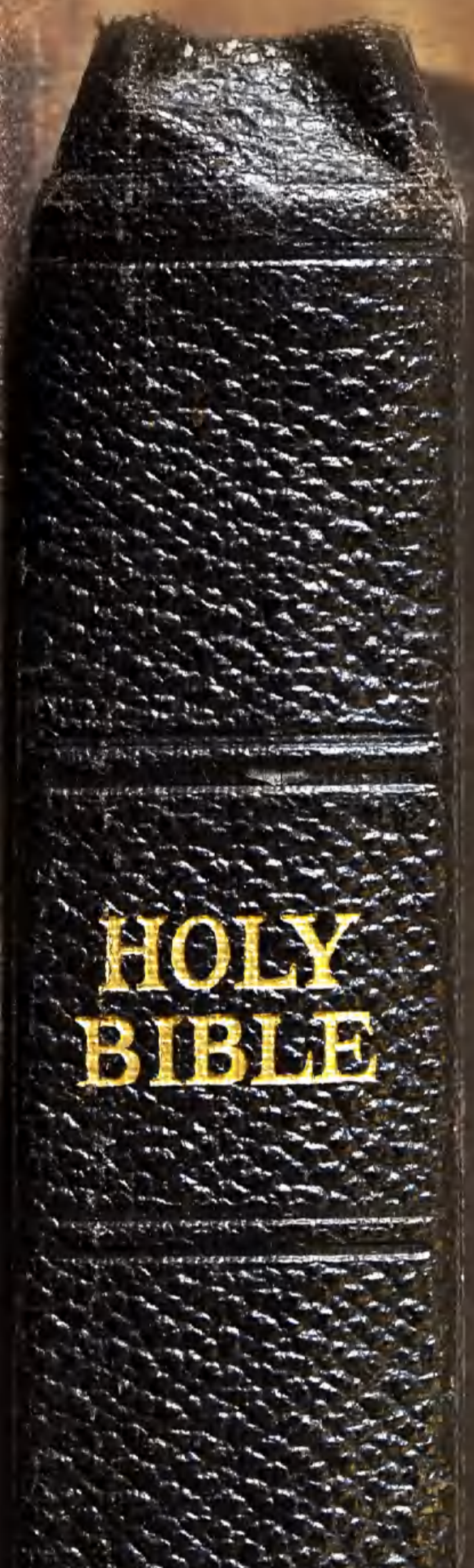

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Art. 97.

illustrated by POLLOCK, C.B., in *Cobbett* v. *Grey* (4 Exch. 744). "If," said the learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*Query*—Battery), 'I will commit an assault,' I think that is not an assault."

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville* v. *Savage*, 1 Mod. 3).

(4) For the same reason, shaking a stick in sport at another is not actionable (*Christopherson* v. *Bare*, 11 Q. B. 477).

ART. 98.—*Definition of Battery.*[152]

(1) Battery consists in touching another's person hostilely or against his will, however slightly (*Rawlings* v. *Till*, 3 M. & W. 28).

(2) If the violence be so severe as to wound, and *à fortiori* if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight), the damages will be greater than those awarded for a mere battery; but otherwise the same rules of law apply to these injuries as to ordinary batteries.

Illustrations.

(1) This touching may be occasioned by a missile or

Canadian Cases.

[152] *Reg.* v. *Shaw*, *ante*, p. 501.

Art. 98.

any instrument set in motion by the defendant, as by throwing water over the plaintiff (*Pursell* v. *Horn*, 8 A. & E. 602), or spitting in his face, or causing another to be medically examined against his or her will (*Latter* v. *Braddell*, 29 W. R. 239). In accordance with the rule, a battery must be involuntary; therefore a beating voluntarily suffered is not actionable; for *volenti non fit injuria* (*Christopherson* v. *Bare*, 11 Q. B. 477).

Touching.

(2) Merely touching a person in a friendly way in order to engage his attention, is no battery (*Coward* v. *Baddeley*, 28 L. J. Ex. 261). And an entirely unintentional touching, which is the result of pure accident, does not amount to trespass. Where one of a shooting party fired at a pheasant and a shot from his gun glanced off a tree and accidently wounded the plaintiff, a carrier, it was held that there was no trespass (*Stanley* v. *Powell*, [1891] 1 Q. B. 86). But wherever an injury to the person is the result of an act of direct force, it amounts to trespass to the person if it is wrongful, either as being wilful or as being the result of negligence (*per* BRAMWELL, B., in *Holmes* v. *Mather*, L. R. 10 Ex. 261), or if it be done in the course of doing an unlawful act (*Sadler* v. *South Staffordshire Tramways Co.*,[153] 23 Q. B. D. 17).

(3) Thus, were a tramway company was authorised by statute to run a steam tramcar on a public road, the statute must be taken to impose on the company a duty to see that the cars and tramway, and all necessary apparatus, are kept in proper condition for this purpose. And this extends not merely to their own line, but also to the lines of other companies over which they have running powers. If they fail to do so, and the tramway

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Canadian Cases.

[153] *Fraser* v. *London Street R. W. Co.*, 29 O. R. 411.

Art. 98.

be in an improper condition, then, in running their cars on that tramway, they are doing that which they are not authorised to do by their Act. They are only authorised to be on the highway at all by their Act; and as regards the public, they can only justify using the tramway if they are doing what the Act allows them to do. If, therefore (apart from any question of negligence), a car runs on the defective tramway, and injures a passer-by, the company will be liable; for it is a direct injury to the person done in the course of doing an unlawful act, and without justification or excuse (*Ibid.*).

Art. 99.—*Definition of False Imprisonment.*

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient legal authority (*Bird* v. *Jones*, 7 Q. B. 743). The restraint may be either physical or by a mere show of authority.[154]

Moral restraint.

Imprisonment does not imply incarceration, but any restraint by force or show of authority. For instance,

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Canadian Cases.

[154] In an action for a malicious arrest, the arrest is not proved by showing that the bailiff to whom the warrant was directed went to the plaintiff's house, and told him at the door that he had a writ against him, but did not enter the house or touch him, and afterwards left him, on his promise to put in bail next day, which he did (*Perrin* v. *Joyce*, 6 U. C. R. (O.S.) 300).

A warrant for taxes alleged to be due to the

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Art. 99. partial restraint of locomotion in a particular direction (as by preventing the plaintiff from exercising his right of way over a bridge) is no imprisonment; for no restraint is thereby put upon his liberty (*Bird* v. *Jones*, *supra*).

Art. 100.—*Justification of Trespass to the Person.*[155]

A trespass to the person, whether amounting to assault, battery, or false imprisonment, may be

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Canadian Cases.

plaintiff had no action for damages, but merely the right to recover back the money paid by him in a proper action for that purpose.

Obiter, that the defendant town would not be liable in any case for the wrongful act of its treasurer unless recognised by the town.

Per Graham, E.J., that the action to recover back money, paid under the circumstances, was an action of debt, but, the amount being below the jurisdiction of the court, although there was no plea to the jurisdiction, the action should be dismissed (*Walker* v. *The Town of Sydney*, 36 N. S. R. 48.

[155] In an action for assault, evidence that libellous and abusive articles were published on the day of and preceding the assault in a newspaper of which the plaintiff was the prosecutor, is admissible (*Percy* v. *Glasco*, 22 U. C. C. P. 521).

"If it were true that this plaintiff had assaulted the justice, the latter might, at the time of the assault, have ordered him into custody, but where the act was over and time had intervened, so that there was no present disturbance, then it became,

justified by the defendant as being authorised by the exercise of a right at common law, or by statute, and if the defendant prove the facts alleged in justification, the plaintiff must fail. Art. 100.

Trespass to the person may be justified as being (a) in defence of property or person; (b) as being in the Justification.

Canadian Cases.

like any other offence, a matter to be dealt with on a proper complaint made by defendant upon oath to some other justice, who might have issued his warrant. Neither a magistrate nor a constable is allowed to act officially in his own case except *flagrante delicto*, while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law, while it is in the act of being resisted" (*Powell* v. *Williamson*, 1 U. C. R. 155—Robinson, C.J.).

"The moderate correction of a servant who is an infant may be justified, but the beating of a servant of full age cannot be justified" (*Mitchell* v. *Defries*, 2 U. C. R. 430—Macaulay, J.).

"Independently of the substantial question of the right of a master to beat and assault his servant by way of moderate correction, the wounding, kicking, and tearing of the servant's clothes are not within the scope of moderate correction" (*Ibid.*—Robinson, C.J.).

Where an affray is admitted by the defendant in an action for assault and battery it is an answer to the pleas on assault demesne for the plaintiff to show that he took the defendant into custody in order to preserve the peace. An affray is stated to have been made by the defendant in the presence of the plaintiff (a constable). That gave the plaintiff a right to lay hands on him to preserve the

Art. 100. exercise of parental or other special authority; (c) as being an arrest or imprisonment made by judicial authority; (d) as being an arrest or imprisonment of a criminal; (e) as being the re-arrest of a person who has escaped from lawful custody; or (f) as being made for the purpose of stopping a breach of the peace.

But in every case the force used must not exceed that which is reasonably required in the circumstances, and any excess of violence amounts to a trespass. Thus a constable ought not unnecessarily to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin* v. *Colman*, 28 L. J. Ex. 134).

Self-defence.

(1) A battery is justifiable if committed in self-defence. Such a plea is called a plea of "son assault demesne." But, to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft* v. *Smith*, 11 Mod. 43). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A's hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cook* v. *Beal*, Ld. Raym. 177).

Defence of property.

(2) A battery committed in defence of real or personal property is justifiable.[156] Thus, if one forcibly enters my

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Canadian Cases.

peace and prevent further violence (*Fido* v. *Wood*, 5 U. C. R. (O.S.) 558).

[156] "If to an assault and battery it is pleaded that the plaintiff was in the defendant's house, and that he was requested to leave and refused, and that the defendant, in order to remove him, laid hands upon him, etc., and issue be joined upon it; and if it be proved that the plaintiff was in the defendant's house and was requested to leave and would not, and that the defendant did lay

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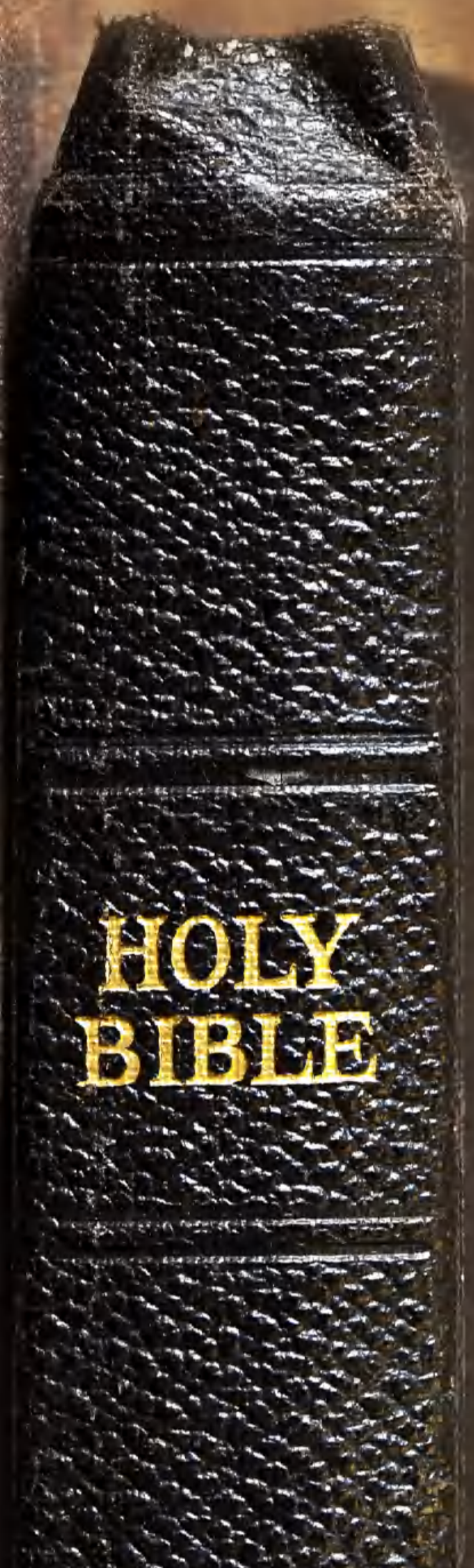

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Art. 100.

refuses, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*Wheeler* v. *Whiting*, 9 C. & P. 265). On the other hand, where a railway traveller lost his ticket and could not produce it when required so to do in accordance with an indorsed condition, and refused to pay over again, it was held that this did not justify the company in forcibly ejecting him (*Butler* v. *Manchester, etc. Rail. Co.*, 21 Q. B. D. 207).

(3) So, a riotous customer may be removed from a shop after a request to leave. For the same reason, where the violence complained of consisted in the defendant attempting to take away certain rabbits from the plaintiff, which did not belong to him but to the defendant's master, and which the plaintiff had refused to give up, the defendant was held to have a good defence to an action of assault (*Blades* v. *Higgs*, 10 C. B. (N.S.) 713; affirmed, 11 H. L. Cas. 621).

Parental and other authority.

(4) A father may moderately chastise his son, and this authority he may delegate to a schoolmaster. Schoolmasters are no doubt justified in moderately chastising and in putting restraint on the liberty of their pupils (see *Cleary* v. *Booth*, [1893] 1 Q. B. 465); and a master may chastise his apprentice (*Penn* v. *Ward*, 2 C. M. & R. 338).

Marital authority.

(5) It was formerly thought that a husband had the right of chastising and imprisoning his wife—but this can no longer be regarded as the law (*R.* v. *Jackson*, [1891] 1 Q. B. 671).

Naval and military officers.

(6) Officers in the army and navy, and officers of volunteers have statutory authority by which they may justify assaults and imprisonment of the men under

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Canadian Cases.

and see "The Toronto" Stuarts' Vice-Admiralty Reps., Quebec, 178, 179).

them (see *Marks* v. *Frogley*, [1898] 1 Q. B. 888), as also have masters of merchant ships over their crew and passengers. Art. 100.

Art. 101.—*General Authority of Judicial Officers to Imprison.*[157]

(1) No action lies against a judge of a superior court in respect of any act done by him in his

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Canadian Cases.

[157] The Criminal Code, 1892 (Canada), regulates the procedure as regards summary conviction; see also R. S. O., 1897, c. 90 (*Croukhite* v. *Sommerville*, 3 U. C. R. 129; *Parsons qui tam* v. *Crabbe*, 31 U. C. C. P. 151; *McLellan* v. *McKinnon*, 1 O. R. 219; *Howell* v. *Armour*, 7 O. R. 363; *Hunter* v. *Gilkison*, 7 O. R. 735; *Bond* v. *Commee*, 15 O. R. 716, and 16 O. A. R. 398; *Jones* v. *Grace*, 17 O. R. 618; *Sinden* v. *Brown*, 17 O. A. R. 173).

A justice of the peace who issues his warrant for the arrest of a person charged with felony without the information having been sworn is liable in trespass. Sects. 22 and 23 of the Criminal Code are a codification of the common law and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorise a justice to direct a constable to make an arrest elsewhere without warrant (*McGuinness* v. *Dafoe*, 23 O. A. R. 704; and see *Sinden* v. *Brown*, 17 O. A. R. 173; *Appleton* v. *Lepper*, 20 U. C. C. P. 138; *Friel* v. *Ferguson*, 15 U. C. C. P. 584; *Bross* v. *Huber*, 18 U. C. R. 282; *Connors* v. *Darling*, 23 U. C. R. 541; and *Sprung* v. *Anderson*, 23 U. C. C. P. 152).

Art. 101. judicial capacity, even though he act oppressively, maliciously, and corruptly; nor against any person acting by the authority of a judge of a superior court in his judicial capacity.

(2) No judicial officer of an inferior court invested with authority to imprison, is liable to an action for a wrongful imprisonment, unless he acts beyond his jurisdiction (*Doswell* v. *Impey*, 1 B. & C. 169). In order to constitute jurisdiction, such officer must have before him some suit, complaint, or matter in relation to which he has authority to imprison or arrest.[158]

(1) Where the judge of the Supreme Court of Trinidad and Tobago caused the plaintiff to be imprisoned in

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Canadian Cases.

[158] "*Connors* v. *Darling* (23 U. C. R. 541) is an express authority that even if there had been originally a good information and proper warrant thereon to arrest, the commitment for trial, in the absence of any examination of witnesses, confession, etc., was an act of trespass without jurisdiction" (*Appleton* v. *Lepper*, 20 U. C. C. P. 143—Hagarty, C.J.).

In trespass for false imprisonment it was *held* that a judge of a district court has no authority to order an arrest upon an affidavit which disclosed a cause of action founded on a contract on which the damages were unliquidated (*Ferris* v. *Dyer*, 5 U. C. R. (O.S.) 5).

A conviction bad upon the face of it, although not quashed, was *held* not to be a sufficient defence to an action of trespass (*Briggs* v. *Spilsbury*, Taylor's K. B. Reps. 440).

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Art. 101. judicial capacity, in the case of a judge of an inferior court the protection only extends to acts done by him *within his jurisdiction.*[159] If he exceeds his jurisdiction, as by sentencing a prisoner for an offence over which he has no jurisdiction, or in a place where he has no jurisdiction, although he act in his judicial capacity, he is not protected, and may be sued for trespass, as also may gaolers, constables and others carrying out the sentence.

Art. 102.—Primâ facie *Jurisdiction sufficient to excuse Judicial Officer of Inferior Court.*

The judge of an inferior court, having a *primâ facie* jurisdiction over a matter, is not responsible

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Canadian Cases.

[159] Where magistrates commit a party upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the real facts of the case might not have supported such complaint if such facts were not laid before him at the time (*Gardner* v. *Burwell*, Taylor's K. B. Reps. 189).

Omitting to state the conviction of a defendant in his warrant of commitment will not subject a justice of the peace to an action of false imprisonment, provided the actual conviction is proved upon his defence (*Whelan* v. *Stevens*, Taylor's K. B. Reps. 245; and see *Burney* v. *Gorham*, 1 U. C. C. P. 358; *Fullarton* v. *Switzer*, 13 U. C. R. 575; *In re Joice*, 19 U. C. R. 197; *Orr* v. *Spooner*, 19 U. C. R. 601; *Thorpe* v. *Oliver*, 20 U. C. R. 264; *Haacke* v. *Adamson*, 14 U. C. C. P. 201; *Dickson* v. *Crabb*, 24 U. C. R. 494; *Moffatt* v. *Barnard*, 24 U. C. R. 498; *McKinley* v. *Munsie*, 15 U. C. C. P. 230; *Crawford* v. *Beattie*, 39 U. C. R. 13).

for a false imprisonment committed on the faith of such *primâ facie* jurisdiction, if, by reason of something of which he could have no means of knowledge, he really has no jurisdiction (*Calder* v. *Halkett*, 3 Moo. P. C. C. 28). Art. 102.

(1) Thus, if, through an erroneous statement of facts, a person be arrested under process of an inferior court, for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Olliett* v. *Bessey*, 2 W. Jones, 214).

(2) Where an inferior court has jurisdiction of a matter before it, but acts erroneously, the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (Com. Dig., tit. County Court, 8; *Houlden* v. *Smith*, 14 Q. B. 841; *Wingate* v. *Waite*, 6 M. & W. 746).

Art. 103.—*Conviction must be set aside.*

Where a magistrate acts in a matter without any, or in excess of his jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof, until such conviction shall have been quashed by the proper tribunal in that behalf; nor for anything done under a warrant followed by a conviction or order, until such conviction is quashed; nor at all for anything done under a warrant for an indictable

Art. 103. offence, if a summons had been previously served and not obeyed (see 11 & 12 Vict. c. 44).

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

Legal warrant.

To constitute false imprisonment the defendant must have acted without due legal authority. Thus, an action lies against a governor of a gaol for receiving and detaining a prisoner without a proper warrant (*Dormer* v. *Cook*, 88 L. T. 629), or for detaining him after his acquittal (*Mee* v. *Cruickshank*, 86 L. T. 708). But if a gaoler acts upon a writ or order of a competent court having jurisdiction, which is valid on the face of it, he is not liable if it subsequently turns out that the order was wrong (*Henderson* v. *Preston*, 21 Q. B. D. 362). But on the other hand, where the order shows on the face of it that the prisoner was committed under a statute which expressly *casts on the gaoler the duty* of releasing the prisoner after a specified time unless the party on whose motion the prisoner was committed brings the prisoner to the bar of the court, then the gaoler will be liable unless he so releases the prisoner (*Moone* v. *Rose*,[160] L. R. 4 Q. B. 486).

Canadian Cases.

[160] Where the judge at *nisi prius* left it to the jury to say whether a constable who had arrested a man without a warrant, acted under a fair and reasonable supposition that he was performing a public duty, telling them at the same time his own impressions as to the evidence, and the jury found in accordance with his views as expressed, it was *held* that the case was properly left to the jury, and the verdict was sustained (*Cottrell* v. *Hueston*, 7 U. C. C. P. 277; *Menervey* v. *Wallace*, 1 N. S. R. 34;

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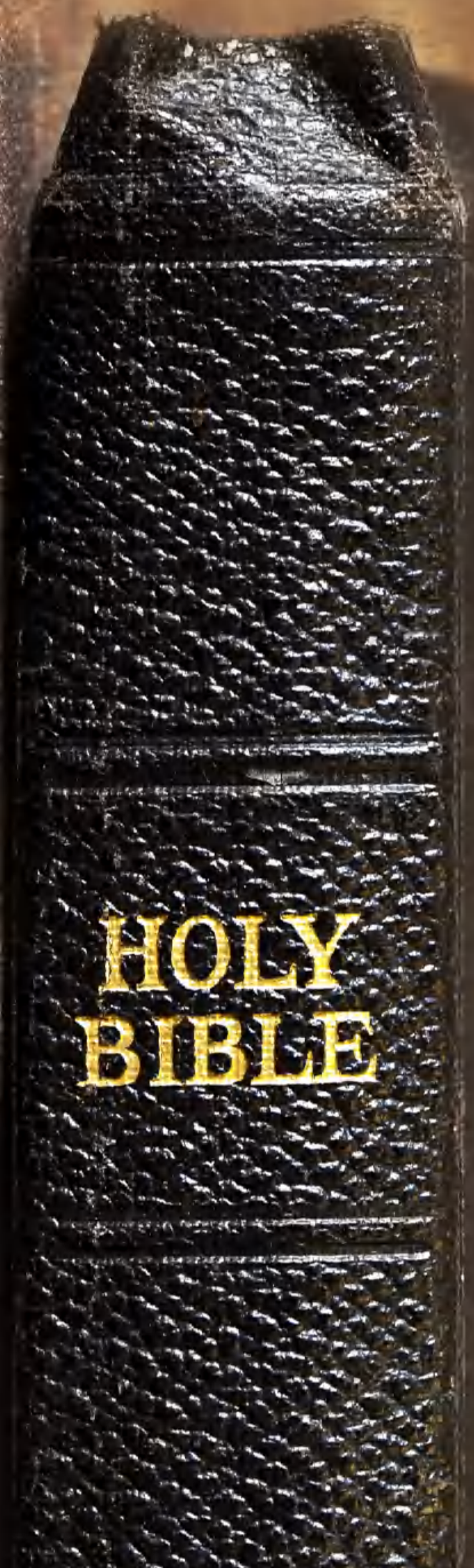

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Art. 104.

Art. 104.—*Power to imprison for Contempt of Court.*[161]

The Court of Appeal and High Court have jurisdiction to punish by commitment for any insult offered to them, and any libel upon them, or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in court.

(1) During the pendency of a suit in the High Court, the publisher of a newspaper commits a contempt if he publishes extracts from affidavits with comments upon them (*Tichborne* v. *Mostyn*, L. R. 7 Eq. 55, n.).

(2) Where an indictment has been removed into the King's Bench Division, and a day appointed for trial, the holding of public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against him,

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Canadian Cases.

[161] A justice of the peace, while sitting in the discharge of his duty, has the power, without any formal proceeding, to order at once into custody, and cause the removal of any party who by his indecent behaviour or insulting language is obstructing the administration of justice (*In re Clarke et al.*, 7 U. C. R. 223).

A justice may commit for contempt while in the execution of his office, out of sessions, but it must be by a warrant in writing and for a specified period (*Jones* v. *Glasford* (U. C. R.) M. T. 2 Vict.; and see *Armour* v. *Boswell*, 6 U. C. R. (O. S.) 486; *McKenzie* v. *Mewburn*, 6 U. C. R. (O. S.) 486; *Reg.* v. *Scott*, 2 U. C. L. J. (N. S.) 323).

and that he cannot have a fair trial, is a contempt of court (*Onslow and Whalley's Case*, *R.* v. *Castro*, L. R. 9 Q. B. 219). Art. 104.

(3) A solicitor is guilty of a contempt of court in writing, for publication, letters tending to influence the result of a suit (*Daw* v. *Eley*, L. R. 7 Eq. 49).

(4) It seems that a judge of a county court has a statutory power only to commit for contempts committed before the court and whilst it is sitting (see 51 & 52 Vict. c. 43, s. 152; *R.* v. *Lefroy*, L. R. 8 Q. B. 134; *R.* v *Brompton County Court Judge*, [1893] 2 Q. B. 195).

(5) A justice of the peace may commit one who calls him, in court, a liar (*Rex* v. *Revel*, 1 Stra. 421.)

Art. 105.—*Power of Magistrates to Imprison.*

If a felony, or breach of the peace, be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But, if he be not present, he must issue his written warrant to apprehend the offender (2 Hale, P. C. 86).

Art. 106.—*Arrest by Constable and Private Persons.*[162]

(1) Any person may arrest another without a warrant if a felony has in fact been committed,

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Canadian Cases.

[162] The Act R. S. O., 1897, c. 88, for the protection of justices of the peace and others

Art. 106. and he has reasonable grounds for suspecting that the person arrested has committed the felony.

Canadian Cases.

from vexatious actions, requires proof that the magistrate acted maliciously and without reasonable and probable cause in all cases where the foundation of the action is in respect to any matter within his jurisdiction as such justice. But an action against a magistrate will be without any such allegation when the justice acted in a manner in which by law he had not jurisdiction. Where the justices have a general jurisdiction over the subject-matter, and acting under that jurisdiction commit the plaintiff to the custody of the gaoler, the latter is not liable for trespass and false imprisonment, although the proceedings may have been erroneous (*Ferguson* v. *Adams*, 5 U. C. R. 200).

A conviction not set aside protects a magistrate against a trespass (*Gates* v. *Derenish*, 6 U. C. R. 260).

Although a conviction is not quashed, yet if it is bad on the face of it an action will lie for trespass (*Briggs* v. *Spilsbury*, Taylor's Reps. 440; and see *Brennan* v. *Hatelie*, 6 U. C. R. (O. S.) 308; *Clapp* v. *Laurason*, 6 U. C. R. (O. S.) 319; *Cleland* v. *Robinson et al.*, 11 U. C. C. P. 416; *Marsh* v. *Boulton*, 4 U. C. R. 354; *Ferguson* v. *Adams*, 5 U. C. R. 194; *Gray* v. *McCarty et al.*, 22 U. C. R. 568; *Graham* v. *McArthur*, 25 U. C. R. 478; *Cummins* v. *Moore*, 37 U. C. R. 130; and *Cross* v. *Wilcox*, 39 U. C. R. 187).

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the accused to gaol,

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Art. 106. thinking that a felony has been committed, and that it has been committed by the person arrested.

Canadian Cases.

acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously (*Scott* v. *Rebum*, 25 O. R. 450).

The object of the "Act to protect Justices of the Peace and others from Vexatious Actions," R. S. O., c. 73 [now R. S. O., 1897, c. 88], is for the protection of those fulfilling a public duty, even though, in the performance thereof, they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause; but where a person entitled to the protection of the Act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required (*Kelly* v. *Archibald*, *Kelly* v. *Barton*, 26 O. R. 608, and 22 O. A. R. 522; and see *Friel* v. *Ferguson*, 15 U. C. C. P. 584; *Neill* v. *McMillan*, 25 U. C. R. 485; *Cummins* v. *Moore*, 37 U. C. R. 130; *Venning* v. *Steadman*, 9 S. C. R. 206; *Coffey* v. *Scane*, 22 O. A. R. 269).

The notice of action against a magistrate should set forth the substantial ground of complaint, and should specify the time and place of the commission (*Madden* v. *Shewer*, 2 U. C. R. 115, and sect. 14, R. S. O., 1897, c. 188; and see *Oliphant* v. *Leslie*, 24 U. C. R. 398; *Bond* v. *Connell*, 16 O. A. R. 398; *Sinden* v. *Brown*, 17

(3) For the sake of preserving the peace, any person who sees it broken may without a warrant

Art. 106.

Canadian Cases.

O. A. R. 173; *Jones* v. *Grace*, 16 O. R. 681; and *Howell* v. *Armour*, 7 O. R. 363).

Amending a conviction made by a justice is not quashing it, and in such a case trespass will not lie against the justice (*McLellan* v. *McKinnon*, 1 O. R. 219).

Plaintiff caused to be served upon defendant, a justice of the peace, notice of action claiming damages for maliciously and without reasonable and probable cause, causing plaintiff to be arrested and confined in the common gaol under a warrant issued in a civil action, brought and tried before defendant, in which one C. was plaintiff, and the present plaintiff defendant, said warrant having been issued without authority, and after the debt for which said suit was brought, and said warrant issued, was paid and satisfied to the satisfaction of the plaintiff, by giving new securities therefor. Plaintiff's statement of claim was framed on the theory that the justice had jurisdiction, but that he acted maliciously, and without reasonable and probable cause. There was no count or paragraph against the justice founded on want or excess of jurisdiction.

It was *held*, that it was not necessary, under the circumstances, to consider whether the justice had exceeded his jurisdiction or not.

Also, that the warrant having been properly issued, and the only question being whether or not it could be enforced after the debt was paid, that this question was not covered by the notice, and that the action must be dismissed (*Hennessey*

Art. 106. arrest him whom he sees breaking it at the moment of the affray or immediately after, so

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Canadian Cases.

v. *Farquhar*, 35 N. S. R. 22, and see R. S. N. S., c. 101, sect. 12).

Per Weatherbe, J., that plaintiff could not succeed, the jury having found that defendant acted in good faith, and that he had reasonable and probable cause for directing the arrest of plaintiff, and that he was not actuated by malice (*Ibid.*).

Quære, whether, after the warrant was issued, plaintiff could adjust the debt by giving new securities.

Per Ritchie, J., that plaintiff could not succeed, the notice of action being defective (*Ibid.*).

Quære, whether plaintiff could not have succeeded if trespass had been alleged.

In an action brought by plaintiff, claiming damages for alleged wrongful arrest and imprisonment, it appeared that plaintiff was arrested and conveyed to gaol upon a warrant issued by defendant, a justice of the peace for the county of Hants, for the collection of the sum $4.20, being three years' poll tax at $1 for each year, and an amount due for costs incurred on a general distress warrant previously issued by defendant for the collection of the taxes, to which a return had been made by the constable that he was unable to find any goods whereon to levy.

It further appeared, that before he issued the warrant under which plaintiff was arrested, defendant had before him the affidavit of the secretary of school trustees for the district in which plaintiff resided, showing that he had not paid his tax for three years, and that the

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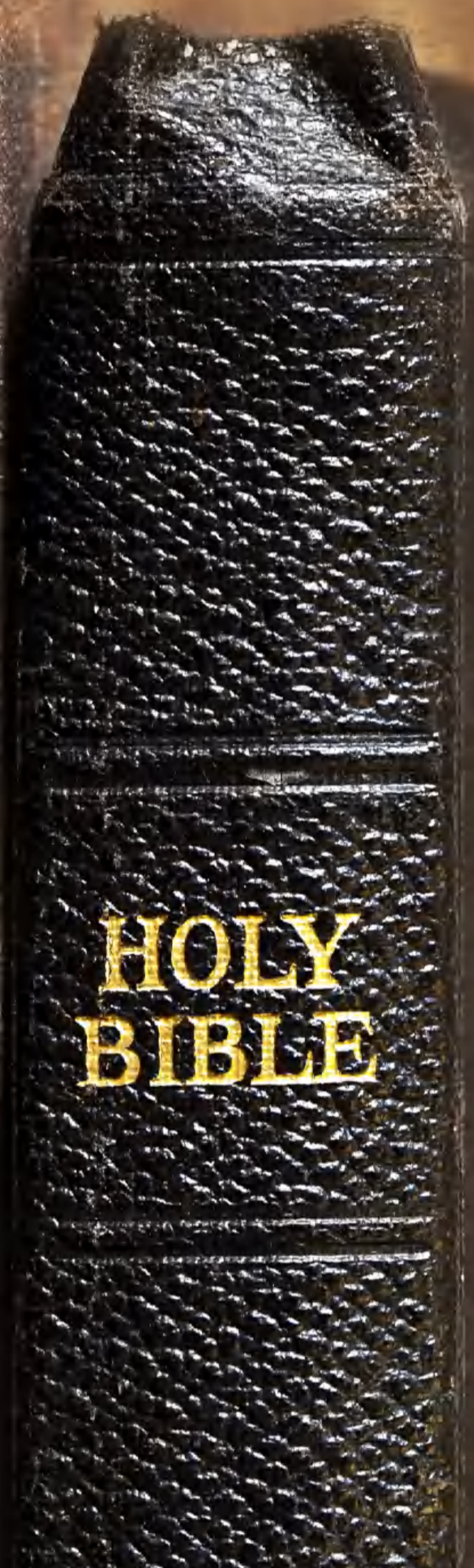

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Art. 106.

(4) Where an arrest can only lawfully be made by warrant, the person arresting must have it with him at the time ready to be produced if demanded (*Gilliard* v. *Laxton*, 31 L. J. M. C. 123).

Felons.

A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise (*Beckwith* v. *Philby*,[163] 6 B. & C. 635).

In an action for false imprisonment, where the defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal trial was *res inter alios acta*, and is not binding on the defendant in a distinct proceeding (*Cahill* v. *Fitzgibbon*, 16 Ir. L. R. 371).

Cases of suspected felony.

As we have seen, a private person can only arrest a suspected felon in cases where a felony has actually been committed by *some one*; and if it should turn out that no such felony was ever committed, he will be liable,

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Canadian Cases.

the duty of inquiring into the validity of the rate is not imposed upon the justice, and that the English cases, where the justices had jurisdiction to levy rates "well assessed" are therefore distinguishable (*Parker* v. *Etter*, 33 N. S. R. 52).

[163] *Lyden* v. *McGee*, 16 O. R. 105; *Patterson* v. *Scott*, 38 U. C. R. 642; *Ellis* v. *Power*, 4 N. B. R. 41.

Art. 106.

however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed before acting; and consequently the law provides that a constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed, he will not be liable (*Marsh* v. *Loader*, 14 C. B. (N.S.) 535; *Griffin* v. *Colman*, 28 L. J. Ex. 134). The suspicion, however, must be a reasonable one, or the constable will be liable.

Illustrations.

(1) Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg* v. *Ward*, 27 L. J. Ex. 443). But, on the other hand, where a constable knows that a warrant is out against a man, that is sufficient ground for his reasonably suspecting that a felony has been committed (*Creagh* v. *Gamble*, 24 Ir. L. R. 458).

(2) But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes the other into custody, the party making the charge, and not the constable, is liable (*Davis* v. *Russell*, 5 Bing. 354). "It would be most mischievous," Lord MANSFIELD remarks, "that the officer should be bound first to try, and at his peril exercise his judgment as to the truth of the charge.

Art. 106.

He that makes the charge alone is answerable" (*Griffin* v. *Coleman*, 4 H. & N. 265).

(3) The right of arrest stated in paragraph 3 of Art. 136 is only to prevent disturbances of the peace. It seems that all persons taking part in the affray may be arrested—provided there is a prospect of the affray being renewed—and may be detained till the heat is over, and may then be delivered to a constable to be taken before a magistrate. Thus, when the plaintiff entered the defendant's shop and exchanged blows with a shopman, the defendant was justified in arresting him and handing him over to the constable, on the ground that though the affray had not been actually committed in his presence, yet the plaintiff persisted in remaining on the premises in such circumstances as made it seem probable that he would renew the disturbance unless he was taken into custody (*Timothy* v. *Simpson*, .1 Cr. M. & R. 757). In such circumstances it seems that a constable is justified in taking the disturber upon the information of one who has seen the affray (even though he was not himself present) if there is a prospect of its being renewed (*Ibid.*). There is some authority for saying that a constable may arrest immediately after an affray even though there is no prospect of the affray being renewed; but the proposition is open to doubt (*a*).

Art. 107.—*Arrest for Misdemeanor.*[164]

No person has at common law power to arrest another for a misdemeanor without a warrant,

(*a*) See the cases discussed in Clerk and Lindsell on Torts, 2nd ed., p. 666.

Canadian Cases.

[164] Where a man is himself assaulted by a person disturbing the peace in a public street, he may

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Art. 107. persons committing offences and refusing to give their names and addresses when requested. See, for instance, the Railways Clauses Consolidation Act, 1845, s. 154, and the Motor Car Act, 1903.

Art. 108.—*Institution of Criminal Proceedings endangers Right of Action.*

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged; and if any person shall have obtained such certificate, or *having been convicted shall have suffered the punishment inflicted*, he shall be released from all further or other proceedings, civil or criminal, for the same cause (24 & 25 Vict. c. 100, ss. 42—45).

Illustrations.

(1) A certificate can only be granted by magistrates where there has been a hearing upon the merits. Where the prosecutor, having obtained a summons, did not attend to give evidence and the magistrates dismissed the summons, the magistrates had no jurisdiction to give a certificate of dismissal (*Reed* v. *Nutt*, 24 Q. B. D. 669). The fact that the accused has been ordered by the magistrates to enter into recognizances to keep the peace

and to pay the recognizance fee, will not constitute a bar to an action (*Hartley* v. *Hindmarsh*, L. R. 1 C. P. 553). Art. 108.

(2) The granting a certificate by magistrates where the complaint is dismissed, is not merely discretionary. Magistrates are bound, on proper application, to give the certificate mentioned in the section (*Hancock* v. *Somes*, 28 L. J. M. C. 196); and, if they refuse to do so, may be compelled by *mandamus* (*Costar* v. *Hetherington*, 28 L. J. M. C. 198).

(3) The words "from all further or other proceedings civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person (*e.g.*, the complainant's husband) consequentially aggrieved thereby (*Masper and Wife* v. *Brown*, 1 C. P. D. 97).

ART. 109.—*Amount of Damages.*

In assessing the damages for an assault or battery, or false imprisonment, the time when, and the place in which, the trespass took place should be taken into consideration.

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks BATHURST, J., in *Tullidge* v. *Wade* (3 Wils. 19), "to be beaten upon the Royal Exchange than in a private room."[166]

Canadian Cases.

[166] In an action for assault, in which the verdict was against two defendants, it was *held* that the

Art. 110.

Art. 110.—*Limitation.*

Every action of trespass to the person (assault, battery, wounding, or false imprisonment) must be brought within four years next after the cause of action.

See also Art. 30, p. 84, for the protection afforded by the Public Authorities Protection Act, the effect of which

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Canadian Cases.

second defendant was liable for damage equally with the first, though the principal injury was caused by the latter (*Dunham* v. *Powell*, 5 U. C. R. (O. S.) 75). Other cases dealing with assault and battery are *McCurdy* v. *Swift*, 17 U. C. C. P. 126; *Coward* v. *Baddeley*, 5 U. C. L. J. 262; *Reg.* v. *M'Evoy*, 20 U. C. R. 244; *Davis* v. *Lennon*, 8 U. C. R. 599; *Reg.* v. *Shaw*, 23 U. C. R. 616; *Reg.* v. *Harmer*, 17 U. C. R. 555; *Reg.* v. *Faneuf*, 5 L. C. J. 167; *Reg.* v. *Dingman*, 22 U. C. R. 283; *Reg.* v. *Crigan*, N. B. R. 1 Hannay, 36; *Reg.* v. *Ryan*, *ibid.* 119—per Ritchie, C.J.; *Reg.* v. *Gomez*, 22 U. C. C. P. 185; *Shires* v. *Barrick*, 14 U. C. R. 424; *Glass* v. *O'Grady*, 17 U. C. C. P. 233.

In trespass for an assault and battery, the defendant offered to prove, in mitigation of damages, that the plaintiff had used very slanderous expressions concerning defendant's wife, during defendant's absence from home, and which being reported to defendant on his return, he, on the spur of the moment, went to plaintiff and assaulted him. This evidence was refused, and the jury gave a verdict for 140*l.* damages. The court set aside the verdict to give an opportunity to elicit the whole circumstances of the transaction (*Short* v. *Lewis*, 3 U. C. R. (O. S.) 385).

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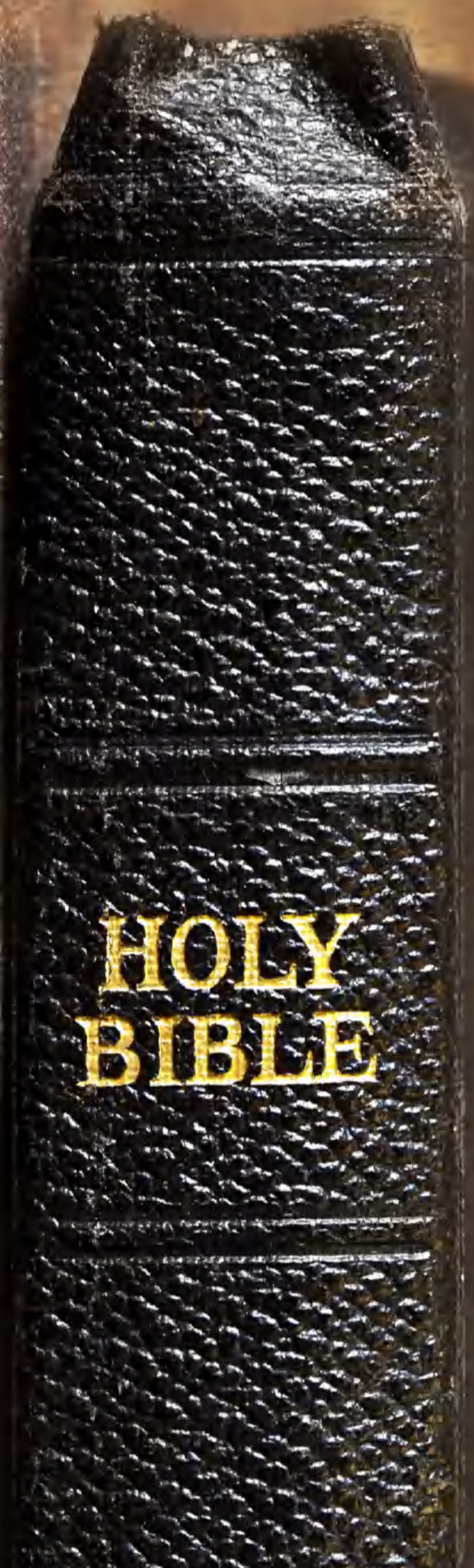

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Art. 111. on the same without lawful authority. It constitutes a tort without proof of actual damage.

Illustrations. (1) Thus, driving nails into another's wall, or placing objects against it, are trespasses (*Lawrence* v. *Obee*, 1 Stark.

Canadian Cases.

of right thereto (*Ridout* v. *Harris*, 17 U. C. C. P. 88; *Brunskill* v. *Harris*, 1 Error & App. 322).

Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land made by a former owner and found in the registry office; but it was not marked, registered or filed, no sale was shown to have been made according to it, and the streets had never been opened or used. *Held*, that the defendant was not acting within his jurisdiction, and was liable in trespass (*Brooks* v. *Williams*, 39 U. C. R. 530).

A sheriff having seized goods, cannot lawfully sell them on defendant's premises without his permission, and any person going on the premises to purchase may be treated as a trespasser (*McMaster* v. *McPherson*, 6 U. C. R. (O. S.) 16).

Trespassers *q. c. f.* will lie by the owner of a close against the owner of a pig which may break and enter and do damage (*Blacklock* v. *Millikan*, 3 U. C. C. P. 34; see also *Mason* v. *Morgan*, 23 U. C. R. 328).

An innkeeper has the sole right to select the apartment for a guest, and, if he find it expedient, to change it and assign another; he cannot be treated as a trespasser for entering to make the change (*Doyle* v. *Walker*, 26 U. C. R. 502).

22; *Gregory* v. *Piper*, 9 B. & C. 591); or fox hunting across land against the will of the owner (*Paul* v. *Summerhayes*, 4 Q. B. D. 9). Art. 111.

Canadian Cases.

Isolated acts of trespass, committed on wild land, from year to year, will not give the trespassers a title under the Statute of Limitations, and there was no misdirection in the judge, at the time of an action for trespass on such land, refusing to leave to the jury for their consideration such isolated acts of trespass as evidence of possession under the statute. To acquire such a title there must be open, visible and continuous possession known, or which might have been known, to the owner, not a possession equivocal, occasional, or for a special or temporary purpose (*Doe* d. *Des Barres* v. *White*, 1 Kerr, N. B. Reps. 595, approved; *Sherren* v. *Pearson*, 14 S. C. R. 581, judgment of the Supreme Court of Prince Edward Island affirmed; and see *Stovel* v. *Gregory*, 21 O. A. R. 137).

K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorising its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost. *Held*, reversing the judgment of the Supreme Court of Nova Scotia (20 N. S. Reps. 95), that in the absence of any evidence of dedication of the road, it must be presumed that the proceedings under the statute were rightly taken, and K. could not recover (*Dickson* v. *Kearney*, 14 S. C. R. 743; and see *Kearney* v. *Oakes*, 18 S. C. R. 148).

E. and B. owned adjoining lots, each deriving his title from S. *E.* brought an action of trespass

Art. 111.

Trespass of cattle.

(2) So, it is a trespass to allow one's cattle to stray on to another's land, unless there is contributory misconduct on his part, such as keeping in disrepair a hedge which

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Canadian Cases.

against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in the right of way was in S., but *E.* founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots. *Held*, affirming the judgment of the Supreme Court of Nova Scotia (19 N. S. Reps. 222), that as **E.** had no grant or conveyance of the right of way and had not proved an exclusive user, he could not maintain his action (*Ells* v. *Black*, 14 S. C. R. 740).

"I am of opinion that the evidence supports the second, fourth, and fifth counts of the plaintiff's declaration, which are in trespass. It makes little difference since the abolition of forms of action whether the injuries complained of are to be classified as wrongs which were formerly remediable in actions of trespass, or in some other form of action; so long as the declaration shows a legal injury that is sufficient. The wrongs complained of in the counts I have mentioned would, however, under the old system of actions, have been the subjects of an action of trespass, inasmuch as they amounted to direct injuries to the plaintiff's land. Thus, driving nails into another's wall, or even placing objects against it, have been held to be trespasses. The acts of the defendant in inserting his beams in the wall of the house then belonging to Caldwell, and now the property of the plaintiff, and in cutting holes in the wall and chimney were, therefore, illegal acts, that is trespasses, except in so far as they

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Art. 111. such duty to repair exists, the owner of cattle is liable for their trespasses even upon uninclosed land (*Boyle* v. *Tamlyn*, 6 B. & C. 337), and for all naturally resulting

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Canadian Cases.

was responsible for the acts of his servant, the book-keeper, for they were done by him in the discharge of what he believed to be his duty and was within the general scope of his authority. *Held* also, that the judgment against both R. and the book-keeper was maintainable, for it was recovered against them as joint wrong-doers (*Murphy* v. *Corporation of Ottawa*, 13 O. R. 334, distinguished; *Ferguson* v. *Roblin*, 17 O. R. 167; and see *Schaffer* v. *Dumble*, 5 O. R. 716).

Obligation to keep cattle from trespassing (*Garrioch* v. *McKay*, 13 M. L. R. 404).

The mere enclosure of the land of another, by the adjoining proprietor, by a fence put up with the consent of and by arrangement with the owner, for the purpose of protecting the lands of both against cattle, does not dispossess the owner, nor prevent him from maintaining trespass against anyone intruding therein, or using his land for purposes other than that for which it was enclosed (*Brookman* v. *Conway*, 35 N. S. R. 462).

Conveying of timber and lumber—Injury to riparian proprietor—Liability of owner—Plea of vis major*—Directions to jury—O.* 37, *r.* 6.

In an action claiming damages for injuries occasioned to plaintiff's land by logs, which defendant had neglected to confine within his boom, and which were suffered to be driven up and down stream by the tide, the trial judge

damage. And where the plaintiff's mare was injured by the defendant's horse biting and kicking her through the fence separating plaintiff's and defendant's land, it was

Art. 111.

Canadian Cases.

instructed the jury that, in assessing damages, they were not restricted to the actual damage referred to in the statute (R. S. N. S. c. 95, s. 17), but, at the same time, the amount allowed ought to be reasonable.

Held, that the jury should have been told, at the same time, that the actual damage was, as a rule, the measure in common law actions of this kind; but, as the amount awarded by the jury was small, and as there was evidence to support it, the misdirection, if any, occasioned no substantial wrong or miscarriage, and was, therefore, within O. 37, R. 6.

Quære, whether defendant could escape liability by employing a contractor to bring down his logs, when, in the ordinary course of things, they would necessarily come in contact with plaintiff's land.

Semble, that he could not.

In respect to a portion of the damage done, defendant relied upon a plea of *vis major*.

Held, that this was not a defence, unless defendant could show that the damage would equally have happened if he had done his duty.

Held, that, in this case, the excuse was insufficient, a large quantity of logs having been brought down the stream in the expectation that, before the high tides came, a sufficient quantity could be sawed to enable the remainder to be confined within the boom, and the high tides having occurred two or three days earlier than defendant expected, as the result of which the logs not

Art. 111. held that this was a trespass for which the defendant was liable apart from any question of negligence (*Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10).

Canadian Cases.

confined in the boom were carried up the stream and stranded on plaintiff's land (*Campbell et al.* v. *Dickie*, 36 N. S. R. 40).

The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorised by the Municipal Act to undertake and carry out the works, were not authorised to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries, from which the anthrax germs came, to connect their systems of sewers, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse, from which the germs were believed to come, into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection.

The elements of damage in such a case considered. Damages assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for the loss of pasture, and for pollution of the air in and about a dwelling-house. The acts of the defendants

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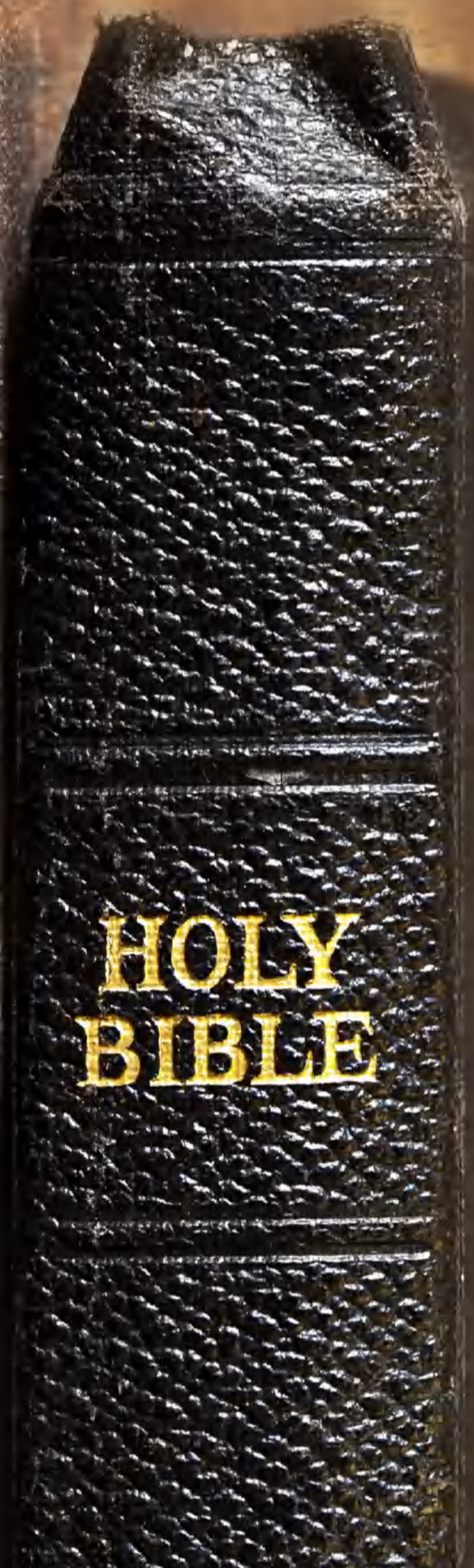

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Art. 111.

lands of a landowner, the soil of which was vested in the owner, a member of the public who uses the road not merely in exercise of his right of way, but in order to interrupt the landowner's sport, is guilty of trespass. For he is using the site of the road for a purpose not covered by his limited right of user (*Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142); for the public only have a right to use a highway for passing and repassing and not for loitering or depasturing cattle (*Doraston* v. *Payne*, 2 H. Bl. 527; and 2 Sm. L. C. 157), or for watching the training of horses on the adjoining lands (*Hickman* v. *Maisey*, [1900] 1 Q. B. 752).

Exceptions.

In the following cases a person has lawful authority to enter upon another's land:

Retaking goods.

(1) If one takes another's goods on to his land, the latter may enter and retake them (*Patrick* v. *Colerick*, 3 M. & W. 485).

Cattle.

(2) If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo* v. *Ridge*, Yelv. 74).

Distraining for rent.

(3) So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Keane* v. *Reynolds*, 2 E. & B. 748); but he may not break open the outer door of a house.

Reversioner inspecting premises.

(4) A reversioner of lands may enter in order to see that no waste is being committed.

Escaping danger.

(5) A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods.

Grantee of easement.

(6) And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*Taylor* v. *Whitehead*, 2 Doug. 745).

Public rights.

(7) Land may be entered under the authority of a

statute (*Beaver* v. *Mayor, etc. of Manchester*,[169] 29 L. J. Q. B. 311); or in exercise of a public right, as of a highway or the right to enter an inn, provided there is accommodation (*Dansey* v. *Richardson*, 3 E. & B. 144). **Art. 111.**

(8) Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands. *Liberum tenementum.*

Art. 112.—*Trespassers* ab initio.[170]

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority, by doing that which he has no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

Canadian Cases.

[169] An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice houses, and for that purpose may cut a channel through private water lots through which to float the ice. Judgment of the Court of Appeal, Ontario, 26 Ont. A. R. 411, reversed (*The Lake Simcoe Ice and Cold Storage Co.* v. *McDonald*, 31 S. C. R. 130.

[170] *Sibbald* v. *Grand Trunk R. W. Co.*, 18 O. A. R. 184.

Art. 112.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance and not a mere nonfeasance (*Six Carpenters' Case*, 1 Sm. L. C. 132).

Illustration.

Thus, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers (*Six Carpenters' Case*, 1 Sm. L. C. 132).

ART. 113.—*Possession necessary to enable the Plaintiff to maintain an Action of Trespass.*[171]

(1) In order to maintain an action of trespass, the plaintiff must be in the possession of the land;

Canadian Cases.

[171] *Greaves* v. *Hilliard*, 15 U. C. C. P. 326.

Trespass *q. c. f.* will not lie against a defendant for acts committed under the authority of the party in possession of and claiming land during the time an action of ejectment against the person in possession was pending (*Street* v. *Crooks et al.*, 6 U. C. C. P. 124).

The mother in possession of the land belonging to the heir, a minor, may sue in trespass *q. c. f.* as the real friend of the minor (*Johnson* v. *McGillis*, 7 U. C. R. 309).

Actual occupation of land is not essential to give a right to maintain trespass by one who has

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Art. 113. (2) The possession of land suffices to maintain an action of trespass against any person *wrongfully*

Canadian Cases.

where, as in Ontario and the North-West, road or street allowances have been made in the original survey of the country the presumption is destroyed, and owners of land abutting upon such roads or streets do not take to the middle thread. It must also, I think, be taken to be settled law in the province of Nova Scotia, upon the authority of *Koch* v. *Dauphinee* (James, N. S. Reps. 159), that lands expropriated for highways under provincial statutes become vested in the Crown as its property, the right of the original owner, upon payment of compensation, being extinguished. It is likewise clear that where there has been no expropriation or other acquisition by the Crown or municipality of lands for highway purposes, the law presumes that the original proprietor has dedicated the highway to the use of the public, and that upon such dedication the right of the public to use such highway is paramount and perpetual" (*O'Connor* v. *The Nova Scotia Telephone Co.*, 22 S. C. R. 289—Sedgwick, J.).

Water and Watercourses—Drains—Increasing Flow of natural Stream—Ditches and Watercourses Act—Outlet—Engineer's Award—Parties—Joint Tort-feasors—Damages—Injunction.

The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him reasonably use the stream as an outlet for the drains made by them in the agricultural use of their lands, although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does

entering upon it; and if two persons are in possession of land, each asserting his right to it, then

Art. 113.

Canadian Cases.

not apply to persons not riparian owners who by proceedings under the Ditches and Watercourses Act obtain an outlet to the stream, and they are liable to the person injured by the increased amount of water.

A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and if the outlet chosen by the engineer is not in fact a proper outlet, his award is no protection to the persons acting under it as against a person not a party to it.

An action to recover damages for flooding his land was brought by a riparian owner against a number of persons who were respectively parties to the construction of several drains under the Ditches and Watercourses Act, the allegation being that by means of the drains the flow of water had been unlawfully increased to the plaintiff's injury. Evidence was given as to the quantum of the plaintiff's damage, and judgment was given against all the defendants for the whole amount. *Held*, that while the defendants who were parties respectively to the construction of each drain were jointly liable for any damage attributable to that drain, the different sets of defendants were not joint tort-feasors and had been improperly joined as defendants; that a joint assessment of damages was improper; and that, there being no evidence of the proportion of damage attributable to each set of defendants, only nominal damages and an injunction could be awarded. Judgment of the

Art. 113.

the person who has the title to it is to be considered in actual possession. and the other person is a mere trespasser (*Jones* v. *Chapman*, 2 Ex. 821).

(3) Where a person is in possession of land, the onus lies upon the *primâ facie* trespasser to show that he is entitled to enter (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1).

Illustrations.

Possession relates back to the right.

(1) Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*Ryan* v. *Clark*, 14 Q. B. 65). But when he has once entered, he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson* v. *Radcliffe*, 29 L. J. Q. B. 128 *Butcher* v. *Butcher*, 7 B. & C. 402).

Surface and subsoil in different owners.

(2) Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*Cox* v. *Mouseley*, 5 C. B. 533); but he

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Canadian Cases.

Drainage Referee varied (*McGillivray* v. *Township of Lochiel*, 8 O. L. R. 446).

Persons engaged in the floating or transmission of logs down rivers and streams under the authority of R. S. N. S., 1900, c. 95, sect. 17, are liable for all damage caused thereby, whether by negligence or otherwise, and the owner of the logs is not relieved from liability because the damage was done while the logs were being transmitted by another person under contract with him (*Dickie* v. *Campbell*, 36 N. S. Rep. 40; 34 S. C. R. 265).

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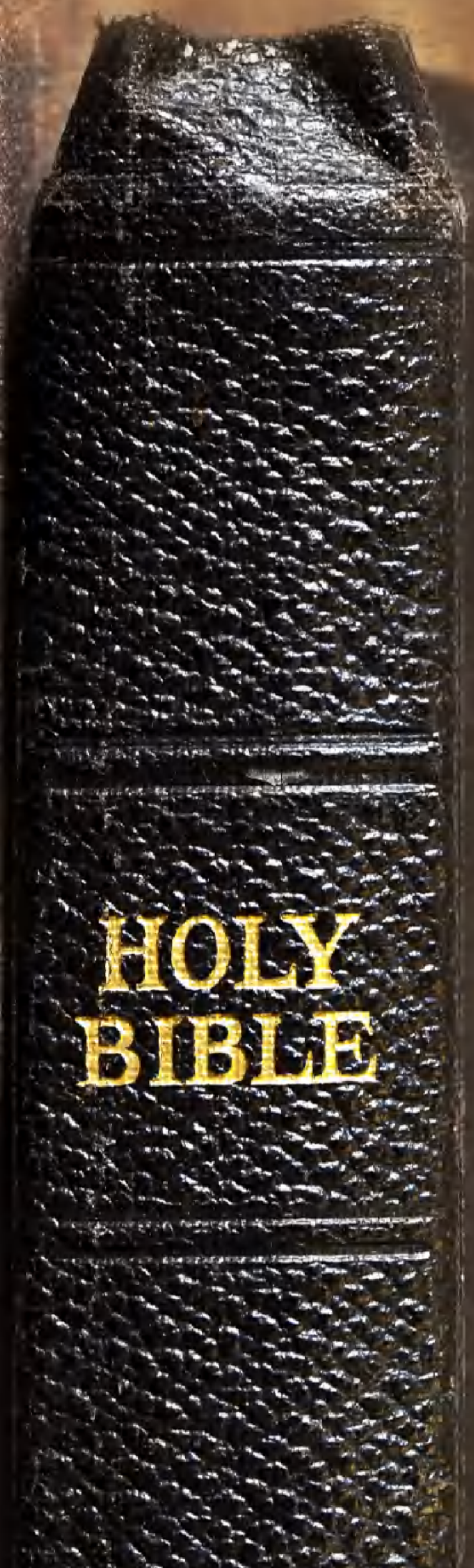

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Art. 114. entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*Stedman* v. *Smith*, 26 L. J. Q. B. 314; *Cubitt* v. *Porter*, 8 B. & C. 257).

Art. 115.—*Continuing Trespasses.*

Where a trespass is permanent and continuing, the plaintiff may bring his action as for a continuing trespass, and claim damages for the continuation; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer* v. *Cook*, 4 C. B. 236). See Art. 32.

Art. 116.—*Limitation.*

All actions for trespass to land must be commenced within six years next after the cause of action arose (21 Jac. I. c. 16, s. 3).

Distress damage feasant.

It is convenient to mention here a peculiar remedy of landowners for trespasses committed by cattle, viz., by seizing the animals whilst trespassing, and detaining them until reasonable compensation is made (see *Green* v. *Duckett*, 11 Q. B. D. 275), not only for damage done to the land, but also for damage (if any) done to animals of the owner of the land (*Boden* v. *Roscoe*, [1894] 1 Q. B. 608). This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy

is allowed in the case of animals *feræ naturæ* reared by a particular person. In such cases the law, not recognising any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while .trespassing. Thus, at common law, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam* v. *Mockett*,[172] 2 B. & C. 939, *per* BAYLEY, J.) (*a*). Art. 116.

SUB-SECTION 2.—OF DISPOSSESSION.

ART. 117.—*Definition.*

Dispossession or ouster consists of wrongfully withholding the possession of land from the rightful owner.

Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment, and since that statute it is by an action for the recovery of land wherein the plaintiff claims possession of the land. Specific remedy.

(*a*) But the killing may amount to a criminal offence by s. 23 of the Larceny Act, 1861 (24 & 25 Vict. c. 96).

Canadian Cases.

[172] "I have always been of opinion, that for trespasses by domestic animals, such as horses, cattle, pigs, &c., the owner of the close might maintain trespass against the owner of the animals, unless he can excuse the act for defect of fences" (*Blacklock* v. *Milliken*, 3 U. C. C. P. 34—Sir J. Macaulay; *Mason* v. *Morgan*, 24 U. C. R. 328).

Art. 118.

Art. 118.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*Martin* v. *Strachan*, 5 T. R. 107).

Possession *primâ facie* evidence of title.

(1) Thus, mere possession is *primâ facie* evidence of title until the claimant makes out a better one (*Smith* v. *Webber*,[173] 1 A. & E. 119).

Title of successful claimant need not be indefeasible.

(2) But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one inclosed waste land, and died without having had twenty years' possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher* v. *Whitlock*, L. R. 1 Q. B. 1).

Jus tertii.

(3) Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to disprove that of the claimant (*Doe* d. *Carter* v. *Barnard*, 13 Q. B. 945). But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher* v. *Whitlock*, *supra*; *Richards* v. *Jenkins*, 17 Q. B. D. 544).

Exceptions.

Landlord and tenant.

(1) Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the

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Canadian Cases.

[173] *Davison* v. *Burnham*, N. S. Reps. and Cassel's S. C. Digest, 515; *Gates* v. *Davison*, 5 Russ. & Geld. 431, and Cassel's S. C. Digest, 516.

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Art. 120.

Art. 120.—*Limitation.*

No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (37 & 38 Vict. c. 57, s. 1; 3 & 4 Will. IV. c. 27, s. 2; *Brassington* v. *Llewellyn*, 27 L. J. Ex. 297) (*a*).

Exceptions. Disability.

(1) Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no action shall be brought after thirty years from the accrual of the right (37 & 38 Vict. c. 57, ss. 3—5; 3 & 4 Will. IV. c. 27, ss. 16, 17).

Acknowledgment of title.

(2) When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing, and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*Ley* v. *Peter*, 27 L. J. Ex. 239).

Ecclesiastical corporations.

(3) The period in the case of ecclesiastical and eleemosynary corporations is sixty years (3 & 4 Will. IV. c. 27, s. 29).

Art. 121.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of

(*a*) The owner of the legal estate must, however, be a party to the action: *Allen* v. *Woods*, 68 L. T. 143.

Art. 121.

the profits or rent of lands, or of the death of the last rightful owner (3 & 4 Will. IV. c. 27, s. 3); and, (b) in respect of an estate in reversion or remainder or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the time when he himself becomes entitled to the possession, whichever of these periods may be the longest (37 & 38 Vict. c. 57, s. 2).

Discontinuance.

(1) Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (see *Smith* v. *Lloyd*, 23 L. J. Ex. 194; *Cannon* v. *Rimington*, 12 C. B. 1). Therefore, in the case of mines, where they do not belong to the surface owner, the period cannot commence to run until someone actually works them; and even then it only commences to run *quâ* the vein actually worked (see *Low Moor Co.* v. *Stanley Co.*, 34 L. T. (N.S.) 186, 187; *Ashton* v. *Stock*, 6 Ch. D. 726).

Continual assertion of claim.

(2) No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (3 & 4 Will. IV. c. 27, ss. 10, 11). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period. As to what acts constitute dispossession, see *Littledale* v. *Liverpool College*[174] ([1900] 1 Ch. 19).

Canadian Cases.

[174] *Archibald* v. *Town of Truro*, 33 N. S. R. 401. For other cases of trespass to land see *McLennan*

Art. 122.

SECTION III.—OF TRESPASS TO AND CONVERSION OF CHATTELS.

Art. 122.—*General Rule.*

Every direct forcible injury, or act, disturbing the possession of goods without the owner's consent, however slight or temporary the act may be, is a trespass. And if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner (as by taking, using, or destroying goods), it then becomes a wrongful conversion.[175]

Destroying goods.

(1) If one draws wine out of a cask and fills up the deficiency with water, he converts the whole cask. He

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Canadian Cases.

v. *Dominion Coal Co.*, 36 N. S. R. 28; *Eisenhaur* v. *Whynacht*, 35 N. S. R. 295; *Dixon* v. *Dauphinee*, 34 N. S. R. 239; *Zwicker* v. *Morash*, 34 N. S. R. 555; *Moore et al.* v. *Ritchie et al.*, 33 N. S. R. 216; *Grant* v. *Wolfe*, 32 N. S. R. 444; *Miller* v. *Corkum*, 32 N. S. R. 358; *Wilkie* v. *Richards*, 32 N. S. R. 295.

[175] A. lent a horse to B. for a special purpose, and while B. was using him consistent with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A. having seen the horse refused to take him, and went to B.'s residence and demanded the horse back sound as received. *Held*, that B.'s non-delivery of the horse after thus demanded back did not furnish evidence of conversion, and that A. could not sustain an action of trover for his value under the circumstances (*Wells* v. *Crew*, 5 U. C. R. (O. S.) 209;

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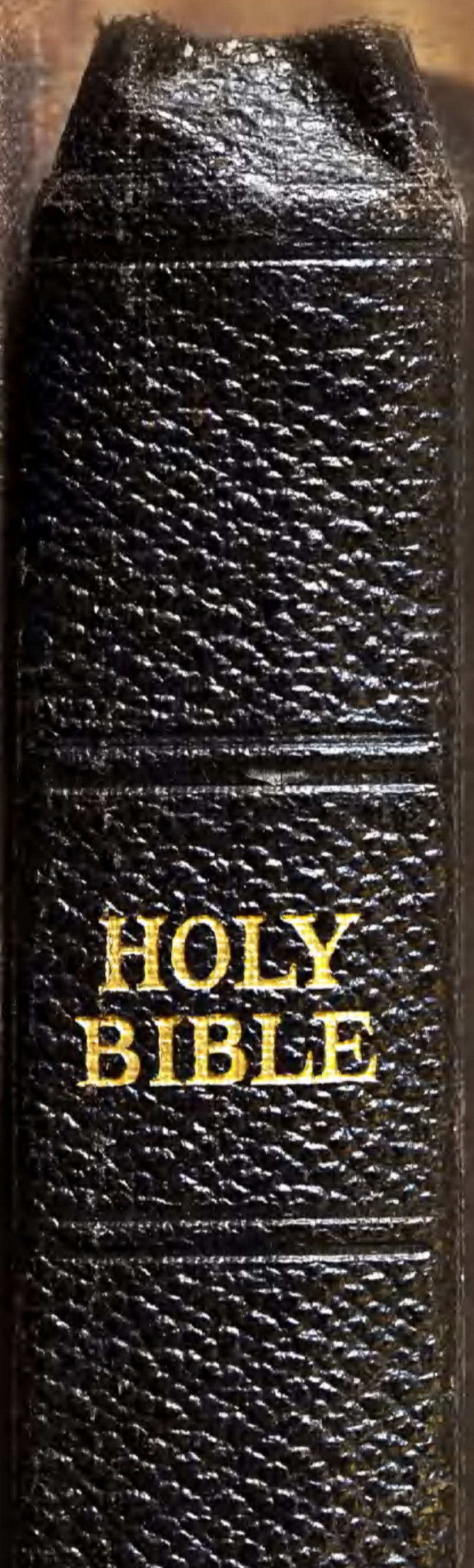

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Art. 122.

Injuring animals.

(3) Beating the plaintiff's dogs is a trespass (*Dand* v. *Sexton*, 3 T. R. 37). And although wild animals are not generally the subject of property while unconfined, yet if A. starts a hare *on the land of B.*, and kills it *there*, it is a trespass. For so long as the hare is on B.'s land it is his property (*Sutton* v. *Moody*, 1 Ld. Raym. 250). On similar grounds, rabbits, bred in a warren, are the property of the breeder so long as they stay on his land, and no longer (*Hadesden* v. *Gryssel*,[177] Cro. Jac. 195).

Intention immaterial.

(4) The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewellery from a drawer in the room in which he had died to a cupboard in another room, in order to ensure its safety, and the jewellery was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, *in the absence of proof that her interference was reasonably necessary*, and she was consequently held liable for the loss (*Kirk* v. *Gregory*, 1 Ex. D. 55). But, on the other hand, the finder of a lost chattel does not commit a tort by merely warehousing or otherwise safeguarding it for a reasonable time until the true owner be discovered, so long as he is not unnecessarily officious (see *per* BLACKBURN, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. at p. 766).

(5) Again, where the owner of household furniture assigned it by bill of sale to the plaintiff, and subsequently employed the defendants (who were auctioneers) to sell it for her by auction, and they sold *and delivered possession of it* to the purchaser from them, they were

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Canadian Cases.

[177] *Chase* v. *McDonald*, 25 U. C. C. P. 129.

"An action will lie by a party other than the tenant to the landlord of the premises upon which a distress for rent is made, for an excessive distress" (*Huskinson* v. *Laurence et al.*, 25 U. C. R. 60).

held liable, although they knew nothing of the bill of sale (*Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495). It is important, however, to note that the tort there was the *delivering* of the furniture to the purchaser, and not the mere selling of it (see *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; and *per* BRETT, J., in *Fowler* v. *Hollins*, L. R. 7 Q. B. at p. 627). Art. 122.

(6) So the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title (*a*). Thus, in the leading case of *Hollins* v. *Fowler*, (L. R. 7 H. L. 757), it was laid down that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion. Conversion by innocent purchaser.

(7) Where, however, the true owner has parted with a chattel to A. upon an actual contract, though there may be circumstances which enable that owner to set the contract aside for fraud, yet a *bonâ fide* purchaser from A. will obtain an indefeasible title (Sale of Goods Act, 1893, s. 23). The question will be, Was there a contract between the real owner and A.? (*Cundy* v. *Lindsay*, 3 App. Cas. 459). Thus, L. was a manufacturer in Ireland: Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letters used this address, "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name carrying on business in Wood Street. The

(*a*) Sale of Goods Act, 1893, s. 21, unless it be a negotiable security (as to which see *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591, and Sale of Goods Act, 1893, s. 25 (2)); or unless he buy it in market overt (Sale of Goods Act, 1893, s. 22); and not even then if it was stolen and the thief had been prosecuted to conviction (*ibid.* s. 24).

Art. 122.

goods were sent there, and the correspondence was all addressed to Blenkiron & Co., 37, Wood Street, and Blenkarn disposed of the goods to the defendant, a *bonâ fide* purchaser:—*Held*, that no contract was ever made with Blenkarn, and that even a temporary property never passed to him, so that he never obtained such a temporary property which he could pass to the defendant (*Cundy* v. *Lindsay*, *supra*; and see also *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Farquharson Brothers* v. *King & Co.*, [1902] A. C. 325).

Sale in market overt.

(8) To this rule, however, there is an exception, that a sale of goods in market overt gives a good title to the purchaser, although the seller has no title. So a purchaser in market overt cannot be sued in an action for conversion if he parts with the goods or refuses to give them up on demand. But this rule only protects the purchaser, and the seller in open market is guilty of conversion by selling and delivering goods to which he has no title (*Peer* v. *Humphrey*, 2 A. & E. 495; *Ganley* v. *Ledwidge*, 14 Ir. L. R. 31). The sale must be an open sale in a lawfully constituted market, and made according to the usages of the market. By special custom all shops in the city of London are market overt between sunrise and sunset for the sale of goods of the kind which by the trade of the owner are there put for sale by him. But the sale must be *by* the shopkeeper not *to* him, and it must take place in the open part of the shop, not in a room at the back (*Hargreave* v. *Spink*, [1892] 1 Q. B. 25).

Revesting on prosecution of thief.

Of this common law exception there is, however, a modification by statute, first enacted by 21 Hen. 8, c. 11, and now contained in s. 24 of the Sale of Goods Act, 1893, viz., that where goods are *stolen* and the thief is prosecuted to conviction, the property revests in the original owner, notwithstanding a sale in market overt. But note that this rule only applies to goods *stolen*, not

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Art. 122. property, is justifiable.[178] Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise (*Wells* v. *Head*, 4 C. & P. 568). But a man cannot justify shooting a dog, on the ground that it was chasing animals *feræ naturæ* (*Vere* v. *Lord Cawdor*, 11 East, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Read* v. *Edwards*, 34 L. J. C. P. 31).

In exercise of right.

(3) A trespass committed in exercise of a man's own rights, is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

Legal authority.

(4) Due process of law is a good justification, as, for example, an execution under a writ of *fieri facias*.[179]

Pledge.

(5) So where goods are pledged, no action of conversion will lie against the pledgee for their detention or for parting with them, until tender of the debt has been made and refused (*Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299).

Canadian Cases.

[178] *Spires* v. *Barrick*, 14 U. C. R. 424—Robinson, C.J.

[179] An action for trespass will not lie against a sheriff for seizing goods which were subject to a chattel mortgage, but of which the mortgagors had possession (*Street* v. *Hamilton*, 5 U. C. R. (O. S.) 658, and R. S. O., 1897, c. 148).

In case for illegal distress the plaintiff is entitled to succeed on showing that there was no such appraisement as the law directs, even though but for nominal damage (*Maguire* v. *Post*, 5 U. C. R. (O. S.) 1).

Art. 123.—*Possession necessary to maintain an Action for Trespass or Conversion.*[180]

(1) To maintain an action for *trespass* or *conversion*, the plaintiff must be the person in actual or constructive possession of the goods, or must have a legal right to the immediate possession.

(2) Any possession however temporary is sufficient against a wrongdoer.

(3) Although he cannot maintain an action for trespass or conversion, the person entitled to the

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Canadian Cases.

[180] A party purchasing a crop of wheat at a sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field (*Haydon* v. *Crawford*, 3 U. C. R. (O. S.) 583).

Where the plaintiff, a constable, had seized a horse under a distress warrant and the horse escaped to a railway and was killed, owing to the defendants' neglect to fence: *Held*, that the plaintiff had sufficient property in the horse to entitle him to sue (*Simpson* v. *Great Western R. W. Co.*, 17 U. C. R. 57; and see *Baker et al.* v. *Flint*, 3 U. C. R. (O. S.) 89; *Hamilton* v. *McDonell*, 5 U. C. R. (O. S.) 720; *Bowman* v. *Fielding et al.*, U. C. R., M. T., 3 Vict.; *Henderson* v. *Moodie*, 3 U. C. R. 348; *Campbell* v. *Cushman*, 4 U. C. R. 9; *Dame* v. *Carberry*, 10 U. C. R. 374; *Porter* v. *Flintoff*, 6 U. C. C. P. 335; *Killington* v. *Herring et al.*, 17 U. C. C. P. 639).

Art. 123.

reversion of goods may maintain an action for any *permanent injury* done to them (*Tancred* v. *Allgood*, 28 L. J. Ex. 362; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; *Mears* v. *London and South Western Rail. Co.*, 11 C. B. (N.S.) 854).

It does not seem necessary to attempt to explain the difference between trespass and conversion. There were formerly some wrongful acts for which trespass only lay, others for which conversion only lay, and others for which either remedy lay. For present purposes, it is enough to say that to support an action of tort in respect of goods, the plaintiff must have possession or the right to immediate possession. The right to immediate possession, without actual possession, is sometimes called "constructive possession." The phrase "constructive possession" is also used of the possession of one who has not physical control of goods, but whose agent has. For instance, where goods are in a warehouse or in a ship, and the owner has the documents of title by means of which he can get actual possession, he may be said to have constructive possession, Another kind of possession is "possession by relation." An administrator or executor has possession by relation from the moment of the death of the intestate or testator, for his title relates back to the death. And this possession by relation is enough to support an action against a wrongdoer, although at the time of the wrongful act the administrator or executor had neither title nor actual possession, nor the right to immediate possession.

Possession of bailee.

(1) If a hirer or carrier of my goods wrongfully delivers them to a third person, the bailment is thereby determined, and the immediate right of possession at once revests in me, so that I can sue in conversion either the bailee or the person to whom he has delivered them

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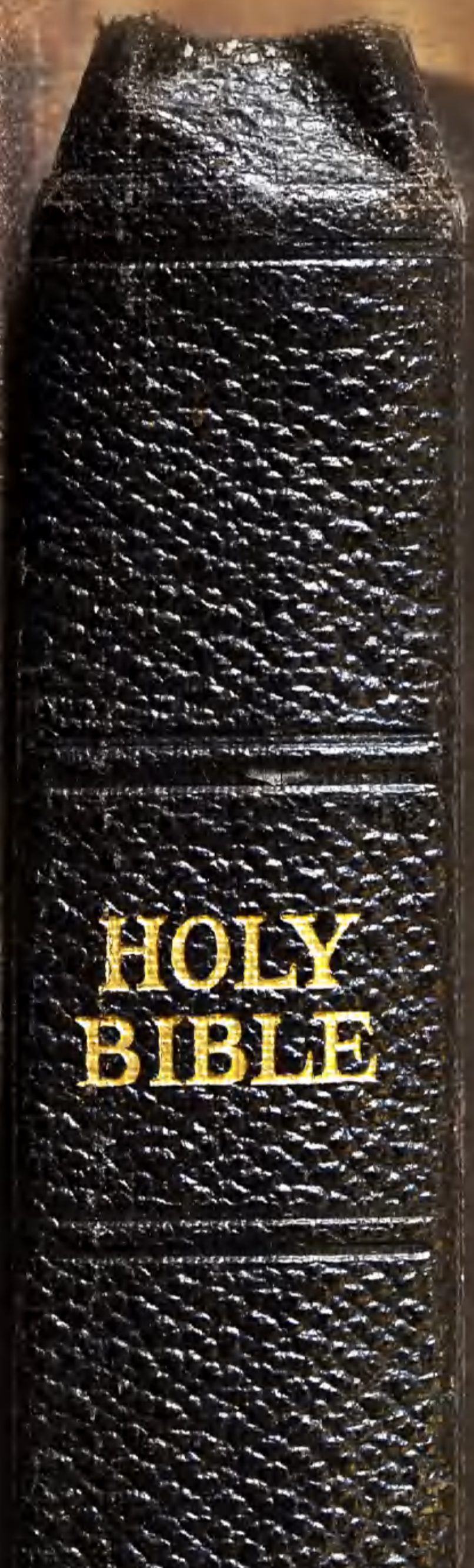

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Art. 123.

(1 Sm. L. C.; see also *South Staffordshire Waterworks Co.* v. *Sharman*, [1896] 2 Q. B. 44), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. In short, a defendant cannot set up a *jus tertii* against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may of course set up a *jus tertii*; for constructive possession depends upon a good title, and if the title be bad there can be no constructive possession (see *Leake* v. *Loveday*, 4 M. & G. 972; *Richards* v. *Jenkins*, 17 Q. B. D. 544), unless the third person waives or has never asserted his claim to the chattels (see *Barker* v. *Furlong*, [1891] 2 Ch. 172).

(6) A bailee of goods may maintain trespass or conversion against a wrongdoer, by virtue of his having the actual possession. So also may the bailor as he is in possession by the bailee. Thus, when an article is lent the borrower or the lender may bring an action against a wrongdoer (*Nicholls* v. *Bastard*, 2 C. M. & R. 659; *Burton* v. *Hughes*, 2 Bing. 173; *Lotan* v. *Cross*, 2 Camp. 464; *Rooth* v. *Wilson*, 1 B. & A. 59). So also may the owner of goods let on hire (*Cooper* v. *Willomatt*, 1 C. B. 672; *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502) and the pledgee of goods pawned (*Swire* v. *Leach*, 18 C. B. (N.S.) 479). The bailee, if he succeeds in an action of conversion, recovers the full value of the goods as damages, and must account to the bailor (see *The Winkfield*, [1902] P. 42 (overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422), where the principles and cases are fully discussed).

Art. 124.—*Trespasses by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint ownership of the plaintiff (2 Wms. Saund, 47 o; and see *Jacobs* v. *Seward*, L. R. 5 H. L. 464).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby (*Barnardiston* v. *Chapman*, 4 East, 121).

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in the market overt, so as to vest the whole property in the purchaser, it would be a conversion (*Mayhew* v. *Herrick*, 7 C. B. 229).

Art. 125.—*Trespassers* ab initio.

If one, taking a chattel by authority given him by law, abuses his authority, he renders himself a trespasser *ab initio* (*Oxley* v. *Watts*, 1 T. R. 12).

Thus, when the defendant took a horse as an astray, as he was authorised by law to do, and then worked the horse (which he had no authority to do), he became a trespasser *ab initio* (*Oxley* v. *Watts*, 1 T. R. 12). But the rule only applies where the original authority is given by law—not where it is given by the parties—and the abuse must be misfeasance not mere nonfeasance (compare the similar rule as to trespass to land, *supra*, Art. 112, p. 543).

Art. 126.

ART. 126.—*Remedy by Recaption.*

When anyone has deprived another of his goods or chattels, the owner of the goods may lawfully reclaim and take them wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace, and he can justify an assault made for the purpose of recapturing after demand and refusal (*Blades* v. *Higgs*,[183] 30 L. J. C. P. 347).

ART. 127.—*Remedy by Ordinary Action.*

(1) Wherever there has been a trespass to, or wrongful conversion or wrongful detention of a chattel, an action lies at the suit of the person injured, for damages.

Canadian Cases.

[183] Where A., having been tried for feloniously shooting at B., and acquitted, was afterwards sued in trespass for the same act and the jury gave a verdict for the defendant, though the trespass was proved, the court, under the circumstances, declined granting a new trial (*Day* v. *Hagoman*, 5 U. C. R. 451).

"If a person should deliberately turn his cattle into his neighbour's grain, and his neighbour, seeing him do it, should fire at the cattle and kill one of them, he would do an act not justifiable; but if the party who gave the provocation should bring trespass for shooting the animal, and the jury should find a verdict against him it would not follow that the court would grant a new trial" (*Ibid.*—Robinson, C.J.).

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Art. 128. against the distrainer, and to return the goods if a return should be awarded (see 51 & 52 Vict. c. 43, ss. 134—137).[184]

The application for the replevying or return of the goods is made to the registrar of the county court of the

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Canadian Cases.

[184] Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities, or other personal property or effects, have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects, have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses (R. S. O., 1897, c. 66, sect. 2).

If an agent is intrusted by his principal with money to buy goods the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as to the unexpended balance.

district where the distress was made, who thereupon causes their return on the plaintiff's giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds £20, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (51 & 52 Vict. c. 43, s. 135). Art. 128.

Art. 129.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*Lamine* v. *Dorrell*, 2 Ld. Raym. 1216; *Oughton* v. *Seppings*, 1 B. & Ad. 241; *Notley* v. *Buck*, 6 B. & C. 160). But, by waiving the tort, the plaintiff estops himself

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Canadian Cases.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin (*Carter* v. *Long and Bisby*, 26 S. C. R. 430; *Francis* v. *Turner*, 10 Man. L. R. 340, and 25 S. C. R. 110; *Sleeth* v. *Hurlbirt*, 27 N. S. Reps. 375; 25 S. C. R. 720; *McDonald* v. *McPherson*, 12 S. C. R. 416; *McDonald* v. *Lane*, 7 S. C. R. 462; *Howard* v. *Herrington*, 20 O. A. R. 175; *Scarth et al.* v. *The Ont. Power and Flat Company*, 24 O. R. 446).

Art. 129. from recovering any damages for it (*Brewer* v. *Sparrow*, 7 B. & C. 310).

Once having elected to treat the transaction as a sale, as by receiving or suing for part of the purchase-money, the plaintiff cannot afterwards sue in tort. If an action for money had and received is brought, that is a conclusive election to waive the tort; and so the bringing of an action of conversion or trespass is a conclusive election not to waive the tort. These are conclusions of law (*Smith* v. *Baker*, L. R. 8 C. P. 350). In other cases it is a question of fact whether or not there has been an election; and if the facts show an intention to retain the remedy in tort against one tort-feasor, a settlement with another one will not affect that right, although the plaintiff may have sued alternatively both in tort and for money had and received, and although he may have got an interim injunction restraining any dealings with the money (*Rice* v. *Reed*, [1900] 1 Q. B. 54).

Art. 130.—*Recovery of Stolen Goods.*

If any person who has stolen property is prosecuted to conviction by or on behalf of the owner, the property revests in the person who was the owner, notwithstanding any intermediate sale in market overt, and the court before whom such person shall be tried shall have power to order restitution thereof[185] (24 & 25 Vict. c. 96, s. 100; 56 & 57 Vict. c. 71, s. 24 (2)).

Canadian Cases.

[185] When any prisoner has been convicted, either summarily or otherwise, of any theft or

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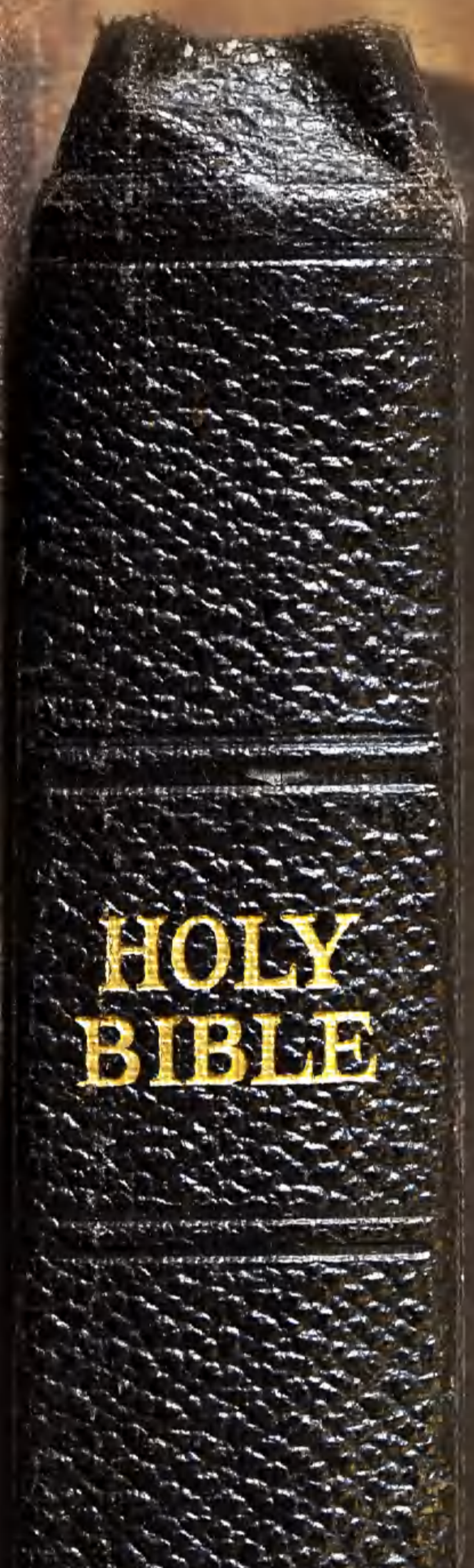

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INDEX.

ABATEMENT
of nuisance, 493.
not proper remedy to prevent prospective nuisance, 495.
not proper remedy of commoner in respect of overstocked warren, 496.
nor of member of public, in respect of nuisance on highway, *ib.*
after failure to obtain a mandatory injunction, *ib.*

ABROAD, liability for torts committed, 69 *et seq.*

ACCIDENT,
if inevitable, not actionable, 25 *et seq.* *And see* NEGLIGENCE, and NUISANCE.
actionable, if preventible, 25, 26.
when occurrence of, *primâ facie* evidence of negligence, 402, 404.
defendant not liable for, unless due to negligence or want of skill, 26, 28.
compensation to persons killed by, Manitoba Act respecting, 409.

ACT OF GOD excuses what would be otherwise actionable, 29, 51 *et seq.*

ACT OF THIRD PARTY,
where damage partly caused by, 30, 33.

ADOPTION. *See* RATIFICATION.

ADVERTISEMENTS, criticism of, privileged, 232.

ADVICE, confidential, a privileged communication, 244.

AGENT,
liability of, for torts, 81.
ratification of tort committed by, 83.
unauthorised delegation by, 84

AGGRAVATION. *See* DAMAGES.

AGRICULTURE, fires kindled for purposes of, liability for, 34, 35.

AIR, when action lies for obstruction of, 458 *et seq.*

ALIEN ENEMY cannot sue for a tort, 72.

AMBASSADORS
not liable for torts, 74.
can waive their privilege, *ib.*

ANIMALS. *See* FEROCIOUS ANIMALS.
injuries done to, 550, 558.
trespasses of, 536, 538.
injuries to, while trespassing, when tortious, 550, 562.
killing, in self-defence, justifiable, *ib.*
dog, injury committed by, ownership, *scienter*, 332.

ANNOYING by persistently following, 319.

ARREST. *See* IMPRISONMENT.

ARTIFICIAL WATERCOURSE. *See* WATERCOURSE.

ASSAULT AND BATTERY,
master responsible for, if committed by servant within the general scope of authority, 107.
definition of assault, 501.
menacing, *ib.*
ability to do harm necessary, *ib.*
attempt necessary, 502.
committed in sport not actionable, *ib.*
definition of battery, *ib.*
may be occasioned by anything set in motion by defendant, *ib.*
battery voluntarily suffered not actionable, 503.
mayhem, 502.
intention to commit immaterial, 503.
injuries inflicted through defective tramway, *ib.*
evidence of publication of libellous articles admissible in action for, 506.
battery committed in defence of property justifiable, 508.
self-defence justifiable, *ib.*
committed in mere retaliation not justifiable, *ib.*
by parental and other authority, justifiable, 510.
by judicial authority, 500.
in order to arrest felon justifiable, 508.
in order to stop breach of the peace justifiable, *ib.*
unnecessary handcuffing of prisoner is, *ib.*
aliter with respect to marital authority, 510.
naval and military officers, *ib.*
masters of merchant ships, 511.
proceedings before justices release civil proceedings, 530.
assessment of damages, 531.
limitation of action for, 532.

ATTORNEY, slandering an, 223.

BAILEE. *See* TRESPASS (2).

BAILMENT, remarks as to contract of, 62.

BAILOR, may bring trespass against purchaser, where bailee has sold goods, 564.

BANKRUPTCY, effect of, on the right to sue or the liability to be sued for tort, 197, 198.

BATTERY. *See* ASSAULT AND BATTERY.

BESETTING OR WATCHING HOUSE for purposes of coercion, 319.

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CLERGYMAN, imputing unchastity to a beneficed, is actionable *per se*, 223.

COERCION,
by unlawful means, 316 *et seq.*
inducement of persons not to work, 316.
combination to injure trade, *ib.*
combination to advance trade not actionable although it results in damage to another, *ib.*
inducement to carry on trade in a particular manner, 317.
inducement not to enter into contracts, *ib.*
molestation, 318.
trade picketing, 319.

COLLISION between two vessels, owner of vessel not in fault may recover the value of goods on board in his custody as a carrier, 26.

COMMON,
definition of right of, 481.
disturbance of, *ib.*
by putting on uncommonable beasts, *ib.*, 482.
by surcharging, *ib.*, 482.
by enclosing, *ib.*
how far lord may enclose, 483.
Commons Law Amendment Act, 1893, prevents further inclosures except by leave of Board of Agriculture and Fisheries, 484.

COMMISSIONERS OF POLICE not liable for the negligence of a constable in charge of a patrol wagon, 88.

COMMON EMPLOYMENT, meaning of. *See* MASTER AND SERVANT.

CONCEALMENT, when fraudulent. *See* FRAUDULENT CONCEALMENT.

CONFIDENCE. *See* MISFEASANCE.

CONSEQUENTIAL DAMAGES. *See* DAMAGES.

CONSPIRACY,
action on the case in the nature of, 10.
unlawful, 321, 322.

CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875...319.

CONSTABLE,
must have warrant with him when arrest can only lawfully be made by warrant, 526.
may arrest without warrant,
on reasonable suspicion of felony, 519, 526.
for breach of peace, 523 *et seq.*, 528.
for malicious injuries, 529.
for Acts of vagrancy, *ib.*
for brawling in church, *ib.*
local Acts empowering constables, *ib.*
protected if acting ministerially for a court having jurisdiction (or *primâ facie* jurisdiction in certain cases), 522 *et seq.*

CONSTABLE—*continued.*
special protection of, in executing warrants of justices without jurisdiction, 516.
limitation of actions against, 532.

CONTINUING TORTS,
commencement of period of limitation in, 147.
fresh action may be brought for, until they are stopped, 166 *et seq.*

CONTRACT,
torts arising out of, 60 *et seq.*
negligence of professional men, 63, 66.
negligence of railway company, 62.
negligence of corporation, 66.
privity not necessary where the remedy is in tort, 62 *et seq.*
aliter, as to deleterious quack medicines, 65.
third party injured by another's negligence in carrying out, has no cause of action, *ib.*
aliter, where the defendant has undertaken a gratuitous duty, 67
inducement not to enter into, not actionable, 316.

CONTRACTOR,
employer not in general liable for nuisance committed by, or negligence of, 86 *et seq.*
exceptions, 90 *et seq.*
when liable for obstruction on highway, 56.

CONTRIBUTION, how far a right to, between tort-feasors, 176.

CONTRIBUTORY NEGLIGENCE. *See* NEGLIGENCE.

CONVERSION. *See* WRONGFUL CONVERSION.

CONVICT in prison cannot sue for a tort, 72.

CORPORATION,
liable for torts, 74 *et seq.*
municipal, may be liable for false imprisonment, 99.
municipal, when liable for neglect to repair, 20, 55, 88.
liable for non-performance of duty of avoiding danger to human life, 58.
cannot sue for a tort merely affecting its reputation, 73.
liable for malicious prosecution, 76.
when liable for obstruction in highway, remedy over, 42.
liability for ice on sidewalk, 77.
liable for negligence in the mismanagement of a ferry, 66.
when liable for negligence of firemen, 76.
liable only when obligation to repair, *ib.*
under no statutory duty to light the streets, nor responsible for contractor's negligence, 86.
not liable for damages caused through acts of person permitted to do work but not an employée, 87.
not liable for acts of medical health officer, 88.
and see cases under NUISANCE, *post*, 417 *et seq.*
railway, liable when invitation express or implied to alight from moving train, 422.
fire, liability for, caused by sparks from engine, 33 *et seq.*, 390, 391, 392.
liability for omission to whistle at crossings, 34, 55, 337.

CORPORATION—*continued.*
railway, liable when, etc.—*continued.*
statutory obligation to fence, 52.
liability for omitting to stop at intersection of another railway, 54.
liable for misfeasance, 57.
must not impair usefulness of highway, 57, 338.
liable for wrongful acts of servants, 102.
duty of company at crossing, 337.
walking on line of, trespass, *ib.*
train running through town at high rate of speed, 347.
cattle straying upon land of, 368.
liable for torts depending on malice, 76.
is generally liable for torts, 75.
where authority exists to perform act which causes damage, negligence must be proved against, 10, 18.

COUNSEL,
opinion of, no excuse for malicious prosecution, 265.
statements of, privileged communications, 238.

CRIME. *See* DEFAMATION.

CRITICISM. *See* DEFAMATION.

DAMAGE,
by fire, liability, 31.
connection of, with unauthorised act or omission, 41.
without wrongful act, not actionable, 9.
if it would have happened even if the wrongful act had not been done, may still be actionable, 44 *et seq.*
in the absence of unauthorised act or omission, 44.
particular, necessary, when injury caused by a public nuisance, 13.

DAMAGE FEASANT,
cattle may be distrained when trespassing, 550.
unless tended at time, *ib.*

DAMAGES,
assessment of amount of, 151 *et seq.*
(1) *For injuries to person and reputation*, 153.
for false imprisonment, 154.
for seduction, *ib.*
seduction, plaintiff suing as master only not entitled to like measure of damage as a parent, *ib.*
for assault and battery, *ib.*
for defamation, *ib.*
mistake or ill-feeling of jury, 153.
too small, *ib.*
smallness of, new trial granted for, when, 154.
remoteness of, 43.
continuing torts, 167.
statutory torts, for, where penalty attached, 53.
under Employers' Liability Act, 122.
(2) *For injuries to property*, 155 *et seq.*
compensatory in character, 155.
measure of, 156, 159.
injury to horse, 156.
for wrongful conversion, 157.

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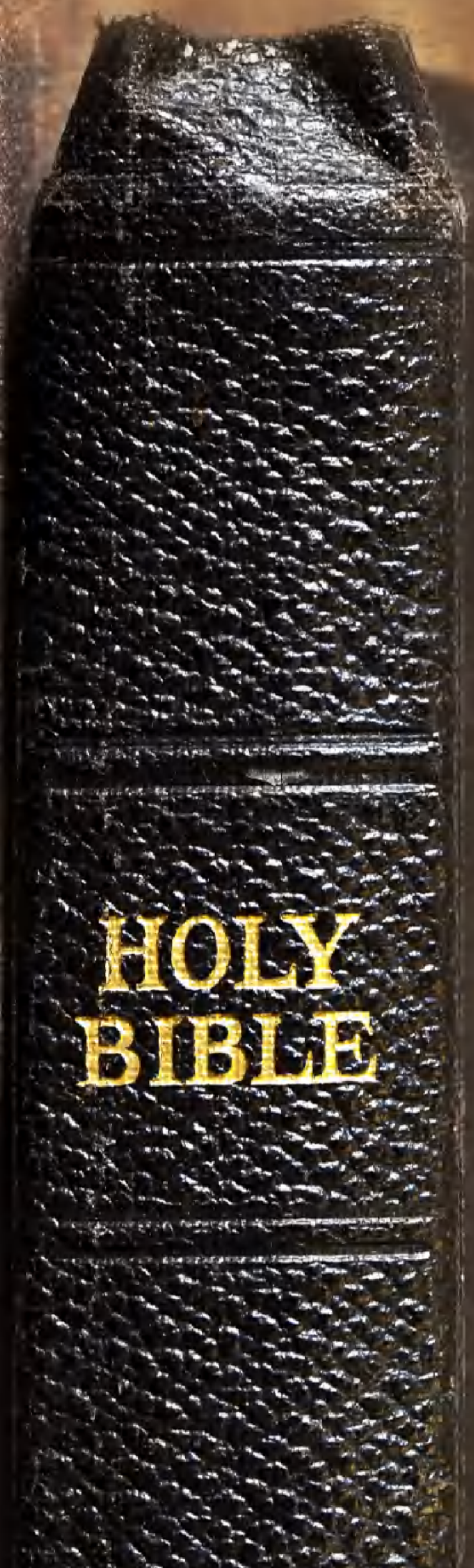

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DAMNUM ABSQUE INJURIA, 9 *et seq.*

DANGER, trespass under the influence of a pressing, 25.

DANGEROUS
substances brought on to land must be kept at peril of bringer, 29, 57.
machine, 57.
animals. *See* FEROCIOUS ANIMALS.
works, principal liable for contractor's defaults, 81, 82.

DAUGHTER, action for seduction of. *See* SEDUCTION.

DEATH, effect of, on the right to sue or liability to be sued for tort, 194 *et seq.*

DECEASED PERSON,
executor of, may bring action for tort, 195.
action against executors of, *ib.*

DECEIT. *See* FRAUD.

DEFAMATION, 201 *et seq.*
Act respecting actions of, 201.
defamatory libel, *ib.*
oral or written, *ib.*
definition, *ib.*, 202, 204.
of dead man, no right of redress by his children, 16.
persons may not be jointly sued for oral slander, 73, 512.
libel, corporation may sue for, 202.
when actionable, *ib.*
action for slander will not lie against a corporation, 76.
when a copartner may sue, 224.
factors necessary to sustain an action for, 203.
justification for, under provocation, 204.
libel, action for, will lie against a corporation, 208.
disparagement, what is, *ib.*
construction of words in natural sense, 206.
variance between words charged and proved, 203.
where words applicable to a class of two, right of action when, 205.
directly defamatory words, 208.
imputation of insanity, *ib.*
insolvency, *ib.*
gross misconduct, *ib.*
cheating at cards, *ib.*
impecuniousness, *ib.*
ingratitude, *ib.*
reflections on professional and commercial conduct, *ib.*
of newspaper proprietor or physician, *ib.*
ironical words, 209 *et seq.*
waxen effigy in chamber of horrors, 210.
disparagement of rival tradesman's goods gives no cause of action, 213.
special damage, 214 *et seq.*
when necessary to prove, 214 *et seq.*
exceptions to general rule as to, 214—217.
must be such as would be the reasonable result of the words used, 215.

DEFAMATION—*continued.*
special damage—*continued.*
must be natural but not necessarily legal consequence of slander, 217.
caused by plaintiff himself, 218.
and imputation of crime, 219.
imputation of unfitness for office, 222 *et seq.*
society, 222.
justification, 230 *et seq.*
proof of, 230.
explanation of fair criticism, 230, 231.
criticism of public men, 232.
publication, 227.
by telegram or postcard addressed to person libelled, 228.
by dictating to clerk, etc., 227, 228.
by newsvendors, 229.
by newspapers, 228.
to or by husband or wife, 229.
functions of court and jury as to publication, 228.
malice, 233.
privilege, qualified, 234, 238.
malice and privilege, 233 *et seq.*
indirectly defamatory words, 209 *et seq.*
insertion of plaintiff's name in bankrupt list, 210.
words complained of must be set out in statement of claim, 211.
meaning of innuendo, a question for the court, *ib.*
charging a municipal corporation with corrupt practices is not libellous, 213.
without proof of special damage, *ib.*
privilege may be absolute or only *primâ facie*, 233 *et seq.*
functions of court and jury, 235, 236.
parliamentary proceedings, 234, 238.
judicial proceedings, *ib.*, 238.
public or private duty, 234.
malice and privilege, 237.
statement of witnesses, 239.
military court of inquiry, *ib.*
reports of legal proceedings, *ib.*
reports of *quasi* judicial proceedings, 240.
newspaper reports of meetings, 224.
speeches at county and town councils, etc., 239.
statements of counsel, 238.
bonâ fide complaints, 243.
petitions of a public nature, 242.
communications to executive government, 243.
aliter when made maliciously and without probable cause, 243.
communications by servant to master concerning third person, 247.
slander, pleading justification of when evidence of malice, 147.
of title, 24, 214.
confidential advice, 244.
social and moral duty, 241 *et seq.*
character of candidate for office, 245.
statement made to a person having a corresponding interest, *ib.*
aliter, when made to persons not having a corresponding interest, 246.

DEFAMATION—*continued.*
damages. *See* DAMAGES.
repetition of defamation, 249.
printing of verbal slander, 250.
communication by third party, *ib.*
libels by newspaper proprietors, 251.
apology for publication of at the earliest opportunity, *ib.*
evidence in mitigation of damages, *ib.*
limitation of actions for, 252.

DEFECT. *See* FRAUD.

DEFENCE. *See* ASSAULT.

DETINUE,
action of, 569.
judge may order return of specific goods in, *ib.*

DISABILITY to sue or to be sued for tort, 72 *et seq.* *See* LIMITATION.

DISPARAGEMENT, by trader of rival's goods gives no cause of action, 213, *and see* DEFAMATION.

DISPOSSESSION,
definition of, 551.
plaintiff must rely on strength of his own title, 552.
mere possession evidence of title for defendant, *ib.*
plaintiff's title need not be indefeasible, *ib.*
jus tertii available by defendant, but not by plaintiff, *ib.*
landlord claimant need not prove his title, *ib.*
tenant may show expiration of landlord's title, *ib.*
master and servant, 553.
licensor and licensee, *ib.*
claimant's title may be legal or equitable, *ib.*
limitation, 554.
disability, *ib.*
acknowledgment of title, *ib.*
ecclesiastical corporations, *ib.*
commencement of period of, *ib.*
discontinuance of possession, 555.
mere entry and continual assertion of claim no bar to running of statute, *ib.*

DOGS,
noisy, 434.
liability of owner for injuries by. *See* FEROCIOUS ANIMALS.
injury to, 558.
killing in self-defence, 562.
killing in defence of sheep or cattle, *ib.*
killing in defence of game, when justifiable, *ib.*

DOOR,
careless shutting, of railway carriages, 373.
contributory negligence by leaving hand on, 376.

EARLIEST OPPORTUNITY,
meaning of, 169.

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FIREWORKS, near highway. *See* NUISANCE.

FIRES,
kindled for the purposes of agriculture, when owner liable for and when not, 30, 31, 34, 35.
statute 14 Geo. III. not applicable when caused by negligence, 31.
sparks from passing locomotives, liability of railway companies, 33.
liability of steamboat for communicating, 57.

FISHERY,
rights of, defined, 484.
origin of rights of, 486.
common of, 487.
public rights of, *ib.*
meanings of "free fishery" and "several fishery," 488.
several fishery in tidal waters, *ib.*
copyhold fisheries, 489.
disturbance of, *ib.*

FOLLOWING persons for purposes of coercion, 319.

FOREIGN COUNTRY, torts committed in, when remediable in England, 69 *et seq.*

FOREIGN SOVEREIGNS, not liable for torts, 74.
can waive their privilege, *ib.*

FRAUD, 298 *et seq.*
definition of, 298.
actionable, definition of, 40.
moral delinquency necessary, 299 *et seq.*
deceit, action for not maintainable unless actual moral fraud, 300.
alter when action is to set aside contract for material false representations, 298.
wife cannot bring action against husband's relatives for false representations as to husband's means, 307.
difference between action for false representation and one for deceit, 298.
judicial difference of opinions as to, now set at rest by *Derry* v. *Peek*, 298 *et seq.*
exception to necessity for moral delinquency made by Directors' Liability Act, 300.
when actionable, 302.
false statement as to credit, *ib.*, 304.
false representation as to construction of buildings, 303.
untrue notice from defendant the lessor of a farm, 304.
forged cheque, 305.
actual fraud, how proved, *ib.*
false representation of value of business to purchaser, 307.
false representation of soundness of a dangerous instrument, *ib.*
fraudulent prospectus, 308 *et seq.*
fraudulent conspiracy with the plaintiff's agent, 266.
dishonest intent to benefit defendant not necessary, 309.
lying practical joke, *ib.*
inducement by deceitful representations to commit unlawful act, *ib.*

FRAUD—*continued.*
when actionable—*continued.*
liability for fraud of agent, 309 *et seq.*
fraud must have been in relation to some matter within the agent's authority, 309.
fraudulent character must be in writing to be actionable, 304.

FRAUDULENT CONCEALMENT,
when actionable, 311 *et seq.*
concealing infectious disease in pigs, 312.
mere abstinence from mentioning a known defect is not actionable, 313, 314.
the expression "with all faults," does not cover all frauds, 312.
limitation, 314.

FUNERAL EXPENSES not recoverable under Lord Campbell's Act, 416.

GAME,
property in, not absolute, 558.
killing dog in order to preserve, when justifiable, 562.

GOODS. *See* TRESPASS, WRONGFUL CONVERSION, NEGLIGENCE.

GRATUITOUS DUTIES, when misfeasance in performance of, gives rise to an action, 67.

GUN,
injury to third party by explosion of a warranted, 65.
accidents caused by, without negligence, 28.

HAIRWASH, injury caused by poisonous, 65.

HIGHWAY,
defective, 42.
obstruction of, remedy by indictment, 13.
obstruction of, a public wrong, 21.
obstructing, special damage necessary to enable an individual to sue, 14, 15.
unauthorised obstruction of, corporation not responsible for damages caused by, 21.
railway crossing, duty of railway company, 20.
sidewalk, defective condition of, liability of city corporation, *ib.*
dedication of, to public not a grant of the land, 549.
trespass may be maintained by grantor of, for unreasonable use of it, *ex. gr.*, obstructing his right of sporting, 542.
shade trees on, trespass may be maintained by owner of land adjoining for damage to, 8.

HORSE,
accident caused by a runaway, when excusable and when not, 29, 89.
measure of damages for injury to, 156.

HOUSE, liability for ruinous state of. *See* NUISANCE.

HUSBAND,
liable for torts of wife, 79.
not liable for wife's torts whilst judicially separated from him, 81.
not entitled to imprison his wife, 510.
to damages for personal injury and suffering of wife, caused by doctor's neglect to attend according to contract, 66.
action will lie for alienation of affections from wife, 10.
taking away wife from, *ib.*
wife cannot bring action against husband's relatives for false representation as to husband's means, 307.
aliter with regard to a voluntary separation, 81.

ICE, when a public nuisance, 41, 44.
liability of railway company for ice on platform, 43.

IMMORALITY. *See* DEFAMATION.

IMPRISONMENT, *and see* CONSTABLE.
false, what constitutes, 504, 516.
moral restraint constitutes, *ib.*
total restraint necessary, 505.
by judges and magistrates. *See* JUDGE.
by private person, 517.
by private persons and constables, 519 *et seq.*
arrest without a warrant, when justifiable, 519 *et seq.*
arrest of suspected felon, 519, 526.
arrest of breakers of the peace, 523 *et seq.*, 528.
arrest for misdemeanour without a warrant, 529 *et seq.*
night offenders, 529.
malicious injuries, *ib.*
vagrants, *ib.*
brawlers, *ib.*
general protection of judicial officers, 511.
no protection if court has no jurisdiction, 512.
what constitutes jurisdiction, *ib.*
where *primâ facie* jurisdiction, 514.
for contempt of court, 518.
by county court judge, 519.
by justice, *ib.*, 519.
may personally arrest one who commits felony or breach of the peace in his presence, 519.
habeas corpus, 532.
limitation of action for, *ib.*
is a continuing tort, *ib.*
in cases of justices and constables, *ib.*
notice of action to justices and constables, *ib.*
damages for, 154.
aggravation of damages, 173.
false, municipal corporation may be liable for, 99.

INCORPOREAL HEREDITAMENT, injury to. *See* SUPPORT, LIGHT, WATERCOURSE, WAY, *and* COMMON.

INEVITABLE ACCIDENT. *See* ACCIDENT.

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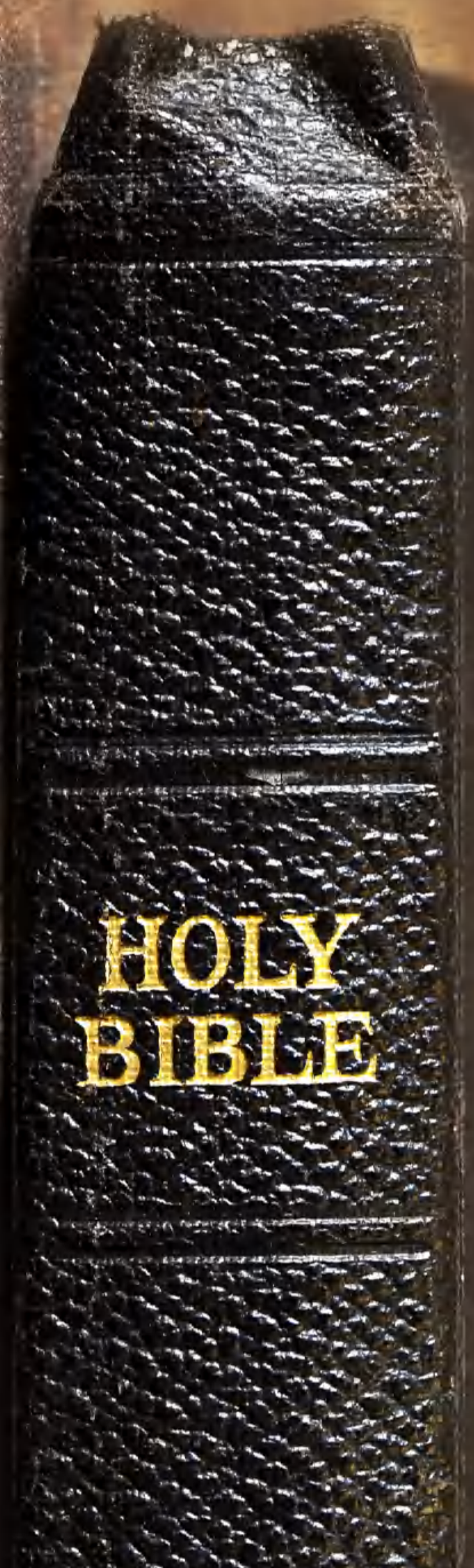

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INJURIA—continued.
classification of, 22.
injury to plaintiff's right, damages may be recovered though none proved, 12.

INJURIA SINE DAMNO, 9.

INSANITY, imputation of. *See* DEFAMATION.

INSOLVENCY, imputation of. *See* DEFAMATION.

INTENTION, not always material in torts, 24 *et seq.*

INTIMIDATION, when actionable, 319.

INVITATION, liability when express or implied given, 27, 68.

INVOLUNTARY TORTS, when actionable, 25, 26.

JOINT OWNERS, trespasses of, towards each other, 549, 567.

JOINT TORT-FEASORS,
liability of, 174 *et seq.*
what rights of contribution between, 176.
recovery of damages, bar to action against others, 175, 176.

JUDGE
statements of, absolutely privileged communications, 238.
magistrate may arrest felon or breaker of peace if offence committed in his presence, 519.
if offence not committed in his presence, must issue warrant, *ib.*
judicial officer of inferior court not liable for a wrongful imprisonment committed erroneously if acting within his jurisdiction, 512, 513.
no action lies against, in respect of any acts done in judicial capacity, *ib.*, 513.
primâ facie jurisdiction is sufficient if, through ignorance of some fact of which he could have no knowledge, he has no jurisdiction, 514.
power of, to commit for contempt, 518.
of county court, power of, 519.
no action against magistrate until judgment quashed, 515.
general protection of, 519 *et seq.*

JUDICIAL PROCEEDINGS, how far privileged communications, 238, 239.

JURISDICTION. *See* JUDGE.

JUS TERTII
defendant in ejectment may set up, but not claimant, 552.
may be set up in trover where defendant not bailee or agent, 566.

JUSTICE OF THE PEACE. *See* IMPRISONMANT *and* JUDGE.

JUSTIFICATION. *See* DEFAMATION, ASSAULT, TRESPASS, IMPRISONMENT.

LANDLORD,
title of, cannot be disputed by tenant, 553.
when liable for nuisance on demised premises, 443 *et seq.*

LATERAL SUPPORT, right to of adjoining owner, 448.

LECTURES. *See* COPYRIGHT.

LIBEL, 38, *and see* DEFAMATION *and* INJUNCTION.

LICENSEE,
a mere, stands in the position of one of the family as regards injuries caused by nuisances, 334.
possession of, is the possession of the licensor, 553.
liable for damage to third party, 29.

LIEN, sale of goods held under, a wrongful conversion, 565.

LIGHT AND AIR,
no right to, *ex jure naturæ*, 457.
right to, can only be prescription, grant or reservation, 458, 460.
in general no right to air can be gained, except by express grant, 459.
aliter for access of air through defined openings or passages, *ib.*
injunction for deprivation of, 182.
where damages instead of, *ib.*
acquired right to light in respect of windows, 459.
rights of adjacent proprietors purchasing from a common vendor, 461.
no implied reservation by a vendor of right to light, *ib.*
reservation of right to, is seldom implied, *ib.*
no excuse that plaintiff has contributed to a diminution of, 466.
new building on old site inherits the old rights of light, 461.
enlargement of ancient lights, 466.
dominant tenement must be a building, *ib.*
implied grants of light, 460.
a man cannot obstruct on property granted by him to another, *ib.*
rights to light gained by prescription, 462.
interruptions sufficient to rebut prescription, 463.
no interruption allowed after nineteen years, *ib.*
but injunction not granted until full twenty years, *ib.*
twenty years enjoyment binds reversioners, *ib.*
right to access of air, *ib.*
degree of diminution of light giving rise to action, 465.

LIMITATION,
of actions of tort, 137 *et seq.*
reasons for, 137.
commencement of period of, *ib.*
Statute of, when once begins to run no subsequent disability will stop it, 147, 148.
Statute of Limitation, has no application to the case of a trustee or other fiduciary agent, 149.
Statute of Limitations is not a bar to an action for criminal conversation, 147.
when tort consists of actual damage, commencement of period of, 141.

LIMITATION—*continued.*
infancy, 138.
conversion, 142.
of actions against road companies, 138.
municipal corporation for non-repair of highways, 139 *et seq.*
for malpractice, 138.
for taking away support of lands, 142.
for negligence in the construction of drains, 139.
for recovery of chattels, 142.
for fraudulent misrepresentation, 139.
for recovery of possession of land, 143 *et seq.*, 149.
great distinction between Real Property Limitation Acts and those relating to chattels, 143.
concealed tort, 141 *et seq.*
continuing torts, 146 *et seq.*
disability, 148.
disability, definition of, 149.
disability arising subsequently to commencement of period, 147.
commencement of period when tort continuing, 146.
in particular cases. *See* under the several headings of those cases.
under Employers' Liability Act, 125.

LOSS OF SERVICE. *See* SEDUCTION.

LUNATIC liable for his torts, 75.

MAGISTRATE. *See* JUDGE.

MAINTENANCE,
definition of, 276.
when action maintainable for, 276 *et seq.*
not where common interest between maintainer and maintained, 277 *et seq.*
distinguished from malicious prosecution, 277.
nor where maintainer actuated by charitable motives, 279.

MALICE, definition of, 37, 41, *and see* DEFAMATION.

MALICIOUS ARREST, 38, 271 *et seq.*, *and see* IMPRISONMENT.

MALICIOUS PROSECUTION, 38.
definition of, 254.
when actionable, 255, 509.
when action cannot be maintained against principal, 86.
factors necessary for maintaining actions for, 255.
principal, when liable for agent's proceedings, 87.
corporation liable for, 76, 269.
agency, ends where malice begins, 87.
unauthorised insertion by magistrate of the word "feloniously" will not make prosecutor liable to an action of, 260.
a complainant not liable who acts in good faith for mistake of magistrate, *ib.*
information under the Criminal Law Amendment Act not a prosecution, 259.
(1) *Prosecution by defendant*, 258.
prosecution ordered by a magistrate not sufficient, 259.
mistake of magistrate, *ib.*

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MASTER AND SERVANT—*continued.*
master not liable for injuries caused by servant while driving master's carriage on business of his own, 101.
ratification of servant's tort, 83.
master not liable for torts committed by persons employed by servant to do his work, 85.
contractor or intermediate employer liable for torts of workmen, 86.
master not liable for torts of servant when latter employed by third party, 95.
fellow-servant, negligence of, master not liable for, 110.
temporary employment by a third party excuses master, 100.
unauthorised delegation by a servant of his duties excuses master from delegates' torts, 84.
when person liable at common law for injuries caused by servant to fellow-servant, 110, 120. *And see* EMPLOYERS' LIABILITY ACT.
master not liable where there is common employment or a voluntary acceptance of risk, 109 *et seq.*
aliter where injury caused by breach of statutory duty, 118.
or by master's negligence, 110.
meaning of common employment, 112.
common employment, a question of fact, 111, 116.
delegation of duty of hiring servants to competent person, 113.
personal negligence of master, 110, 117.
master knowingly employing an unskilful servant, 111 *et seq.*
duty of to hire competent servant, 113 *et seq.*
when liable for defective machinery or defective system, 117, 120 *et seq.*
servant's knowledge of danger, when a bar, 117 *et seq.*
volunteer helpers are in the position of servants with regard to suing the master for negligence of his true servants, 121.
aliter where acting with master's consent or acquiescence, 122.

MAXIMS OF LAW, 3.

MEASURE OF DAMAGES. *See* DAMAGES.

MEDICAL EXPENSES. *See* CAMPBELL'S (LORD) ACT.

MEDICAL MEN,
negligence of, 63.
slandering. *See* DEFAMATION.

MINE, flooding of, by water brought by defendant on to his land actionable without proof of negligence, 31 *et seq.*, 430.
aliter where defendant only allowed natural percolation, 431.

MISFEASANCE,
liability for, 67.
by railway companies carrying passengers to whom they have not issued tickets, 68.

MISREPRESENTATION. *See* FRAUD.

MISTAKE, no justification, 24, 25.

MITIGATION. *See* DAMAGES.

MORAL GUILT, 37, 40.

MUNICIPAL CORPORATION. *See* CORPORATION.

MURDER. *See* DEFAMATION.

MURDERER,
no civil remedy against, by family of murdered man, 16.

NECESSITY, right of way, 475.
may excuse what would otherwise be a tort, 25, 34, 54.

NEGLIGENCE. *See also* PROFESSIONAL MEN, MASTER *and* SERVANT, *and* CONTRACTOR.
definition of, 323, 329.
allowing dangerous hole to exist, 325.
when actionable, 324 *et seq.*
not actionable unless it be proved that the injury suffered ought reasonably to have been anticipated by defendant, 335.
blasting operations, accident following, 37.
auctioneer selling goods at ruinous sacrifice, 60.
railway company, 62, 64.
dangerous situation, responsibility for, 36.
druggist's mistake in making up prescription, 65.
duties gratuitously undertaken, 67.
dangerous stacking of hay, 330.
entrusting loaded gun to inexperienced servant girl, *ib.*
erecting dangerous stage for use of plaintiff, 333.
dock master inviting vessel to take up a dangerous berth, 334.
bursting of water company's mains, 329.
damage caused by extraordinary flood, *ib.*
custody of dog entrusted to a railway company, *ib.*
collision in harbour, 324.
hotel proprietor failing to comply with Fire Escapes Act, *ib.*
fire for agricultural purposes, *ib.*
damage to building by blasting operations, 326
injury to plaintiff's horse in stable, defendant not liable or, 326.
sparks from portable steam engine, *ib.*
duty of custodian of dangerous things, 327.
defective fence allowing horse to stray on highway, *ib.*
duty of user of highway, 328.
of proprietors of public conveyances, *ib.*
of carriers, *ib.*
of occupier of premises, 328, 333, 334.
of owners of adjoining premises, 329.
hair wash compounded of dangerous chemical ingredients, 330.
dangerous goods, *ib.*
accidents to persons coming on business, 333.
aliter with regard to accident to unauthorised visitor, 335.
"trap," liability for, *ib.*
negligence of railway company, 337 *et seq.*
unfenced railway track, 336, 341, 371.
responsibility not freed by fulfilling statutory requirements, 337.
neglecting to ring bell at level crossing, 337, 344, 404.

NEGLIGENCE—*continued.*
negligence of railway company—*continued.*
not applying air brakes, 339.
contributory negligence, 340, 342, 349, 351.
use of foreign railway car, 341.
accident through not stopping a reasonable time at station, *ib.*
height of freight cars, 342.
neglect to guard level crossing, 343.
accident in sleeping berth when, and when not, attributable to, 344, 346.
excessive speed of street railway, 346, 348.
electric car not under sufficient control, 347, 356.
fire caused by cinders from locomotive, 387 *et seq.*
neglecting to stop at level crossing, 376.
not stopping a reasonable time at station, 384.
unfenced embankment, 394.
negligence of municipal corporations—
neglect to remove ice or snow from sidewalk, 351 *et seq.*
defective highways, 355 *et seq.*
overhanging trees, 358.
broken bridge, *ib.*
obstruction of road, 361.
construction of roads and bridges, 362.
notice of accident, 336.
dangerous and savage animals, 331.
when *scienter* necessary, 332.
when *scienter* not necessary, 332, 333.
negligence a mere relative term, and varies with circumstances, 336.
proof of necessary, when statute authorises the act which caused damage, 10.
onus of proof of, 36, 401 *et seq.*
generally on plaintiff, 401.
aliter where the accident would not be likely to happen without negligence, 402, 407.
runaway horse, 402.
accident capable of two explanations, 403.
heavy article dropping out of window, 404 *et seq.*
contributory, 368 *et seq.*
cattle straying upon a railway, *ib.*
obstructions on highway, 373.
accidents on elevators, &c., 380 *et seq.*
negligence in leaving unguarded trap in public office, 378.
continuous use of what is known to be dangerous is, 18.
where contributory, affords no excuse, 374, 380, 386.
contributory negligence of carrier to whom plaintiff has entrusted himself, no excuse, 397.
contributory in infants, 398.
negligence of defendant must be the proximate cause of damage, 389.
combined, of defendant and third party, 399 *et seq.*
actions by representatives of a person killed by. *See* CAMPBELL'S (LORD) ACT.
duties of judge and jury in actions for, 407.
mode of estimating damages caused by, 288. *And see* DAMAGES.
limitation of actions for, 408.

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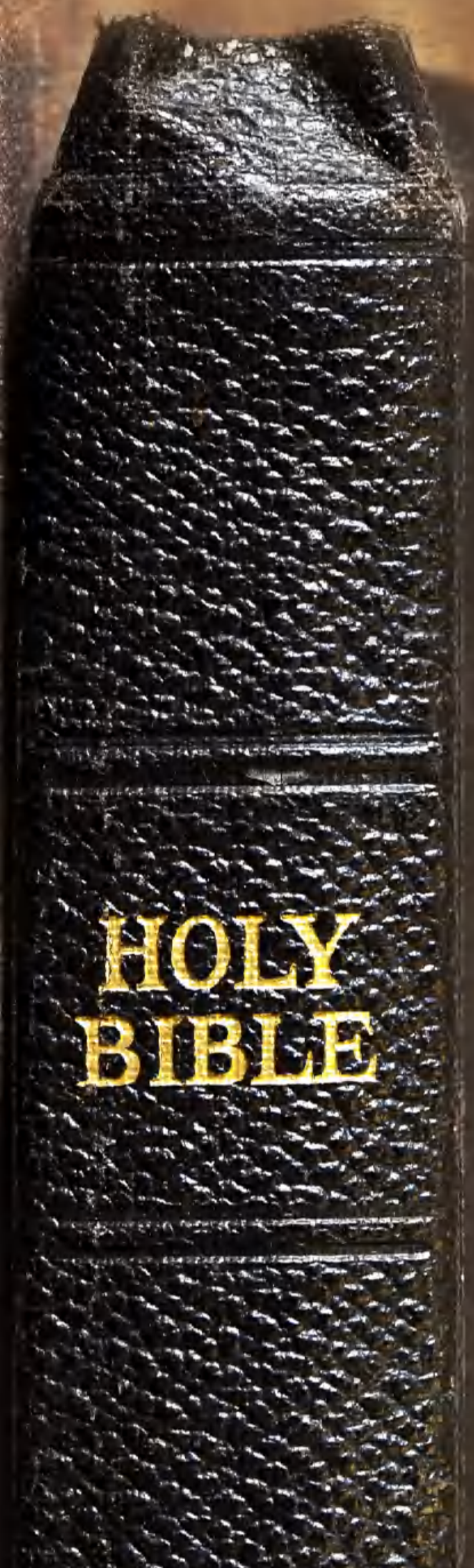

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NUISANCE—*continued.*
private, affecting corporeal hereditaments—*continued.*
statutory right to commit, 438.
not implied unless the statute necessarily imports it, 438 *et seq.*
tenant not liable for accidents caused by snow falling from roof, 433.
liability for nuisances created by business premises, 442 *et seq.*
premises adjoining highway, liability of occupier of, 442.
aliter if landlord covenants to do repairs, 443.
weekly tenancy, *ib.*
liability of tenant who covenants to repair, *ib.*
landlord's responsibility for dangerous structure, *ib.*
affecting incorporeal hereditaments, 444 *et seq.*
easements, 447.
profits *à prendre*, 448.
servitudes, 446.
title to easements, *ib.*
disturbance of natural right to support, 448.
right arises *ex jure naturæ*, 449.
right may be released by agreement, *ib.*
right not extended to remote owners whose support has been weakened by acts of intermediate owner, 450.
subterranean water, 451.
the damage must be material, 449.
but pecuniary loss not essential, 451 *et seq.*
railway and canal companies have no right of support, 452.
right of support for land burdened with buildings, *ib.*
right can be gained only by prescription or grant, *ib.*
right acquired by twenty years' user, 455.
right may be similarly acquired for support from adjacent houses, 456.
where natural right to support is infringed the consequent damage to a modern house may be recovered, *ib.*
right to light and air. *See* LIGHT AND AIR.
right to watercourse. *See* WATERCOURSE.
right to ways. *See* WAYS.
remedy by abatement, 493 *et seq.*
not applicable to prospective nuisances, 495.
when notice is necessary, *ib.*
remedy by injunction. *See* INJUNCTION.
remedy of reversioner, 497.
limitation, 498.

OBSTRUCTION,
of entry to places of business, 21.
of road, 14.
of light and air. *See* LIGHT AND AIR.

OUSTER. *See* DISPOSSESSION.

PARTNERS, liability of, for each other's torts, 131 *et seq.*
liability for torts other than fraudulent misappropriations, 133.
liability for fraudulent misappropriations, 134, 135.

PARTNERS—*continued.*
liability is joint and several, 133.
liability for professional negligence of one of the partners, *ib.*
malicious prosecution outside the authority of a partner, 134.
liability for defamation, *ib.*
fraudulent guarantees, exemption from liability, *ib.*

PARTY-WALL, trespass to, 549.

PATENT DEFECT. *See* FRAUD.

PERJURY,
no action lies for consequences of, 195.
imputation of, not actionable, unless made with reference to a judicial inquiry, 220.

PERSONAL PROPERTY, trespass to. *See* TRESPASS.

PICKETING, 319.

PIT, accidents from unguarded, 26.

POISONOUS TREES, 27.

POSSESSION. *See* TRESPASS AND NUISANCE.

PRESCRIPTION. *See* LIGHT AND AIR, NUISANCE, SUPPORT, WATERCOURSE, WAY, *and* COMMON.

PRINCIPAL,
liability of for agent's torts, 81.
exceptions to, 82, 83.
liability of for contractors and other agents, 86 *et seq.*
not liable for malicious act of agent, 87.
when liable for agent's acts, 90.
when liable for agent's unlawful acts, 90.

PRINTER. *See* DEFAMATION.

PRIVATE WAY. *See* WAY.

PRIVILEGED COMMUNICATIONS. *See* DEFAMATION.

PROBABLE CAUSE. *See* MALICIOUS PROSECUTION.

PROBABLE CONSEQUENCE, every man presumed to intend the, of his acts, 25.

PROFESSIONAL MEN, negligence of, 63.

PROXIMATE CAUSE, 41 *et seq.*

PUBLIC AUTHORITIES PROTECTION ACT, 1893...142 *et seq.*
limitation in favour of public officers and authorities, 149, 150.
contractor under public authority cannot claim protection, 150.

PUBLIC CONVENIENCE, does not justify a tort to an individual, 190.

PUBLIC NUISANCE. *See* NUISANCE.

PUBLIC RIGHT, invasion of does not entitle to action without special damage to plaintiff, 14.

PUBLIC WORK, causing depreciation of property, does not entitle particular owner to claim compensation, 16.

PUBLICATION. *See* DEFAMATION.

QUIA TIMET INJUNCTION, 189.

RAILWAY COMPANY. *See* NEGLIGENCE, MASTER AND SERVANT, CONTRACT, MISFEASANCE, NUISANCE, *and* CORPORATION.

RATIFICATION. *See* MASTER AND SERVANT.

RECAPTION, remedy by, 568.

REMEDY OVER FOR DAMAGES. *See* CORPORATIONS.

REMOTENESS of damage, 41 *et seq.*

REPLEVIN, action of, 569.

REVERSIONER,
- may enter into and inspect premises, 542.
- remedy of, for injury to land, 497.
- remedy of, for trespass, accompanied by a denial of title, *ib.*
- remedy of, for obstructions, *ib.*
- no remedy given to, for mere transient trespasses or nuisances, *ib.*
- some injury to the reversion must be proved, 498.
- remedy of, for injury to personal property, 564.

RIGHTS,
- absolute infringement of, 12.
- private, torts founded on the direct infringement of, 449 *et seq.*
- qualified private, infringement of, 12, 21.
- public, infringement of, 13.

RIVER. *See* WATERCOURSE.

RIVER WALL, damage through insufficient height of, 44.

ROAD COMPANIES, liability for obstructing highway, 56.

RUINOUS PREMISES. *See* NUISANCE.

RUNAWAY HORSE, liability of owner, onus of proof, 25.

SCIENTER. *See* FEROCIOUS ANIMALS.

SCULPTURE, copyright in. *See* COPYRIGHT.

SEDUCTION,
- right of action for does not survive to the administrator of original plaintiff, 194.
- action for, whence arising, 280.
- under guise of courtship, 168.
- of servant from master's employ is actionable, 281.
- relation of master and servant essential, 284.
- contract o service, when implied, 284 *et seq.*
- debauching plaintiff's daughter, 280 *et seq.*
- action by person *in loco parentis*, 287.
- proof of loss of service necessary to sustain an action for, 280 *et seq.*

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STATUTE,
does not take away common law rights in general, 57.
nor, unless very explicit, does it excuse a nuisance, 189.

STATUTE LIMITATIONS,
will bar rights of an infant, 149.
aliter where fiduciary relationship exists, *ib.*
when once begins to run no subsequent disability will stop it, 148.

STATUTORY DUTIES,
breaches of, 52 *et seq.*
where no right created in favour of the plaintiff there is no action maintainable, 52
no action where statute only intended to prevent mischief of a different character to that suffered by plaintiff, 55 *et seq.*
sometimes injured party is restricted to the statutory penalty, 53 *et seq.*
private Act, remedy for breach of duties imposed by, *ib.*

STATUTORY PRECAUTIONS, observance of, does not restrict Common Law liability, 57.

STREET RAILWAYS,
collision with vehicle, excessive speed, 346.
motorman, duty of, must have car under full control, 347.
contributory negligence of plaintiff, 348 *et seq.*
duty of, to keep road in repair, 442.

STRIKERS, torts by, 315 *et seq.*

SUE, who may for a tort, 72.

SUED, who may be, for a tort, 73.

SUPPORT. *See* NUISANCE.

TENANT. *See* LANDLORD.
cannot dispute landlord's title, 553.
but may show that title has expired, *ib.*

TENANTS IN COMMON cannot maintain trespass against each other, 72.

TITLE. *See* TRESPASS *and* DISPOSSESSION.

TOOLS, hiding, of blackleg, 319.

TORT,
definition of, 7.
nature of a, discussed, 7 *et seq.*
effect of the absence of one of the severa factor constituting, 9.
evil motive not an essential ingredient in, 37.
classification of, 22.
who may sue for a, 72.
who may be sued for, 73.
arising out of contract, 60.
waiver of, 571.
committed abroad, 69 *et seq.*
contract and tort, relation of, 60.
limitation of actions for, 137.

TRADE COMBINATIONS not tortious, 320.

TRADE MARKS, infringement of, remediable by injunction, 185.

TRADE UNION, liability of for torts, 78.

TRADES UNIONS, torts by members of, 315 *et seq.*

TREES on highway, damages recoverable by owner of adjoining land for injury to, 8.

TRESPASS. *And see also* DISPOSSESSION.
(1) *To Lands* (*quare clausum fregit*), 533 *et seq.*
definition, 533.
what it consists of, 534 *et seq.*
driving nails into wall is, *ib.*
by straying cattle, *ib.*, 536, 538.
isolated acts of, committed on wild land, will not give title under Statute of Limitations, 535.
any user going beyond that authorised, 538.
conveying of land and timber, *ib.*
injury to riparian owner, *ib.*
wilful destruction of property, 541.
in re-taking goods, justifiable, 542.
in driving cattle off plaintiff's land, when justifiable, *ib.*
in distraining for rent, justifiable, *ib.*
in executing legal progress, justifiable, *ib.*
by reversioner inspecting premises, justifiable, *ib.*
in escaping a pressing danger, justifiable, *ib.*
by grantee of easement for the purpose of making repairs, justifiable, *ib.*
under due legal authority, justifiable, 542, 543.
plea of *liberum tenementum*, 543.
trespassers, *ab initio*, 543, 544.
possession necessary to maintenance of action for, 544.
when two people are in adverse possession, possession in persons entitled, 547.
possession dates back to title, 548.
onus of proof of title lies on *primâ facie* trespasser, *ib.*
when surface and subsoil in different owners, *ib.*
to highways. *ib.*
of joint owners, *ib.*
carrying away of soil by one of two joint owners, *ib.*
reasonable working of coal mine by joint owner. *ib.*
injuries to party-walls, *ib.*
continuing, 550.
damages for. *See* DAMAGES.
distress *damage feasant*, 550.
limititation of actions for, *ib.*
(2) *To Goods and Chattels* (*de asportatis bonis*), 556 *et seq.*
what is, 556.
to animals, 405, 556.
destroying goods, 556.
good intention no excuse, 558.
destruction of goods by bailee, 556.
excessive sale by sheriff, 557.
injuring animals, 558.
conversion by innocent purchaser, 559.
revesting of stolen goods in original owner on prosecution of thief, notwithstanding a sale in market overt, 560.

TRESPASS—*continued.*
(2) *To Goods and Chattels* (*de asportatis bonis*)—*continued*
purchasing goods without title, 560.
purchasing goods in market overt, *ib.*
no trespass if plaintiff in fault, 561.
aliter with regard to goods obtained by fraud, *ib.*
no remedy if animals get injured whilst trespassing, unless defendant used unreasonable force, 562.
wrongful alteration or mixing up of goods prevents the person altering from maintaining an action for the materials or goods with which the alteration was made or mixed, 561.
unauthorised painting of carriage, *ib.*
trespass in defence of property, *ib.*
shooting a trespassing dog, when allowable, *ib.*
trespass in self-defence, 17, 561.
trespass in exercise of right, 562.
trespass in exercise of legal authority, *ib.*
conversion to enforce pledge, *ib.*
possession necessary to maintenance of action, 563.
possession follows title, *ib.*
bailee delivering goods to an unauthorised person revests possession in bailor, 564.
sale by a person having a lien is a trespass, 565.
damages for sale of goods by person having a lien, *ib.*
administrator may maintain trespass for injuries to goods committed before grant of administration, *ib.*
so may a trustee when possession actually in *cestui que trust*, *ib.*
what possession suffices, *ib.*
possession of finder, 565.
possession, *primâ facie* proof of title, 566.
defendant cannot in general set up *jus tertii*, *ib.*
trespasses of joint owners, 567
trespass *ab initio*, *ib.*
recaption, 568.
action for trespass, *ib.*
action of replevin, 569.
waiver of tort, 571.
stolen goods, 572.
limitation, 573.
bailee, maintainable by, 73, 566.
owner of goods let on hire, maintainable by, 566.

TRESPASS TO THE PERSON, 500 *et seq.* *See* ASSAULT AND BATTERY *and* IMPRISONMENT.
definition of, 500.
onus of proof, *ib.*
justification of, 506 *et seq.*
evidence of publication of libellous articles admissible in action for assault, 506.
self-defence, 508.
defence of property, *ib.*

TROVER. *See* WRONGFUL CONVERSION.

TRUSTEE may maintain trespass or conversion for injuries to goods when actual possession in *cestui que trust*, 565.

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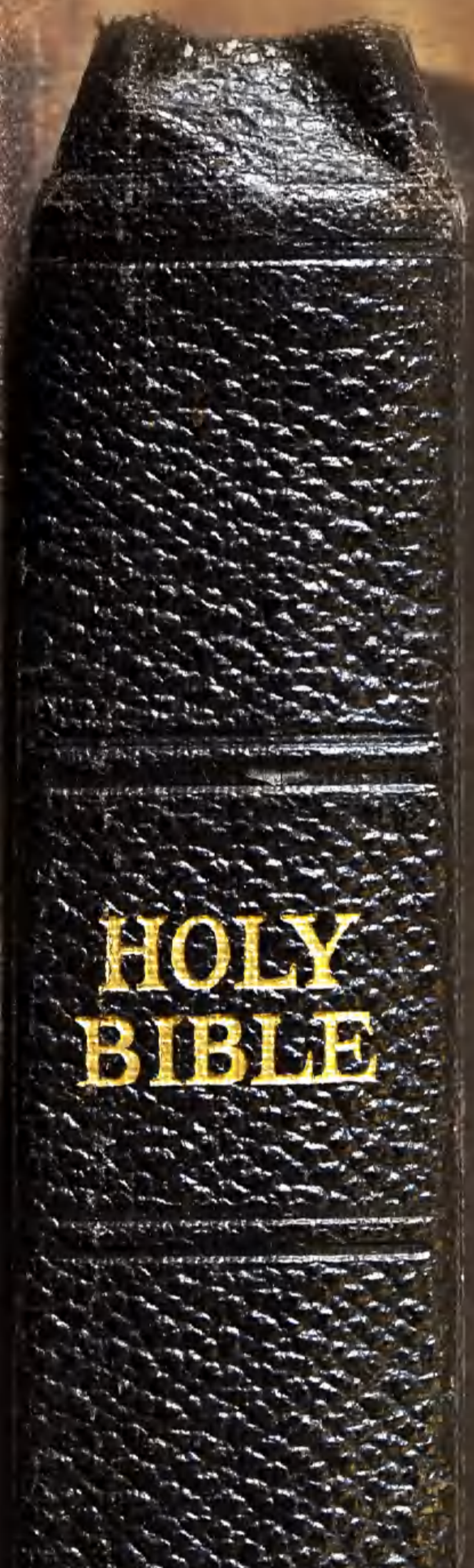

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WAY—*continued.*
right strictly limited by terms of grant or by mode of user, 475.
right of, of necessity, *ib.*
cessor of right when necessity ceases, *ib.*
implied grants of way over private roads, 476.
prescriptive rights of way, *ib.*

WIFE,
may sue for loss caused by the killing of her husband, 409 *et seq.*
ante-nuptial and post-nuptial torts of, 79.
liability of husband for torts of, *ib.*
may sue without joining her husband, 73.
for alienation of husband's affections, 10.
separation and foreign divorce, husband's action for criminal conversation, 11.

WINDOWS. *See* LIGHT AND AIR.

WORDS. *See* DEFAMATION.

WORKMEN'S COMPENSATION FOR INJURIES ACT, 122.

WRONGDOER,
all things are presumed against a, 160.
wilful intention not necessary to prove against, 25 *et seq.*

WRONGFUL CONVERSION,
what is, 556.
excessive execution is a, 557.
good intention no excuse for officious interference, *ib.*
selling another's goods by mistake is a, however *bonâ fide*, 558.
purchase of goods from a person not entitled is a, even by a *bonâ fide* purchaser, 559.
purchase from person who has obtained goods by fraud may or may not be a conversion, *ib.*
revesting on prosecution of thief, 560.
purchase of goods in market overt, *ib.*
possession necessary to maintenance of action for, 563.
reversioner cannot sue for, 564.
reversioner's remedy, *ib.*
possession follows title, 565.
unauthorised delivery by bailee revests possession in bailor, 564, 565.
sale by one having a lien is a conversion, 565.
any possession suffices against a wrongdoer, 566.
possession of finder, 565.
when defendant may set up *jus tertii*, *ib.*
conversions of joint owners, 567.
subsequent conversion of lawfully-obtained chattel, *ib.*
remedy by recaption, 568.
ordinary remedy by action, *ib.*
power of judge to order restitution, 569.
remedy by action of replevin, *ib.*
waiver of tort, 571.
recovery of stolen goods, 572.
limitation, 573.

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